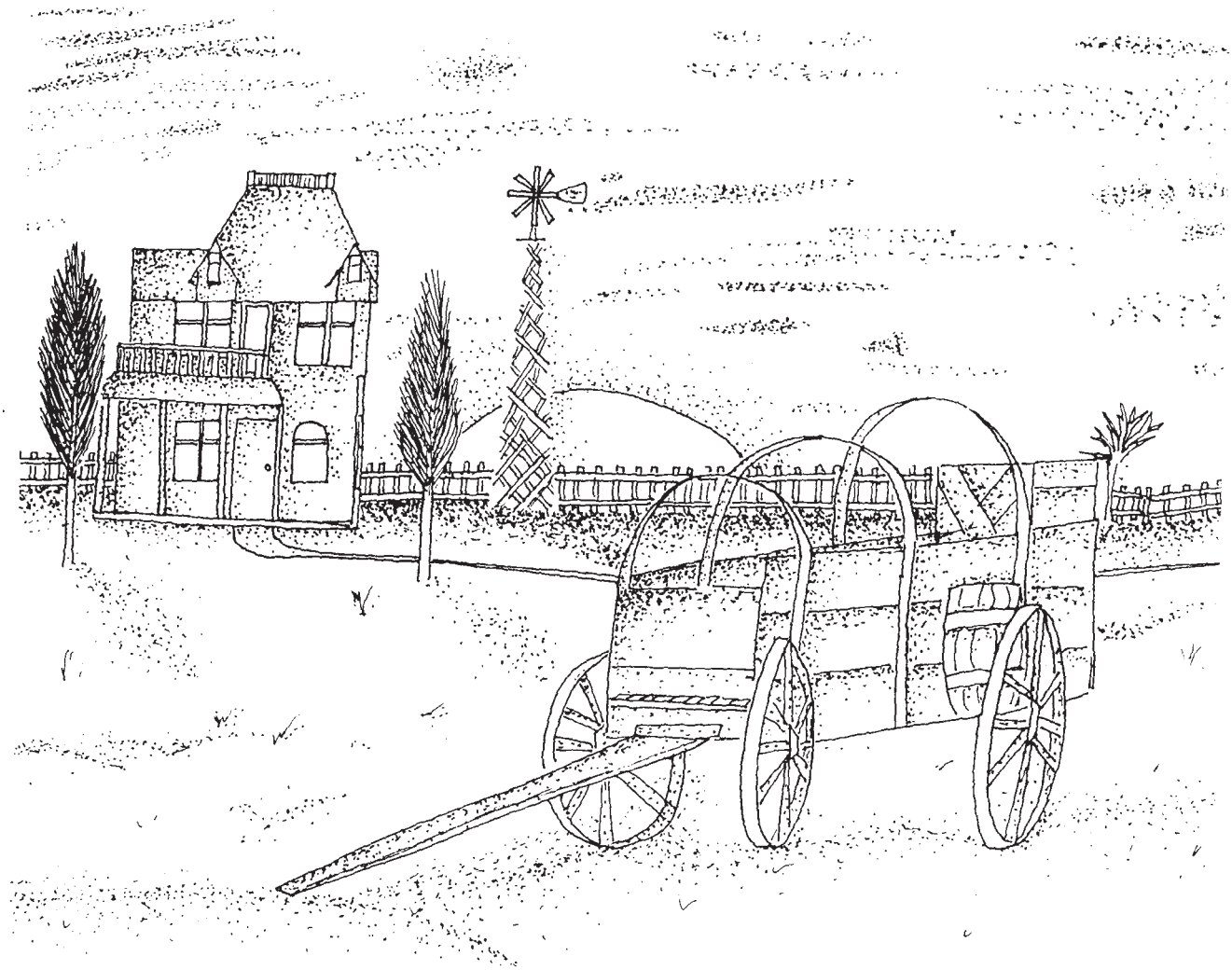
TEXAS REGISTER

Volume 24 Number 39 September 24, 1999 *Pages 7981-8384*



This month's front cover artwork:

Artist: *Natilie Hodges*

9th Grade

Rockwall High School

School children's artwork has decorated the blank filler pages of the *Texas Register* since 1987. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

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

The artwork is published on what would otherwise be blank pages in the *Texas Register.* These blank pages are caused by the production process used to print the *Texas Register.* The artwork does not add additional pages to each issue and does not increase the cost of the *Texas Register.*

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

Texas Register, **ISSN 0362-4781,** is published weekly, 52 times a year. Issues will be published by the Office of the Secretary of State, 1019 Brazos, Austin, Texas 78701. Subscription costs: printed, one year $150, six month $100. First Class mail subscriptions are available at a cost of $250 per year. Single copies of most issues for the current year are available at $10 per copy in printed format.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodical Postage is paid at Austin, Texas.

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

a section of the
Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(800) 226-7199
(512) 463-5561
FAX (512) 463-5569
http://www.sos.state.tx.us

Secretary of State - Elton Bomer

Director - Dan Procter
Assistant Director - Dee Wright

Receptionist - Brett Tiedt

Texas Administrative Code
Dana Blanton
John Cartwright

Texas Register
Carla Carter
Tricia Duron
Ann Franklin
Kris Hogan
Roberta Knight
Becca Williams

Circulation/Marketing
Jill S. Ledbetter
Liz Stern

ATTORNEY GENERAL

PROPOSED RULES

TEXAS DEPARTMENT OF AGRICULTURE

GENERAL PROCEDURES

MARKETING AND PROMOTION DIVISION

TEXAS AGRICULTURAL FINANCE AUTHORITY: FARM AND RANCH FINANCE PROGRAM

TEXAS AGRICULTURAL FINANCE AUTHORITY: FINANCIAL ASSISTANCE PROGRAM RULES

TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT

ENTERPRISE ZONE PROGRAM

TEXAS COMMUNITY DEVELOPMENT PROGRAM

TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT GOVERNING BOARD INVESTMENT POLICY

TOURISM ADVISORY COMMITTEE RULES

PUBLIC UTILITY COMMISSION OF TEXAS

SUBSTANTIVE RULES

SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

TEXAS MOTOR VEHICLE BOARD

WARRANTY PERFORMANCE OBLIGATIONS

GENERAL DISTINGUISHING NUMBERS

TEXAS EDUCATION AGENCY

SCHOOL DISTRICTS

COMMISSIONER'S RULES CONCERNING THE EQUALIZED WEALTH LEVEL

SCHOOL DISTRICT PERSONNEL

STATE BOARD OF DENTAL EXAMINERS

DENTAL LICENSURE

DENTAL HYGIENE LICENSURE

CONTINUING EDUCATION

DENTAL BOARD PROCEDURES

TABLES AND GRAPHICS

IN ADDITION

OFFICE OF THE ATTORNEY GENERAL

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

Open Records Request

Parties interested in submitting a brief to the Attorney General concerning this ORQ are asked to please submit the brief no later than October 11, 1999.

ORQ-36. Requested by Mr. Michael S. Wenk, Criminal District Attorney, Hays County, 110 East San Marcos, Texas, 78666, concerning the construction of the commercial or financial prong of section 552.110 as amended by Senate Bill 1851, Act of May 25, 1999, 76th Legislature, Regular Session. (ID# 129314-99)

TRD-9905987
Elizabeth Robinson
Assistant Attorney General
Office of the Attorney General
Filed: September 15, 1999

♦ ♦ ♦

Opinions

Opinion #JC-0108 (RQ-0005). Requested by The Honorable Pete P. Gallego, Chair, Committee on General Investigating, Texas House of Representatives, P.O. Box 2910, Austin, Texas, 78768-2910, concerning whether the governing body of a hospital district may meet in closed session when acting as a medical peer review committee under the Medical Practice Act and related questions.

Summary. Pursuant to the Medical Practice Act, the governing body of a hospital district acts as a medical peer review committee when it decides whether a physician should receive hospital privileges, evaluates the competence of a physician, or evaluates the quality of medical and health care services at the district's hospital, to the extent that the evaluation involves discussions or records that specifically identify an individual patient or physician. Section 161.032(a) of the Texas Health and Safety Code exempts a hospital district's proceedings as a medical peer review committee from the requirements of the Open Meetings Act.

Opinion #JC-0109 (RQ-0045). Requested by The Honorable Patricia Gray, Chair, Public Health Committee, Texas House of Representatives, P.O. Box 2910, Austin, Texas, 78768-2910, concerning whether a section 4B development corporation is subject to section 272.001 of the Local Government Code, and related questions.

Summary. A development corporation established under section 4B of article 5190.6 of the Revised Civil Statutes is not subject to section 272.001 of the Local Government Code, which establishes procedures political subdivisions must follow to sell land. However, a development corporation must ensure that it receives fair market value for any land, purchased with sales and use tax proceeds, that the development corporation sells for non-project purposes. Although article 5190.6 prohibits a city from granting a development corporation public money or free services, the Act does not preclude a city from providing funds or services to a development corporation in exchange for consideration from the development corporation, within certain limitations.

Opinion #JC-0110 (RQ-0043). Requested by The Honorable James Warren Smith, Jr., Frio County Attorney, 500 East San Antonio Street, Box 1, Pearsall, Texas, 78061-3100, concerning authority of a court with jurisdiction of truancy cases to compel the appearance in court of a truant who is living with a custodian, and related question.

Summary. With respect to a juvenile who is charged with failure to attend school and who is living with a custodian, section 54.021(g) of the Family Code authorizes a court with jurisdiction of truancy cases to compel the juvenile's court appearance by summoning the custodian to appear and to bring the juvenile. Under section 54.021(a) of the same code, a juvenile court may waive its exclusive jurisdiction of cases involving conduct indicating a need for supervision, where the alleged conduct is failure to attend school, either on a case-by-case basis or for all such cases. If the court waives its jurisdiction of all truancy cases as a class, the waiver is effective for one year.

TRD-9905977
Elizabeth Robinson
Assistant Attorney General
Office of the Attorney General
Filed: September 15, 1999

♦ ♦ ♦

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 4. AGRICULTURE

Part 1. TEXAS DEPARTMENT OF AGRICULTURE

Chapter 1. GENERAL PROCEDURES

Subchapter L. URBAN SCHOOLS GRANT PROGRAM

4 TAC §§1.800-1.804

The Texas Department of Agriculture (the department) proposes new Chapter 1, Subchapter L, §§1.800-1.804, concerning the establishment of the Urban Schools Grant Program. The new sections are proposed to implement House Bill 2631, as enacted by the 76th Legislature, 1999, which establishes an urban school grant program for the purpose of establishing demonstration agricultural projects in certain public school districts. New §1.800 provides a statement of purpose for the subchapter. New §1.801 provides definitions to be used in the subchapter. New §1.802 provides eligibility standards for applicants wishing to participate in the program. New §1.803 provides the makeup of the panel responsible for selecting grant recipients . New §1.804 provides for a reporting requirement for grant recipients.

Trey Powers, deputy assistant commissioner for intergovernmental affairs, has determined that for the first five- year period that the proposed new sections are in effect, there will be fiscal implications for state government as a result of enforcing or administering the sections. The department will use available funds to implement the urban grants program. The department has also been given authority to solicit and accept gifts, grants and other donations to fund the program. Because the program is voluntary, it is not possible to determine the number of applicants meeting eligibility requirements or, as a result, the costs to the state in implementing its part of the program or the amount of grants that will be awarded. There will be no fiscal implications for local government as a result of enforcing or administering the new sections.

Mr. Powers has also determined that for the first five years that the proposal is in effect the public benefit resulting from the enforcing or administering the new sections will be increased awareness and understanding of the agricultural industry by school children and the general public, and a greater appreciation of the importance of agriculture to Texas. There is no anticipated beneficial economic effect on small business. There may be incidental costs related to applying to the program or meeting eligibility requirements to schools seeking to participate in the program.

Comments may be submitted to Trey Powers, Deputy Assistant Commissioner for Intergovernmental Relations, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of the publication of the proposal in the *Texas Register*.

The new sections are proposed under the Texas Agriculture Code (the Code) §12.016, which provides the department with the authority to adopt rules as necessary for the administration of its powers and duties under the Code; and, House Bill 2631, 76th Legislature, 1999, which provides the department with the authority to adopt rules to implement the urban school grants program.

The code affected by the proposal will be the Texas Agriculture Code, Chapter 12.

§1.800. Statement of Purpose.

The Urban Schools Grant Program is designed to establish demonstration agricultural projects in certain Texas urban public school districts by awarding grants of $2,500 to eligible elementary schools.

§1.801. Definitions.

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

(1) Commissioner- The Commissioner of Agriculture, Texas Department of Agriculture.

(2) Department- The Texas Department of Agriculture.

(3) Urban Public School District- A Texas public school district with an enrollment of at least 49,000 students.

§1.802. Eligibility.

Subject to available funds, one public elementary school from each urban public school district in the state is eligible to receive a grant under this subchapter if the school submits to the department a proposal that includes:

(1) a description of the proposed project;

(2) a schedule of projected costs for the project; and

(3) a statement of the educational benefits of the project, including how the project will improve the students' understanding of agriculture.

§1.803. Selection.

(a) Community group panels appointed by the commissioner shall select grant recipients.

(b) Community group panels shall be composed of the following:

(1) one representative of the urban public school district submitting the request;

(2) one representative of the department;

(3) one representative of the livestock industry;

(4) one representative of the specialty crop industry;

(5) one representative of the row crop industry;

(6) one representative of the horticulture industry; and

(7) one representative of the Texas Agricultural Extension Service.

§1.804. Reporting Requirement.

The department shall assign a liaison to monitor all demonstration agricultural projects. Grant recipients shall submit a report to the department at the conclusion of the project that shall include a brief summary of the educational results of the project and pictures to document such results.

This 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 13, 1999.

TRD-9905934
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-4075

♦ ♦ ♦

Chapter 17. MARKETING AND PROMOTION DIVISION

Subchapter G. GO TEXAN PARTNER PROGRAM RULES

4 TAC §§17.300-17.310

The Texas Department of Agriculture (the department) proposes new Chapter 17, Subchapter G, §§17.300-17.310, concerning the establishment of the GO TEXAN Partner Program (GOTEPP). The new sections are proposed to implement House Bill 2719, as enacted by the 76th Legislature, 1999, which establishes a matching funds program for the promotion of Texas agricultural products. New §17.300 provides a statement of purpose for the subchapter. New §17.301 provides definitions to by used in the subchapter. New §17.302 sets out responsibilities of both the department and the GOTEPP advisory board under the subchapter. New §17.303 provides eligibility standards for applicants wishing to participate in the program. New §17.304 provides requirements for participation in the program. New §17.305 provides requirements for project requests. New §17.306 provides filing requirements and procedures for consideration of a request. New §17.307 provides selection criteria for projects submitted by applicants. New §17.308 provides limitations on use and allocation of funds. New §17.309 provides requirements for use of the GO TEXAN and Design mark. New §17.310 provides for administrative penalties for violations of subchapter G or for misuse of the GO TEXAN and Design mark.

Delane Caesar, assistant commissioner for marketing and promotion, has determined that for the first five-year period that the proposed new sections are in effect, there will be fiscal implications for state government as a result of enforcing or administering the sections. The GO TEXAN Partner Program is a voluntary matching funds program under which an eligible applicant may seek matching funding from the program to carry out projects to promote Texas agricultural products. The department has been appropriated $500,000 for use in fiscal year 1999-2000 and $500,000 for use in fiscal year 2000-2001. Funds may only be expended if matched by program applicants. No funds have been appropriated for fiscal years after fiscal year 2000-2001. Because the program is voluntary, it is not possible to determine the number of applicants meeting eligibility requirements or, as a result, the costs to the state in implementing its part of the program. However, it is anticipated that the costs associated with implementing the program will be covered by the funds that will be provided by applicants in the way of matching funds. There will be no fiscal implications for local government as a result of enforcing or administering the new sections.

Ms. Caesar has also determined that for the first five years that the proposal is in effect the public benefit resulting from the enforcing or administering the new sections will be increased awareness of and sales of Texas agricultural products due to the expansion of the department's GO TEXAN promotional marketing program and general promotion of Texas agricultural products, and increased cost efficiencies as a result of receiving of matching funds to implement project proposals. There is an anticipated beneficial economic effect on small businesses that will participate in the program. The actual amount of that benefit will be determined by the nature of the business and the project proposal submitted for consideration. In addition, there may be incidental additional costs related to applying to the program or meeting eligibility requirements to persons or entities seeking to participate in the program.

Comments may be submitted to Delane Caesar, Assistant Commissioner for Marketing and Promotion, Texas Department of Agriculture, P.O. Box 12847, Austin Texas 78711. Comments must be received no later than 30 days from the date of the publication of the proposal in the *Texas Register*.

The new sections are proposed under the Texas Agriculture Code (the Code) §12.016, which provides the department with the authority to adopt rules as necessary for the administration of its powers and duties under the Code; the Code, §12.0175

which authorizes the department to establish programs to promote products grown in Texas and products made from ingredients grown in Texas and to charge a membership fee for those programs not to exceed $50; and the Code, §46.012, which provides the department with the authority to adopt rules to administer the GO TEXAN Partner Program.

The code affected by the proposal will be the Texas Agriculture Code, Chapter 12 and the Texas Agriculture Code, Chapter 46.

§17.300. Statement of Purpose.

The GO TEXAN Partner Program is a promotion program designed to increase consumer awareness of Texas agricultural products and expand the markets for Texas agricultural products by developing a general promotional campaign for Texas agricultural products and advertising campaigns for specific Texas agricultural products based on project requests submitted by successful applicants.

§17.301. Definitions.

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

(1) Board- GO TEXAN Partner Program Advisory Board, as established by the Texas Agriculture Code, Chapter 46.

(2) Commissioner- The Commissioner of Agriculture, Texas Department of Agriculture.

(3) Cooperative organization- A group of five or more individuals who produce or market agricultural products in the state and associate to achieve common goals by registering with the Secretary of State's Office.

(4) Department- The Texas Department of Agriculture.

(5) GO TEXAN and Design mark–The certification mark used in the GO TEXAN promotional marketing program, as defined in §17.51 of this title (relating to Definitions).

(6) GO TEXAN Partner Program Account- An account in the state general revenue fund composed of legislative appropriations, gifts, grants, and matching funds received under Texas Agriculture Code, Chapter 46, money required to be deposited in the account under §502.2761, Transportation Code, and other money required by law to be deposited in the account.

(7) GO TEXAN Program- A marketing and promotion program for Texas agricultural products that meet program requirements, as established by §§17.51-17.58 of this title (relating to TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, and GO TEXAN and Design marks).

(8) Person- An individual, firm, partnership, corporation, governmental entity, cooperative organization, or association of individuals.

(9) Small business- An agricultural enterprise with annual gross receipts not in excess of $500,000.

(10) Texas agricultural product–An agricultural, horticultural, viticultural, or vegetable product, either in its natural or processed state, that has been produced, processed, or otherwise had value added to the product in this state, including:

(A) bees;

(B) honey;

(C) fish or other seafood;

(D) a forestry product;

(E) livestock or a livestock product;

(F) planting seed; or

(G) poultry or poultry products.

§17.302. Administration.

(a) The department's responsibilities under this subchapter are as follows.

(1) The department's Marketing and Promotion Division shall administer the GO TEXAN Partner Program.

(2) Department staff shall solicit GO TEXAN Partner Program project requests by posting public notice in the Texas Register and by publicizing to the general public via media outlets.

(3) Department staff shall develop a general promotional campaign for Texas agricultural products.

(4) Department staff shall receive project requests, submitted by eligible applicants, for advertising campaigns for specific Texas agricultural products.

(5) Department staff shall screen applicants for eligibility.

(6) Department staff shall present eligible project requests, as determined by the department, to the board.

(7) Department staff may establish guidelines on advertising activities by applicants.

(8) The department may contract with media representatives for the purpose of dispersing promotional materials.

(9) The department shall receive matching funds from program applicants.

(10) The department may accept donations or grants from any source.

(b) The board's responsibilities under this subchapter are as follows.

(1) The board shall be composed of the following members appointed by the commissioner:

(A) two department representatives;

(B) one United States Department of Agriculture Commodity Credit Corporation representative;

(C) one radio media representative;

(D) one print media representative;

(E) one television media representative;

(F) one advertising representative;

(G) one consumer representative; and

(H) one higher education representative with expertise in marketing and promotion.

(2) The board shall meet no less often than quarterly;

(3) Two-thirds of the total board membership shall constitute a quorum;

(4) The board shall review project requests of eligible applicants, as determined by the department, and approve or deny funding under this subchapter;

(5) The board may advise the department on matters related to the administration of the GO TEXAN Partner Program account; and

(6) The board may advise the department on the adoption of rules relating to the administration of the GO TEXAN Partner Program.

§17.303. Eligibility.

An eligible applicant must be:

(1) a state or regional organization or board that promotes the marketing and sale of Texas agricultural products and does not stand to profit directly from specific sales of agricultural commodities;

(2) a cooperative organization, as defined by § 17.301 of this title (relating to Definitions);

(3) a state agency or board that promotes the marketing and sale of agricultural commodities;

(4) a national organization or board that represents Texas producers and promotes the marketing and sale of Texas agricultural products;

(5) a small business, as defined by §17.301 of this title (relating to Definitions); or

(6) any other entity that promotes the marketing and sale of Texas agricultural products. For purposes of this section, the department shall have the sole discretion to determine whether an entity meets program eligibility requirements.

§17.304. Requirements for Participation.

To be eligible for participation in the program through the use of matching funds under this subchapter, an applicant must:

(1) be a member in good standing of the GO TEXAN program;

(2) be an eligible applicant under this subchapter;

(3) prepare and submit a project request in accordance with this subchapter;

(4) submit a sworn affidavit certifying that applicant is not currently delinquent in the payment of any franchise taxes owed the State of Texas under Chapter 171, Tax Code and will notify the department of status change;

(5) submit a sworn affidavit certifying that applicant is not currently delinquent in the payment of child support and will notify the department of status change;

(6) submit a sworn affidavit disclosing any existing or potential conflict of interest relative to the evaluation of the project plan by the board and acknowledge that applicant will notify the department of status change; and

(7) submit to the department, within ten business days after receiving board approval for the project request, cash matching funds as specified in the project request and in accordance with this subchapter.

§17.305. Project Requests.

A project request submitted by an eligible applicant must describe the advertising or other market-oriented promotional activities to be carried out using matching funds. The department shall not submit to the board a project request submitted under this subchapter unless the request includes:

(1) a cover page including the name, title, and address of applicant;

(2) a table of contents;

(3) an abstract of approximately 200 words or less, on one page, including the title, if any, a brief description of the project, specific objectives and importance of the project, project plan and methodology, and expected contribution to further or enhance the GO TEXAN Program;

(4) a detailed specific narrative or factual description of the project, anticipated benefits to a specific region of the state, to specific commodities, any preliminary market research or sales percent increases to be achieved as a result of the project, a description of expected results, a biography of the applicant, and a description of the business entity;

(5) a detailed project budget including specific dollar amounts for all potential costs; and

(6) a description of how anticipated sales increases due to implementation of the project will be quantified and reported to the department;

§17.306. Filing Requirements and Consideration of Project Requests.

(a) Project request. An applicant must submit a project request, completed in accordance with this subchapter, to the department's Marketing and Promotion Division, 1700 North Congress Avenue, 10th Floor, Austin, Texas 78711.

(b) Department review. Department staff will review the project request for completeness and examine the benefits of the project for Texas agriculture and economic growth in the state.

(c) Department staff determination of ineligibility. Department staff may determine that project requests are ineligible for any of the following reasons:

(1) department staff determines that the project request is not complete, in accordance with this subchapter; or

(2) department staff determines that applicant provided false information to the department.

(d) Notification. If a determination of ineligibility is made by staff, the department will notify the applicant in writing, identifying the reasons for ineligibility. Eligible applicants will be notified in writing and advised of the next scheduled board meeting.

(e) Board review of eligible applicants. The board shall approve or deny each project request by a majority of the quorum of the board.

(f) Deposit of matching funds. Matching funds for board approved project requests shall be deposited with the department within ten business days after board approval.

§17.307. Selection Criteria.

(a) Project requests shall be selected on a competitive basis.

(b) Preference shall be given to project requests that are unique in nature and avoid duplication with other project requests that are being funded by the department.

(c) Project requests should demonstrate an innovative use of funding and resources.

(d) Only project requests that further or enhance the department's GO TEXAN Program shall be funded.

(e) Only project requests submitted by applicants who are physically located in Texas or who have their principal place of business in Texas shall be funded. For purposes of this section, the board shall have the sole discretion to determine whether an applicant meets selection criteria.

§17.308. Use of Funds.

(a) Funds received under this subchapter may only be used for activities promoting the sale of Texas agricultural products.

(b) The department may allocate funds to categories of eligible applicants and to general or product-specific promotional activities. For purposes of this subchapter, the department shall have the sole discretion to allocate funds to categories.

(c) For the first six months of Fiscal Year 2000, the board shall not approve project requests in excess of $30,000, including matching funds.

(d) The department may use program funds for the payment of program administrative expenses in accordance with authority provided in the Texas Agriculture Code, Chapter 46.

(e) Projects funded shall meet all state bidding requirements.

(f) 85% of all funds for each approved project request shall be expended to promote the specific product(s) of applicants and 15% of all funds for each approved project request shall be expended to promote the GO TEXAN Program. If feasible and practical, the 15% portion of funds for each individual project request will be expended in a manner that directly or indirectly promotes the specific product(s) of applicant.

§17.309. Use of GO TEXAN and Design Mark.

Use of the GO TEXAN and Design mark by program members under this subchapter is subject to the rules of the GO TEXAN Program as provided in Subchapter C of this chapter (relating to TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, and GO TEXAN and Design marks).

§17.310. Administrative Penalties; Other Enforcement Remedies.

(a) A person violates this subchapter if the person is a GO TEXAN Partner Program member and:

(1) uses, reproduces, or distributes the GO TEXAN and Design mark without registering with the department as a GO TEXAN Program member; or

(2) violates a requirement of this subchapter or Subchapter C of this chapter (relating to TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, and GO TEXAN and Design marks).

(b) A person who violates this subchapter:

(1) forfeits the person's ability to use the GO TEXAN and Design mark;

(2) is ineligible for a grant of funds under this subchapter;

(3) forfeits applicant matching funds required to satisfy outstanding debts incurred to implement applicant's project request.

(c) The department may assess an administrative penalty as provided by Texas Agriculture Code §12.020 against a person who violates this subchapter.

(d) Proceedings for the imposition of administrative penalties under this subchapter shall be conducted in the manner provided for contested cases by the Administrative Procedure Act, Texas Government Code, and Chapter 1 of this title (relating to General Practice and Procedure).

(e) Proceedings for the imposition of administrative penalties under this subchapter shall not preclude the commissioner from pursuing any other remedies, including, where applicable, the penal and injunctive remedies provided for by law.

This 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 13, 1999.

TRD-9905935
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-4075

♦ ♦ ♦

Chapter 24. TEXAS AGRICULTURAL FINANCE AUTHORITY: FARM AND RANCH FINANCE PROGRAM

4 TAC §§24.8-24.10, 24.12, 24.13, 24.14, 24.15

The Board of Directors (the board) of the Texas Agricultural Finance Authority (the Authority) of the Texas Department of Agriculture proposes amendments to §§24.8, 24.9, 24.10. 24.12, 24.13, 24.14 and 24.15, concerning the Authority's Farm and Ranch Finance Program.

The amendments are proposed in order to provide an expansion of the financial assistance program available through the Authority and to provide availability of the program to the agricultural community. The proposed amendment to §24.8(3) clarifies that the applicant must provide evidence of relevant to the applicant's business plan presented with the application. The proposed amendment to §24.9(a) clarifies that the applicant may use the application form of the lender or the authority, provided that the lender application contains all the information required by the program. The proposed amendment to §24.10 clarifies that the applicant is to complete the application as required by the lender originating the loan. The proposed amendment to §24.10(5) adds the requirement that a current credit bureau report can be included in the application in place of two credit references. The proposed amendment to §24.10(b) clarifies that the financial statements presented with the application for the applicant are preferred to be presented in accordance with generally accepted accounting principles. The proposed amendment to §24.10(e) clarifies that an appraisal of the farm or ranch land is to be completed in accordance with Federal law; that an appraisal must be completed by a duly qualified appraiser, selected by the lender; and deletes the requirement of having a second appraisal completed for the application by the authority. The proposed amendment to §24.12(a) changes the funding structure of the program from the authority funding no less than 75% of the total loan to the authority funding 50% of the total loan. The proposed amendment to §24.12(c) changes the sharing percentage of collateral between the lender and the authority from 72% for the authority and 28% for the lender to 44% for the authority and 56% for the lender. The proposed amendment to §24.12(e) clarifies that the authority may charge an origination fee as identified in the fee schedule. The proposed amendment to §24.12(f) clarifies the interest rate charged on a loan to be the interest rate established by lender and authority and that such interest rate must be variable, adjusting no less than semi-annually. The proposed amendment to §24.12(h) clarifies that the closing costs associated with closing an approved loan are the responsibility of the borrower with the exception that

the borrower is not responsible for the legal review of the closing documents by the authority's legal counsel. The proposed amendment to §24.13 clarifies that a partial release of property financed by the lender and the authority can be approved by the lender and the authority and clarifying that the lender is the point of contact for the borrower. The proposed amendment to §24.14 clarifies that a borrower may be declared in default by the lender and deletes requirement that the borrower is declared in default. The proposed amendment §24.15(g) changes the ratio in which the net proceeds from liquidation of the collateral will be distributed from 28% lender and 72% authority to 56% lender and 44% authority. The proposed amendment to the fee schedule reduces the origination fee from 1.5% of the total loan amount to 1% of the total loan amount to be paid to the authority within ten days of the initial funding of the loan.

Robert Kennedy, deputy assistant commissioner for finance, has determined that for the first five-year period that the amendments are in effect there will be no anticipated fiscal implications to state or local governments as a result of enforcing or administering the amendments.

Mr. Kennedy has also determined that for the first five years the amendments are in effect the public benefit anticipated will be the provision of financial assistance to more agricultural businesses in the state and to provide more efficient financial assistance programs. There is no anticipated effect on small businesses, except that small businesses that are granted financial assistance under this program will benefit from that assistance. There are no anticipated economic costs to persons required to comply with the amendments. The amendment to the fee schedule, in fact, reduces the loan origination fee required to be paid by applicants.

Comments on the proposal may be submitted to Robert Kennedy, Deputy Assistant Commissioner for Finance, Texas Department of Agriculture, P. O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Agricultural Code, §59.022, which provides the Authority with authority to adopt rules and procedures necessary for the administration of the Farm and Ranch Finance Program including the setting and collection of fees in connection with the program.

The Texas Agriculture Code, Chapters 58 and 59 are affected by the proposed amendments.

§24.8. Applicant Requirements.

An applicant may submit an application to the Authority if the applicant meets the following requirements:

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

(3) applicant provides evidence that he/she has at least three years of experience [~~in~~] relevant to the applicant's agriculture business plan [~~production~~];

(4) applicant provides evidence that his/her net worth (preferably computed in accordance with generally accepted accounting practices) together with the applicant's spouse and their dependents is less than $400,000;

(5)-(9) (No change.)

§24.9. Filing Requirements and Consideration of Application.

(a) Application forms. An applicant seeking [~~a loan~~] program assistance from the Authority may [~~must~~] use the application forms provided by the lender or by the Authority. Applications must include the information necessary to identify eligibility for the program.

(b)-(h) (No change.)

§24.10. Contents of the Application.

(a) Required information. Applicants must complete an application as required by the lender originating [~~assisting in origination of~~] the loan. The application must contain adequate information to determine eligibility and creditworthiness. Such information must include but is not limited to:

(1) (No change.)

(2) the applicant's social security number [~~current valid driver's license number~~];

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

(5) a current credit bureau report and/or two credit references [~~and two personal references, all from different sources and none from ther applicant's immediate family~~];

(6)-(8) (No change.)

(b) Financial statement. Financial statements, [~~must be provided~~] preferably based in accordance with generally accepted accounting principles , [~~. They~~] should be typed or written in ink, dated (no more than three months old), and signed by the applicant and spouse, if applicable. Printed forms of lending institutions will be accepted. A financial statement will be required from each person/entity who will become personally liable on the loan.

(c)-(d) (No change.)

(e) Farm or ranch land appraisal. An appraisal of the farm or ranch land , as completed in compliance with Federal law, must be submitted which identifies the appraised market value [~~and the income potential~~] of the farm or ranch land. The appraisal must be completed by an appraiser, selected by the lender, who is duly qualified to perform such task [~~under the Texas Appraiser Licensing and Certification Act~~]. A letter stating the appraiser's qualifications and experience must be submitted with the appraisal. [~~The Authority may require the applicant to obtain an additional appraisal from another appraiser when comparable sales do not reasonably reflect the value of the farm or ranch land stated in the original appraisal.~~]

(f) (No change.)

§24.12. General Terms and Conditions of Authority's Financial Commitment.

(a) The program will work in partnership with lenders who are familiar with making farm or ranch land loans. Such partnership will include a joint funding of financing to eligible applicants in Texas. Such joint funding will be structured so that [~~determined on a case by case basis but~~] the Authority's portion will be 50% [~~no less than 75%~~] of the total financing not to exceed the limitations defined in subsection (b) of this section.

(b) (No change.)

(c) The Authority and the lender will share the pledged collateral in a ratio of 44% [~~72%~~] to the Authority and 56% [~~28%~~] to the lender.

(d) (No change.)

(e) Fees. A non-refundable application fee of $50 will be required with each application presented to the Authority for consideration. The Authority may charge an origination fee as identified in the following fee schedule. [~~In addition, origination points based on the term of the approved loan commitment will be~~

~~charged.~~] All fees will be the responsibility of the applicant and shall be remitted to the Authority.
Figure: 4 TAC §24.12(e)

(f) Interest rates on loans will be based upon rates established by the lender and the Authority. Interest rates established must be variable, adjusting no less than semi- annually.

(g) (No change.)

(h) Closing costs. All closing costs associated with the closing of an approved loan , with the exception of [~~including~~] the Authority's review of the closing documents by independent legal counsel , shall be the liability of the borrower.

(i) Closing of the loan. The staff may attend the verification and signing of the closing documents at the time, date and location determined by the Authority and lender. The closing documents must include all those documents , which are necessary for the protection of the Authority and the lender as determined by the legal counsel.

(j)-(k) (No change.)

§24.13. Partial Release. lender and the

The lender and the Authority may approve the release of a portion of the property , purchased under the program , from a lien [~~or may delegate the approval authority to the lender/servicer~~] under the following conditions:

(1) the lender and the Authority [~~and lender~~] determine that the release will not adversely affect either the borrower's operational ability or ability to continue in the program;

(2) the borrower agrees to comply with the conditions for release imposed by the lender and the Authority which may include conditions as to the amount and location of acreage to be released, and the application of any and/or all of the proceeds of the sale to the loan; and

(3) (No change.)

§24.14. Default by Borrower.

A borrower may be declared [~~is~~] in default if one or more of the following conditions exists as determined by the lender and any other reasons that may be identified in the closing documents of the loan:

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

§24.15. Default Proceedings.

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

(g) Net proceeds from the foreclosure sale or the ultimate final sale of the property by the lender, whichever is greater, and any net proceeds resulting from the collection under a deficiency judgment, shall be shared by the lender and the Authority in the ratio of 56% [~~28%~~] to the lender, and 44% [~~72%~~] to the Authority. Net proceeds shall mean that amount received from the foreclosure sale less expenses attributable to the foreclosure. All expenses must be approved by the lender and the Authority.

(h) (No change.)

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

Filed with the Office of the Secretary of State, on September 13, 1999.

TRD-9905936
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-4075

♦ ♦ ♦

Chapter 28. TEXAS AGRICULTURAL FINANCE AUTHORITY: FINANCIAL ASSISTANCE PROGRAM RULES

4 TAC §§28.2, 28.3, 28.7, 28.10

The Board of Directors (the board) of the Texas Agricultural Finance Authority (the Authority) of the Texas Department of Agriculture proposes amendments to §§28.2, 28.3, 28.7 and 28.10, concerning the Authority's financial assistance program's.

The amendments are proposed in order to provide an expansion of the financial assistance program available through the Authority and to make the sections consistent with House Bill 3050, as enacted by the 76th Legislature, 1999. The proposed amendment to §28.2 deletes the phrase "otherwise would not be provided and that" to provide access to the programs of the Authority by any agricultural business. The proposed amendments to §28.3 expand the definitions for an agricultural business by adding the entity designated to carry out the boll weevil eradication in accordance with the Texas Agriculture Code, §74.1011, adding a clarification that an agricultural-related business in rural areas of Texas that provides recreational activities associated with the enjoyment of nature or the outdoors, or a state agency or an institution of higher education that is engaged in producing an agricultural product are eligible to participate in the programs. The proposed amendment to§28.3 expands the definition of an applicant to include the entity designated to carry out the boll weevil eradication in accordance with the Texas Agriculture Code, §74.1011, or a state agency or institution of higher education, and adds a definition for the term "rural" area as an area which is predominately rural in character, being one which the board defines and declares to be a rural area.

The proposed amendment to §28.7(a)(9) deletes the requirement that the applicant provides evidence satisfactory to the board that financial assistance is not otherwise available. The proposed amendment to §28.7(b)(13) adds the cost of the insect eradication and suppression programs as an eligible project cost. The proposed amendment to §28.10(c) adds that the Authority may provide financial assistance to the entity designated to carry out the boll weevil eradication in accordance with §74.1011, and to a state agency or institution of higher education for an agricultural-related business in amount approved by the board. The proposed amendment to §28.10(h) clarifies the fees charged to the applicant under the programs.

Robert Kennedy, deputy assistant commissioner for finance, has determined that for the first five-year that the proposed amendments are in effect there will be no anticipated fiscal implications to state or local government as a result of enforcing or administering the proposed amendments.

Mr. Kennedy has also determined that for the first five years the amendments are in effect the public benefit anticipated will be the provision of financial assistance to more agricultural-related businesses in the state and to provide more efficient financial assistance programs. There is no anticipated effect on small businesses, except that small businesses that are granted

financial assistance under the Authority's programs will benefit from that assistance. There are no anticipated economic costs to persons required to comply the amendments.

Comments on the proposal may be submitted to Robert Kennedy, Deputy Assistant Commissioner for Finance, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Agricultural Code, §58.022, which provides the Authority with authority to adopt rules and procedures necessary for the administration of its programs including the setting and collection of fees in connection with the program; and §58.023, which provides the Authority to adopt rules to establish criteria for eligibility of applicant and lenders under the financial assistance programs.

The Texas Agriculture Code, Chapter 58 is affected by the proposal.

§28.2. Purpose. The purpose of the Texas Agricultural Finance

Authority (the Authority)is to provide financial assistance to eligible agricultural businesses and to other agricultural-related rural economic development projects that [~~otherwise would not be provided and that~~] the board of the [~~Texas Agricultural Finance~~]Authority [~~(the Authority)~~] considers to present a reasonable risk and have a sufficient likelihood of repayment. The Authority is mandated to support the expansion, development, and diversification of production, processing, marketing, and exporting of Texas agricultural products and to promote the development of [~~support other~~] agricultural- related rural economic development projects. These rules establish standards of eligibility and the application procedures for the Authority's financial assistance programs.

§28.3. Definitions.

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

(1) (No change.)

(2) Agricultural business - A business that is or proposes to be engaged in [~~innovative, diversified, or value-added production,~~] processing, marketing, or exporting of an agricultural product , that is the entity designated to carry out the boll weevil eradication program in accordance with the Texas Agriculture Code, § 74.1011, [~~or a business~~] that is or proposes to be engaged in an agricultural-related business in rural areas of Texas, including a business that provides recreational activities associated with the enjoyment of nature or the outdoors on agricultural land, or a state agency or an institution of higher education that is engaged in producing an agricultural product [~~economic development project~~].

(3) (No change.)

(4) Applicant - Any person, corporation, partnership, cooperative, joint venture, [~~or~~] sole proprietorship , the entity designated to carry out the boll weevil eradication in accordance with §74.1011, or a state agency or institution of higher education filing an application with the Authority for financial assistance. A lender may submit an application for any of the above-mentioned parties.

(5)-(19) (No change.)

(20) Rural area - A rural area means an area which is predominately rural in character, being on which the board defines and declares to be a rural area.

(21) [~~(20)~~] Staff - The staff of the Authority or staff of the department performing work for the Authority.

(22) [~~(21)~~] State - The State of Texas.

§28.7. Project Eligibility Requirements.

(a) Projects. An applicant is eligible for assistance from the Authority if the proposed project meets the following criteria:

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

[~~(9) the applicant provides evidence satisfactory to the board that financial assistance is not otherwise available.~~]

(b) Project costs. The proceeds of the financial assistance provided by the Authority may be used to finance costs incurred in connection with the production, processing, marketing, or export of Texas agricultural products or in connection with the development of other agricultural-related rural projects, including, but not limited to, the costs of:

(1)-(10) (No change.)

(11) acquisition of licenses, permits, and approvals from any governmental entity;[~~and~~]

(12) pre-export and export expenses ; and [~~.~~]

(13) insect eradication and suppression programs.

(c) (No change.)

§28.10. General Terms and Conditions of the Authority's Financial Assistance.

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

(c) Maximum amount financial assistance. The Authority shall not provide a loan guaranty, or a participation purchased to an applicant, including its affiliates, that at any one time exceeds $2 million except that by a two-thirds vote of the board, the total aggregate participation purchase or loan guaranty may exceed $2 million but may not exceed $5 million. The assistance in the form of a loan guaranty shall not exceed 90% of the total loan. The Authority board will apply the following as a guideline when approving [~~loan~~] guaranty applications: a guaranty may not exceed 75% on guaranties of $2 million and over; a guaranty may not exceed 80% for guaranties between $1 million and $1,999,999; a guaranty may not exceed 85% for guaranties between $500,000 and $999,999; and a guaranty may not exceed 90% for guaranties between $30,000 and $499,999. The financial assistance in the form of a guaranty shall never exceed 90% of the total loan or $5 million, whichever is less. Furthermore, the Authority may make, guaranty, insure, coinsure, or reinsure a loan up to the limits described above for a single eligible business which already has an active loan and will consider the guaranty percentage under which the active loan was guarantied, if the action is approved by a two-thirds vote of the members present. The Authority may provide financial assistance to the entity designated to carry out the boll weevil eradication program in accordance with the Texas Agriculture Code, §74.1011 and to a state agency or institution of higher education for an agricultural-related business in amounts approved by the board. The maximum direct loan is $250,000 as established in §28.16(a) of this title (relating to Criteria for a Direct Loan).

(d)-(g) (No change.)

(h) Fees. The board has adopted the following fee schedule which will be used as a guideline to calculate the fees payable by the applicant to the Authority within 10 days of the initial funding of the loan. However, the Authority may approve fees as it deems appropriate on a case-by-case basis. A nonrefundable application

fee will be required with the qualified application. If the qualified application is approved, the application fee will be credited as part of the total fees charged. Any and all legal fees incurred by the board in issuing a direct loan or loan guaranty will be an obligation of the applicant.

Figure: 4 TAC §28.10(h)

(i)-(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 13, 1999.

TRD-9905937

Dolores Alvarado Hibbs

Deputy General Counsel

Texas Department of Agriculture

Earliest possible date of adoption: October 24, 1999

For further information, please call: (512) 463-4075

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

Part 5. TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT

Chapter 176. ENTERPRISE ZONE PROGRAM

10 TAC §§176.1, 176.3, 176.10, 176.11

The Texas Department of Economic Development (department) proposes amendments to §§176.1, 176.3, 176.10, and 176.11, relating to the Texas Enterprise Zone Program.

The proposed amendments reflect changes made to the program by House Bill 3658 of the 76th Legislature, update legal citations and remove references to obsolete statutory language.

The proposed amendment to §176.1 deletes federal program language that no longer exists because the federal program no longer exists, and corrects statutory citations and division names within the department.

The proposed amendment to §176.3 deletes federal program language that no longer exists.

The proposed amendment to §176.10 deletes a date reference that is no longer needed. The amendment also adds language to establish a minimum scoring threshold. This was done in an effort to ensure than the limited number of enterprise projects designations are awarded to projects that have the potential to provide quality jobs for Texas.

The proposed amendment to §176.11 changes the deadline for the annual report to the governor, legislature, and the Legislative Budget Board from December 1st to December 15th in accordance with changes made by House Bill 3658 of the 76th Legislature.

Mr. Craig Pinkley, Director of Finance, has determined that for each year of the first five years that the amendments will be in effect there will be no additional cost, no reduction in costs, and no loss or increase in revenue to the state or to local governments as a result of enforcing or administering the amendments. The probable economic cost to persons required to comply with the amendments is any cost incurred by businesses in preparing and submitting applications. Costs to businesses receiving enterprise project designation will be significantly offset by the benefits of the program.

Mr. Pinkley has further determined that the public benefit that can be expected for each year of the first five years that the amendments are in effect is that local communities participating in the Enterprise Zone Program will better understand program requirements and administration.

Written comments on the proposed amendments may be hand-delivered to DeAnn Luper, Legal Assistant, Texas Department of Economic Development, 1700 N. Congress, Suite 130, Austin, Texas, 78701, or mailed to P. O. Box 12728, Austin, Texas, 78711-2728, within thirty days of publication. Comments may be faxed to Ms. Luper at (512) 936-0415.

The amendments are proposed pursuant to Government Code, §481.0044(a), authorizing the governing board of the department to adopt rules for the administration of department programs, Government Code, §2303.051(c) directing the department of adopt rules to carry out the Enterprise Zone Program, and Government Code, Chapter 2001, subchapter B, setting forth the agency rulemaking process.

Government Code, Chapter 2303 is affected by these amendments.

§176.1. General Provisions.

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

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

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

(9) Depressed area–An area within the jurisdiction of a county or municipality designated by ordinance or order that is an area with pervasive poverty, unemployment, and economic distress. An area is an area of pervasive poverty, unemployment, and economic distress if:

(A) (No change.)

(B) the area meets one or more of the following criteria:

(i) the area was a low-income poverty area;

~~*[(ii)* the area is in a jurisdiction or pocket of poverty eligible for urban development action grants under federal law according to the most recent certification available from the United States Department of Housing and Urban Development;]~~

(ii) [~~(iii)~~] at least 70% of the residents or households of the area have an income below 80% of the median income of the residents or households of the locality or state, whichever is lower;

(iii) [~~(iv)~~] chronic abandonment or demolition of commercial or residential structures exists in the area;

(iv) [~~(v)~~] substantial tax arrearages for commercial or residential structures exist in the area;

(v) [~~(vi)~~] substantial losses of businesses or jobs have occurred in the area;

(vi) [~~(vii)~~] the area is part of a disaster area declared by the state or federal government during the most recent 18-month period; or

(vii) [~~(viii)~~] the area has had a substantial increase in the number of individuals younger than 18 years of age arrested due to criminal activity.

(10)-(20) (No change.)

(21) Qualified business–A person, including a corporation or other entity that the department, for purposes of state benefits under the Act, and a governing body, for purposes of local benefits, certifies to have met the following criteria:

(A)-(D) (No change.)

(E) is a qualified hotel project that is owned by a municipality with a population of 1.5 million or more or a nonprofit municipality sponsored local government corporation created pursuant to the Texas Transportation Corporation Act , Chapter 431, Transportation Code [~~(Texas Civil Statutes, Article 1528 (1))~~] proposed to be constructed within 1,000 feet of a convention center owned by a municipality having a population of 1.5 million or more, including all facilities ancillary thereto such as shops and parking facilities.

(22)-(27) (No change.)

(d)-(f) (No change.)

(g) Written communication with the department. Applications and other written communications to the department should be addressed to the attention of the Texas Enterprise Zone Program, Business Development [~~Services~~] Division, Texas Department of Economic Development, P. O. Box 12728, Austin, Texas 78711-2728.

§176.3. Eligibility Requirements for Designation of an Enterprise Zone.

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

(e) Documentation. For the purpose of showing that an area is qualified to be designated as an enterprise zone, the applicant must submit documentation, including the source, methodology and certification of the data. The authorized data source for population estimates is the State Data Center. The authorized data source for labor force data is the Texas Workforce Commission. Data will be considered current from the State Data Center and the Texas Workforce Commission if they are the most recently published estimates or if the enterprise zone application containing the data is received by the department before the 61st day after the date revised estimates of that data are published. An industrial park may be included as part of the enterprise zone without averaging in the unemployment and poverty data. However, data will be required if part of the zone includes an area which is outside the industrial park but within the same census area. The industrial park may not exceed 25% of the proposed zone area. To show an area has been designated as an industrial park the applicant must include documentation of official action taken by the governing body.

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

[~~(4) Urban Development Action Grants. The applicant must provide certification from the United States Department of Housing and Urban Development that the area is within a jurisdiction that is eligible for urban development action grants under federal law. Such certification must be current within 90 days of the date the enterprise zone application is received by the department.~~]

(4) [~~(5)~~] Chronic abandonment or demolition. To qualify, the applicant must demonstrate to the department that 25% or more of the structures in such area are found by the governing body to constitute substandard, slum, deteriorated, or deteriorating structures as defined by local law. If local law does not define what constitutes a substandard, slum, deteriorated, or deteriorating structure, the governing body of the applicant may consider as substandard a structure which:

(A) is abandoned;

(B) does not have plumbing;

(C) has been condemned or cited for building or fire code violations by the appropriate city authority;

(D) is in an inadequate state of repair under applicable public health, safety, fire, or building codes;

(E) is the subject of a tax or special assessment delinquency stated as a percentage of total taxes assessed, which exceeds the fair market value of the land involved and the improvements thereon; or

(F) is functionally or economically obsolete as determined by a qualified appraiser.

(5) [~~(6)~~] Substantial tax arrearages. The applicant must certify and submit evidence that within the proposed zone area, at least 25% of the commercial or residential taxes have gone unpaid and have been delinquent for at least one year. For purposes of determining substantial tax arrearages, the tax rolls of the applicable city or county nominating an area as an enterprise zone must be used.

(6) [~~(7)~~] Substantial loss of businesses or jobs. A substantial loss of businesses or jobs is defined as a loss of at least 20% over the most recent one year period or a loss of 30% over the most recent three-year period in the proposed zone area. The applicant must seek advance approval of documentation to be provided to the department.

(7) [~~(8)~~] Declaration of an area as a state or federal disaster area. The applicant must provide documentation by the applicable state or federal government that the area has been declared a state or federal disaster area within the most recent 18-month period.

(8) [~~(9)~~] Substantial increase in individuals under the age of 18 arrested for criminal activity. The applicant must provide data from the appropriate law enforcement authority or authorities that the proposed zone area has had a substantial increase in the number of individuals younger than 18 years of age arrested due to criminal activity. A substantial increase in arrests is defined as at least a 20% increase over the most recent three-year period.

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

§176.10. Approval Standards.

(a) (No change.)

(b) Approval standards for designation of enterprise projects. The department shall designate qualified businesses as enterprise projects on a competitive basis. Applications for designation of enterprise projects will be accepted on a quarterly basis on or before the following application deadlines:

(1) (No change.)

(2) The department will designate qualified businesses as enterprise projects under the following conditions:

(A) Each enterprise zone governing body may not have more than four qualified businesses designated as enterprise projects in enterprise project eligible enterprise zones within its jurisdiction during any [~~the~~] state fiscal biennium [~~beginning September 1, 1995~~]. The enterprise project designations will be granted by the department on a first-come, first-served basis, subject to the limitations in this section and based upon the availability of enterprise project designations. Although enterprise project designations will be

awarded on a first-come, first-served basis, applications will be scored for the purpose of determining if the project meets the minimum threshold score of 30 points, as well as for awarding bonus enterprise project designations.

(B)-(C) (No change.)

(3) (No change.)

(c)-(i) (No change.)

§176.11. Reporting Requirements.

(a) Annual reports.

(1) Each municipality, county, or combination of municipalities and/or counties that authorized the creation of an enterprise zone shall submit an annual report to the department on or before October 1 of each year. The report must be in a form prescribed by the department and contain the information listed in the Act, §2303.205 (c). The information in the report will be used by the department to compile an annual report to the governor, legislature, and the Legislative Budget Board by December 15 [1] as required by the Act. If such report is not received by the deadline, the department may, following a public hearing, consider termination of the designation of the enterprise zone.

(2) (No change.)

(b) (No change.)

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

Filed with the Office of the Secretary of State on September 9, 1999.

TRD-9905797
Gary Rosenquest
Chief Administrative Officer
Texas Department of Economic Development
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 936-0181

♦ ♦ ♦

Chapter 178. TEXAS COMMUNITY DEVELOPMENT PROGRAM

The Texas Department of Economic Development (department) proposes the repeal of 10 Texas Administrative Code, Chapter 178, §§178.1, 178.2, 178.10-178.16, and 178.41,Texas Community Development Program in its entirety, relating to the administration of the State of Texas' allocation of community development block grant nonentitlement area funds. The repeal is necessary to accurately reflect current law. Agency review of this rule has found that the reason for the rules has ceased to exist, because rules for the program are set out in Title 10 Texas Administrative Code, Part 1. Texas Department of Housing and Community Affairs, Chapter 9. Texas Community Development Program.

Craig Pinkley, Director of Finance, has determined that for each year of the first five years that the repeal will be in effect there will be no fiscal implications to the state or to local governments as a result of the repeal. No cost to either government or the public will result from the repeal. There will be no impact on small businesses. No economic cost is anticipated to persons as a result of the repeal.

Mr. Pinkley has also 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 avoidance of any confusion that may be caused by the rules being listed under two different agencies. No economic costs are anticipated to persons who are required to comply with the proposed repeal.

Written comments on the proposed repeal may be hand-delivered to DeAnn Luper, Legal Assistant, Texas Department of Economic Development, 1700 N. Congress, Suite 130, Austin, Texas, 78701, or mailed to P.O. Box 12728, Austin, Texas, 78711-2728, within thirty days of publication. Comments may be faxed to Ms. Luper at (512) 936-0415.

Subchapter A. ALLOCATION OF PROGRAM FUNDS

10 TAC §§178.1, 178.2, 178.10-178.16

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

The repeal is proposed pursuant to Government Code, §481.0044(a), which directs the governing board of the department to adopt rules for administration of department programs, and Government Code, Chapter 2001, Subchapter B which prescribes the standards for rulemaking by state agencies.

Texas Government Code, Chapter 481, is affected by this proposal.

§178.1. Definitions.

§178.2. Complaint System.

§178.10. General Provisions.

§178.11. Regional Review Committees.

§178.12. Community Development Fund.

§178.13. Texas Capital Fund.

§178.14. Planning/Capacity Building Fund.

§178.15. Emergency Fund.

§178.16. Urgent Need Fund.

This 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 9, 1999.

TRD-9905796
Gary Rosenquest
Chief Administrative Officer
Texas Department of Economic Development
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 936-0181

♦ ♦ ♦

Subchapter B. CONTRACT ADMINISTRATION

10 TAC §178.41

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices

of the Texas Department of Economic Development or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed pursuant to Government Code, §481.0044(a), which directs the governing board of the department to adopt rules for administration of department programs, and Government Code, Chapter 2001, Subchapter B which prescribes the standards for rulemaking by state agencies.

Texas Government Code, Chapter 481, is affected by this proposal.

§178.41. Uniform Administrative Requirements

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

Filed with the Office of the Secretary of State on September 14, 1999.

TRD-9905961
Gary Rosenquest
Chief Administrative Officer
Texas Department of Economic Development
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 936-0181

♦ ♦ ♦

Chapter 183. TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT GOVERNING BOARD INVESTMENT POLICY

10 TAC §§183.1-183.9

The Texas Department of Economic Development (department) proposes amendments to §§183.1-183.9, relating to the Governing Board Investment Policy.

The Public Funds Investment Act, Government Code, Chapter 2256, requires the governing body of an investing entity review its investment policy and investment strategies not less than annually. As a result of the review, the department proposes amendments to update references to the Texas Department of Commerce and its policy board and to accurately reflect current statutory language and department practices.

§§183.1-9 change the name of the department to reflect the abolishment of the Texas Department of Commerce by Senate Bill 932 of the 75th Legislature, the transfer of that agency's functions to the department, effective September 1, 1997, and the replacement of the Texas Department of Commerce Policy Board with the governing board of the department.

The proposed amendment to §183.4 changes the training requirement to accurately reflect the training standard imposed by the Public Funds Investment Act.

The proposed amendments to §183.6 clarify the language regarding permissible investments.

The proposed amendments to §183.8 change performance and review procedures to make them consistent with the Public Funds Investment Act, as amended by House Bill 3009 of the 76th Legislature.

Mr. Craig Pinkley, Director of Finance, has determined that for each year of the first five years that the amendments will be in effect there will be no fiscal implications to the state or to local governments as a result of the amendments. No cost to either government or the public will result from the amendments. There will be no impact on small businesses. No economic cost is anticipated to persons as a result of the repeal.

Mr. Pinkley has also determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of the amendments will be the avoidance of any confusion that may be caused by incorrect references to the old agency name and policy board. No economic costs are anticipated to persons who are required to comply with the proposed amendments.

Written comments on the proposed amendments may be hand-delivered to DeAnn Luper, Legal Assistant, Texas Department of Economic Development, 1700 N. Congress, Suite 130, Austin, Texas, 78701, or mailed to P.O. Box 12728, Austin, Texas, 78711-2728, within thirty days of publication. Comments may be faxed to Ms. Luper at (512) 936-0415.

The amendments are proposed pursuant to Government Code, §481.0044(a), authorizing the governing board of the department to adopt rules for the administration of department programs, Government Code, Chapter 2001, subchapter B, setting forth the agency rulemaking process.

Government Code, Chapter 481 is affected by these amendments.

§183.1. Authority.

The Texas Department of Economic Development [~~Commerce~~] Governing [~~Policy~~] Board (Governing [~~Policy~~] Board) hereby adopts its written investment policy under the authority of The Development Corporation Act of 1979, Article 5190.6, Texas Civil Statutes, as amended (Act), Texas Government Code, Chapter 481, as amended, and the Public Funds Investment Act, Texas Government Code, Chapter 2256, Subchapter A, as amended (PFI Act).

§183.2. Code of Ethics.

(a) Investment responsibility. The members of the Governing [~~Policy~~] Board serve ex officio as the board of directors of the Texas Small Business Industrial Development Corporation (TSBIDC). In that capacity, the Governing [~~Policy~~] Board is responsible for the revenues and funds of TSBIDC and for prudently investing its assets. The Governing [~~Policy~~] Board members of the Texas Department of Economic Development [~~Commerce~~] (Department[~~Commerce~~]), the board of directors of TSBIDC, any other entity under the control of the Department[~~Commerce~~], or anyone acting on their behalf shall comply with the provisions of this section.

(b) Compliance with code of ethics. The Governing [~~Policy~~] Board members are public officials governed by the provisions of the Texas Government Code, Chapter 572, and the conflict of interest provisions of Texas Government Code, §481.0042 and §481.050.

(c) Persons affected by this section. A reference to a Governing [~~Policy~~] Board member includes the Governing [~~Policy~~] Board member and each member of his or her immediate family (spouse or children), members of a firm with which they are associated, or individuals with whom they have a financial association.

(d) Assets affected by this section. The provisions of this section apply to all Department [~~Commerce~~] funds and funds under its control that are not required to be deposited in the state treasury and which the Department [~~Commerce~~] and/or an entity under its control (Department [~~Commerce~~] and/or an entity under its control, individually and collectively, the "Investing Entity") has authority to invest, including both publicly and non-publicly traded investments.

(e) Non-participation and disclosure. A Governing [~~Policy~~] Board member shall not participate in a discussion or vote on a matter in which the member has direct or indirect financial interest. In addition, a Governing [~~Policy~~] Board member shall fully disclose any substantial interest, as defined in the Texas Government Code, §572.005 and Texas Government Code, §481.050(b), in any publicly or non-publicly traded investment.

(f) Prohibitions affecting direct placement. For purposes of this chapter, the term "direct placement" (with respect to investments that are not publicly traded) is defined as a direct purchase or sale of securities without the use of underwriters, or a direct purchase of bond program obligations. No Governing [~~Policy~~] Board member shall:

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

(5) be employed for two years after the end of his or her term on the Governing [~~Policy~~] Board with an organization in which the Investing Entity invested, unless the organization's stock or other evidence of ownership is traded on the public stock or bond exchanges.

(g) Prohibitions against receipt of anything of value from current or prospective service providers. A Governing [~~Policy~~] Board member shall not accept "anything of value" from any person or entity who is currently or prospectively a contractor furnishing services related to any bond issue or the investment of bond proceeds. The term "anything of value" shall include, but not be limited to, gifts, meals, travel expenses, commissions, discounts, or remunerations in any form.

(h) Prohibitions affecting political solicitations. In addition to the prohibitions specified in subsections (a)-(g) of this section, no Governing [~~Policy~~] Board member shall solicit support on behalf of a political candidate from an Investing Entity's manager, trustee, consultant, or staff member. The manager, trustee, consultant, or staff member shall report any such incident in writing to the Department [~~Commerce~~] executive director for distribution to all Governing [~~Policy~~] Board members.

(i) Responsibilities of investment managers, trustees, and consultants. Each investment manager, trustee, and consultant retained by an Investing Entity to invest funds covered by the PFI Act shall be notified in writing of the code of ethics contained in this section and the related conflict of interest laws of Texas. Any future investment shall strictly conform to this code of ethics. The manager, trustee, or consultant shall report in writing any suggestion or offer by a Governing [~~Policy~~] Board member to deviate from the provisions of this section to the Department [~~Commerce~~] executive director for distribution to all Governing [~~Policy~~] Board members. An investment manager, trustee, consultant, or other person retained in a fiduciary capacity must comply with the provisions of this section.

(j) Hiring external professionals. The Investing Entity has the authority and responsibility to hire other external professionals, including trustees, custodians, and consultants. The Investing Entity shall comply with the provisions of the Texas Government Code, Chapter 572, and the standards of conduct and conflict of interest procedures of the Department [~~Commerce~~] when hiring an external professional. The Governing [~~Policy~~] Board and/or Investing Entity's Board may authorize the Department [~~Commerce~~] investment officer to retain qualified professionals to assist in investment and related matters of the Investing Entity's funds.

(1) Basis for selection. The Governing [~~Policy~~] Board and/or Investing Entity's Board shall approve recommendations from the Department [~~Commerce~~] investment officer for retention of professional assistance on the demonstrated ability of the professional to provide the expertise or assistance needed based upon a best qualified, least cost scenario.

(2) Types of expertise for consideration. Examples of professionals or specialized expertise the Governing [~~Policy~~] Board and/or Investing Entity's Board may authorize the Investing Entity to retain include: trustees, investment managers, accountants, consultants, bond counsel, custodians, remarketing agents, paying agents, and servicing agents.

(3) Process for selecting professional assistance. The Department [~~Commerce~~] investment officer shall establish and maintain an objective process for selecting expertise or assistance in accordance with state law.

§183.3. Purposes of Investment Policy Statement.

The purposes of the investment policy statement are to:

(1) specify the investment objectives, policies, and guidelines the Governing [~~Policy~~] Board considers appropriate and prudent for the investment of funds and use of proceeds from bond issues, and for maintaining a low risk, self-supporting program status;

(2) communicate the investment objectives, guidelines, and performance criteria to an Investing Entity, the Department's [~~Commerce's~~] investment officer and staff, and all other affected or interested parties;

(3) guide the ongoing oversight of the Investing Entity's investment of funds to ensure compliance with the PFI Act and any bond indenture covenants, and to ensure the trust and confidence of bondholders, credit/liquidity facility providers, program participants and the public; and

(4) document that the Governing [~~Policy~~] Board and Investing Entity are fulfilling their responsibilities under Texas law.

§183.4. Responsible Parties and Their Duties.

(a) Investment officer. The Governing [~~Policy~~] Board has appointed an investment officer for the Department[~~Commerce~~]. The Governing [~~Policy~~] Board has delegated administrative responsibility for the investment of the Investing Entity's funds to the Department [~~Commerce~~] investment officer, subject to the oversight of the Governing [~~Policy~~] Board.

(b) Investment officer qualifications. The investment officer shall possess and maintain the following qualifications:

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

(4) attend at least one training session which relates [~~ten hours per year of continuing education courses which relate~~] to issues associated with investments, securities, or PFI Act within each two year period.

(c) Investment officer duties. The investment officer has the following responsibilities and duties:

(1) coordinate any and all actions approved by the Governing [~~Policy~~] Board and/or Investing Entity's Board and required to be taken in connection with the funds of an Investing Entity's bond issue and its assets;

(2) (No change.)

(3) advise and recommend to the Governing [~~Policy~~] Board and/or Investing Entity's Board courses of action to be taken for all matters concerning Investing Entity's bond issue and its investment of funds;

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

(6) upon expiration, resignation or termination of agreements with service providers utilized in connection with a bond issue, request bids from at least three separate service providers with no material financial interest in Investing Entity's bond issue and funds, and recommend to the Governing [~~Policy~~] Board and/or Investing Entity's Board the best qualified, lowest cost bid;

(7)-(8) (No change.)

(9) provide any information the Governing [~~Policy~~] Board and/or Investing Entity's Board shall request regarding the Investing Entity's bond issue and its funds and assets.

(d) Reports. The investment officer shall be responsible for providing the following quarterly reports to the Governing [~~Policy~~] Board, the Department[~~Commerce~~] executive director, and Investing Entity:

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

(e) Disclosure statement. An investment officer who has a personal business relationship with an entity seeking to sell an investment to an Investing Entity or its trustee shall file a statement disclosing that personal business interest. An investment officer who is related within the second degree by affinity or consanguinity, as determined under Texas Government Code, Chapter 573, to an individual seeking to sell an investment to Investing Entity shall file a statement disclosing that relationship. A statement required under this subsection must be filed with the Texas Ethics Commission and the Governing [~~Policy~~] Board on an annual basis.

§183.5. Objectives.

(a) (No change.)

(b) Asset allocation policy.

(1) The Governing [~~Policy~~] Board shall adopt and implement a strategic asset allocation plan based on a low risk policy of protecting the principal of Investing Entity's funds, which will attain program purposes and maintain a self-supporting program status. This approach to the investment of Investing Entity's assets will be indicated by the following characteristics of the funds invested:

(A)-(C) (No change.)

(D) the investment preferences and risk tolerance of the Governing[~~Policy~~] Board in regard to investing Entity's bond indenture covenants, requirements of agreements with any credit/liquidity facility providers, maintaining a self-supporting program status, and compliance with the PFI Act; and

(E) the rate of return objectives.

(2) (No change.)

(3) Investments shall not exceed the strategic ranges the Governing [~~Policy~~] Board establishes for each asset class in accordance with Investing Entity's bond covenants and any required approvals of credit/liquidity facility providers.

(4) Investments shall not have maturities longer than the maturities of the bonds from which the proceeds were derived.

§183.6. Permissible and Prohibited Investments and General Guidelines for Investments.

(a) Permissible investments.

(1) The Investing Entity may invest only in authorized investments in accordance with the PFI Act. [~~The Policy Board, upon the recommendation of the Commerce investment officer, shall approve the investment of all available monies of any Investing Entity's assets, excluding purchased program obligations, only in investments that are permitted by the bond indenture covenants, subject to the approval of any credit/liquidity facility provider and in compliance with the PFI Act.~~] The Investing Entity's separately written investment strategy for each of the funds under its control shall specify the particular types of authorized investments approved by the Governing [~~Policy~~] Board based upon the investment objectives and the risk and return characteristics enumerated in each separately written investment strategy. The Governing [~~Policy~~] Board and/or Investing Entity's Board shall require express written agreements authorizing any person or entity to act on its behalf for investment of Investing Entity's assets. Such agreements shall specify the duties, responsibilities, types of authorized investments, and reporting requirements authorized by the bond indenture, any credit/liquidity facility agreements associated with the bond issue, and the PFI Act.

(2) [~~The Policy Board and/or Investing Entity's Board, upon the recommendation of the Commerce investment officer, subject to any approvals required by any agreements with credit/liquidity facility providers to the bonds, shall approve and authorize the~~] The purchase of all program obligations shall be based upon the investment objectives and risk and return characteristics enumerated in each fund's separately written investment strategy, provided the investment is consistent with the bond indenture covenants, program goals and objectives and the PFI Act. Monies for investments permitted under this paragraph shall be limited to the funds available for such program purpose authorized by the bond indenture and as specified by the strategic asset allocation mix.

(3) Any person or entity authorized by the Governing [~~Policy~~] Board and/or Investing Entity's Board to act on its behalf shall present a written copy of this investment policy to any person or business organization seeking to sell such person or entity an authorized investment. The registered principal of the person or business organization shall execute a written instrument substantially to the effect that the registered principal of the person or business organization has:

(A) received and thoroughly reviewed this investment policy of the Governing [~~Policy~~] Board; and

(B) acknowledged that the person or business organization has implemented reasonable procedures and controls in an effort to preclude imprudent investment activities arising out of investment transactions conducted between the person or entity acting on behalf of the Governing [~~Policy~~] Board and/or Investing Entity's Board and the person or business organization.

(4) The Governing [~~Policy~~] Board and/or Investing Entity's Board shall not authorize investments to be purchased from a person or organization who has not complied with paragraph (3) of this subsection.

(b) Prohibited transactions and restrictions. Unless otherwise agreed to in writing by the Governing [~~Policy~~] Board, the Department [~~Commerce~~] investment officer may not direct a trustee or other authorized person acting on behalf of Investing Entity to invest funds without written Governing [~~Policy~~] Board and/or Investing Entity's Board authorization and without written approvals required from credit/liquidity facility providers to Investing Entity's bond issue. Any investments authorized shall not be in contravention of the PFI Act.

§183.7. Standards of Performance.

In determining whether an investment officer or trustee has exercised prudence with respect to an investment decision, the determination shall be made taking into consideration:

(1) the investment of all funds, or funds under Investing Entity's control, over which the Department [~~Commerce~~] investment officer or trustee has responsibility rather than a consideration as to the prudence of a single investment; and

(2) whether the investment decision was consistent with the written investment policy of the Governing [~~Policy~~] Board.

§183.8. Performance and Review Procedures.

As requested by the Governing [~~Policy~~] Board, evaluation and periodic investment reports shall supply critical information on a continuing basis, such as the amount and type of investments, investment performance, cash positions, financial condition, rates of return, and other perspectives of Investing Entity's asset portfolios. The reports shall address compliance with investment policy guidelines.

(1) [~~Meetings and reports. At least annually, the Policy Board shall meet with the Commerce investment officer to review the investment officer's responsibilities, the bond assets, and investment results in terms of the provisions of the PFI Act.~~]

[~~(2)~~] Review and modification of investment policy statement. The Governing [~~Policy~~] Board and the Department [~~Commerce~~] investment officer shall review the provisions of this Investment Policy at least once a year to determine if modifications are necessary or desirable. Upon approval by the Governing [~~Policy~~] Board, any modifications shall be promptly reported to all parties responsible for providing services associated with Investing Entity's bond issue and its assets.

[~~(3) Compliance with this Investment Policy and the PFI Act. Annually, the Commerce investment officer shall confirm to the Policy Board that the Investing Entity and any providers of service to the bond issue and its assets have complied with the provisions of this Investment Policy and the PFI Act and other Texas statutes.~~]

(2) [~~(4)~~] Compliance audit. The Department[~~Commerce~~] and Investing Entity, in conjunction with their annual financial audit, shall perform a compliance audit of management controls on investments and adherence to the Governing[~~Policy~~] Board's established investment policies. The Department[~~Commerce~~] shall report the results of the audit performed under this subsection to the state auditor.

(3) Compliance audit of management controls. The Department shall arrange for a compliance audit of management controls on investments and adherence to its investment policies at least once every two years in accordance with the PFI Act.

(4) [~~(5)~~] Significant events. The Department[~~Commerce~~] investment officer shall notify the Governing[~~Policy~~] Board promptly if any of the following events occur within the credit/liquidity facility providers to any bond, program participants whose obligations have been purchased together with any associated credit enhancement facility provider, trustees, custodians, and securities dealers:

(A) any event that is likely to adversely impact to a significant degree the management, professionalism, integrity, or financial position of the person or entity;

(B) any change in ratings by a rating firm that affect any minimum required ratings;

(C) a change in ownership or control; and

(D) any violation of policy.

§183.9. Investment Strategy of Texas Small Business Industrial Development Corporation (TSBIDC) Bond Issue for Economic Development Programs.

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

(d) Authorized Investments. The following investments are authorized investments for TSBIDC bond funds, subject to any approval required by a credit/liquidity facility provider:

(1) (No change.)

(2) Program Obligations rated A or better by Moody's or SP or a Program Obligation supported by credit enhancement that is rated A or better by Moody's or SP with a maturity not to exceed 20 years, unless approved by the Governing[~~Policy~~] Board and any credit/liquidity facility provider for a longer maturity not to exceed 30 years, provided that no Program Obligation shall have a maturity that exceeds the maturity of the TSBIDC Bonds.

This 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 9, 1999.

TRD-9905798
Gary Rosenquest
Chief Administrative Officer
Texas Department of Economic Development
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 936-0181

♦ ♦ ♦

Chapter 196. TOURISM ADVISORY COMMITTEE RULES

10 TAC §§196.1-196.16

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

The Texas Department of Economic Development (department) proposes the repeal of 10 Texas Administrative Code, Chapter 196, §§196.1-196.16. Tourism Advisory Committee, in its entirety, concerning the procedures for administration of the Tourism Advisory Committee. The repeals are necessary allow the adoption of new rules.

Robin Abbott, General Counsel, has determined that for each year of the first five years that the repeals will be in effect there will be no fiscal implications to the state or to local governments as a result of the repeal of the rules. No cost or reduction in cost to either government or the public is anticipated as a result of the repeal of the rules. There will be no impact on small businesses. No economic cost is anticipated to persons as a result of the repeal of the rules.

Ms. Abbott 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 the repeal of the rules will be the avoidance of any confusion that may be caused by the complexity of the rules, incorrect wording, legal citations or agency names. No economic costs are anticipated to persons as a result of the repeal of the rules.

Written comments on the proposed repeals may be hand-delivered to DeAnn Luper, Legal Assistant, Texas Department of Economic Development, 1700 North Congress, Suite 130,

Austin, Texas 78701, or mailed to P.O. Box 12728, Austin, Texas 78711-2728, within 30 days of publication. Comments may be faxed to Ms. Luper at (512) 936-0415.

The repeals are proposed pursuant to Government Code, §481.0044, which directs the governing board to adopt rules for the administration of the department and Government Code, Chapter 2001, subchapter B, which prescribes the standards for rulemaking by state agencies.

Government Code, Chapter 481, is affected by this proposed repeals.

§196.1. Mission.

§196.2. Statutory Authority.

§196.3. Appointing Authority.

§196.4. Regular Members.

§196.5. Ex Officio Members.

§196.6. Elections and Members.

§196.7. Filling of Vacancies.

§196.8. Voting.

§196.9. Officers.

§196.10. Length of Term.

§196.11. Frequency of Meetings.

§196.12. Reporting.

§196.13. Public Information Act.

§196.14. Committee Support.

§196.15. Dissolution.

§196.16. Amendments.

This 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 9, 1999.

TRD-9905795
Gary Rosenquest
Chief Administrative Officer
Texas Department of Economic Development
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 936-0181

♦ ♦ ♦

10 TAC §§196.1-196.8

The Texas Department of Economic Development (department) proposes new Chapter 196, Advisory Committees, §§196.1-196.8. The new rules are proposed pursuant to Government Code, §481.0044, which directs the governing board to adopt rules for the administration of the department and the Administrative Procedure Act, Government Code, Chapter 2001, subchapter B, Rulemaking.

Robin Abbott, General Counsel, has determined that for each year of the first five years that the new rules will be in effect there will be no fiscal implications to the state or to local governments as a result of enforcing or administering the new rules. No cost or reduction in cost to either government or the public is anticipated as a result of the rules. There will be no impact on small businesses. No economic cost is anticipated to persons as a result of the new rules.

Ms. Abbott has also determined that for each year of the first five years the new rules are in effect the public benefit anticipated as a result of enforcing the rules will be better understanding of the roles, functions, and administration of advisory committees to the department. No economic costs are anticipated to persons who are required to comply with the proposed rules.

Written comments on the proposal of these new rules may be hand-delivered to DeAnn Luper, Legal Assistant, Texas Department of Economic Development, 1700 North Congress, Suite 130, Austin, Texas 78701, or mailed to P.O. Box 12728, Austin, Texas 78711-2728, within 30 days of publication. Comments may be faxed to Ms. Luper at (512) 936-0415.

The new rules are being proposed in accordance with Texas Government Code, Chapter 2110, which sets out general requirements for advisory committees; Government Code, §481.007, which authorizes the department to appoint advisory committees; and to allow the department have standard and uniform rules for all advisory committees.

Government Code, Chapter 481 is affected by this proposal.

§196.1. Applicability and Purpose.

(a) These rules apply to any advisory committees that may be established from time to time by the Texas Department of Economic Development to study, advise, make recommendations, and otherwise assist the department in carrying out its duties.

(b) These rules apply to advisory committees established by statute to the extent consistent with the authorizing law.

(c) Advisory committees to the department may study, discuss, deliberate, and develop resolutions and recommendations regarding department public policy and business for the department's consideration, but shall not have supervision or control over public business or policy unless specifically authorized by the department.

§196.2. Creation and Dissolution of Advisory Committees.

(a) The governing board or executive director may appoint advisory committees at any time to assist them in the performance of their duties pursuant to Government Code, §481.007.

(b) Advisory committees shall be established by a majority vote of the board unless another method of establishing a committee is prescribed by law. Advisory committees may be dissolved by majority vote of the board, according the terms of the committee's rules and procedures, or by operation of law.

§196.3. Rules and Procedures.

Each advisory committee may adopt rules and procedures by majority vote. The rules and procedures may address composition and election or appointment of committee members, meetings, dissolution, and any other matters of interest to the committee. A copy of the rules and procedures shall be submitted to the department and shall be reviewed by the advisory committee annually. The department's executive director or governing board may modify the rules and procedures of an advisory committee as needed when such modification is determined to be in the best interest of the department.

§196.4. Composition.

(a) The governing board or executive director shall designate the initial number of regular and ex officio members of each advisory committee. Each committee shall include at least two but no more than four members of the governing board.

(b) If members of a committee can no longer serve because of death, disability, or change in qualifications, a replacement to fill the unexpired term may be appointed by the chair of that committee, subject to the approval of the department's executive director or governing board.

§196.5. Officers.
The presiding officer and any other officers of an advisory committee may be elected or appointed according to the procedures established by the committee.

§196.6. Reimbursement of Members' Expenses.
Advisory committee members shall receive no compensation for their committee service. Members may be reimbursed for actual travel expenses as provided in the General Appropriations Act and other law.

§196.7. Reporting Requirements.
Advisory committees shall report to the governing board or the executive director from time to time, but at least annually, on the activities and proceedings of the committee. Such reports may be oral or in writing, and may be delivered in person, electronically, or by fax or telephone.

§196.8. Evaluation of Committee Costs and Effectiveness.

(a) Each advisory committee shall evaluate annually:

(1) the committee's work;

(2) the committee's usefulness; and

(3) the costs related to the committee's existence, including the cost of agency staff time spent in support of the committee's activities.

(b) The department shall report to the Legislative Budget Board the information developed in the evaluation required by this section. The department shall file the report biennially in connection with its request for appropriations.

This 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 9, 1999.

TRD-9905794
Gary Rosenquest
Chief Administrative Officer
Texas Department of Economic Development
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 936-0181

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

Part 2. PUBLIC UTILITY COMMISSION OF TEXAS

Chapter 23. SUBSTANTIVE RULES

Subchapter E. CUSTOMER SERVICE AND PROTECTION

16 TAC §23.55

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the 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 §23.55 relating to Operator Services. Project Number 17709 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, §23.55 will be replaced by proposed new §26.311 relating to Information Relating to Operator Services; §26.313 relating to General Requirements Relating to Operator Services; §26.315 relating to Requirements for Dominant Certificated Telecommunications Utilities (DCTUs); §26.317 relating to Information to be Provided at the Telephone Set, §26.319 relating to Access to the Operator of a Local Exchange Company (LEC); and §26.321 relating to 9-1-1 Calls, "0-" Calls, and End User Choice in Chapter 26, Substantive Rules Applicable to Telecommunications Service Providers.

Christopher Green, Attorney, Office of Regulatory Affairs, 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.

Mr. Green 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 rule. There will be no effect on small businesses or micro-businesses as a result of repealing this section. There is no anticipated economic cost to persons as a result of repealing this section.

Mr. Green has determined that the proposed repeal should not affect the local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the proposed repeal (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. All comments should refer to Project Number 17709, repeal of §23.55.

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.

§23.55. Operator Services.

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

Filed with the Office of the Secretary of State, on September 8, 1999.

TRD-9905782
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 936-7308

♦ ♦ ♦

Subchapter H. TELEPHONE

16 TAC §23.97

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the 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 §23.97 relating to Interconnection. Project Number 17709 has been assigned to this proceeding. The Appropriations Act of 1997, House Bill 1, Article IX, §167 (§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 §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, §23.97 will be duplicative of proposed new §26.272 of this title (relating to Interconnection) in Chapter 26, Substantive Rules Applicable to Telecommunications Service Providers.

Mr. Martin Wilson, Attorney, Office of Regulatory Affairs, 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.

Mr. Wilson 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 rule. There will be no effect on small businesses or micro-businesses as a result of repealing this section. There is no anticipated economic cost to persons as a result of repealing this section.

Mr. Wilson has determined that the proposed repeal should not affect the local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the proposed repeal (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. All comments should refer to Project Number 17709, repeal of §23.97.

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.

§23.97. Interconnection.

This 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 13, 1999.

TRD-9905882
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 936-7308

♦ ♦ ♦

Chapter 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

Subchapter H. ELECTRICAL PLANNING

Division 1. RENEWABLE ENERGY RESOURCES AND USE OF NATURAL GAS

16 TAC §25.172

The Public Utility Commission of Texas (commission) proposes new §25.172 relating to Goal for Natural Gas. The proposed new rule implements a provision of Senate Bill 7, 76th Legislature, Regular Session (1999) that will be codified as Texas Utilities Code, §39.9044. The proposed new rule establishes a natural gas energy credit (NGEC) trading program to meet the legislative goal that 50% of the electric generating capacity installed in this state after January 1, 2000, use natural gas. Project Number 21072 has been assigned to this proceeding. Copies of this proposed rule may be obtained in Central Records and on the commission's web page at http://www.puc.state.tx.us/rules/rulemake/21072/21072.cfm.

When commenting on specific subsections of the proposed rule, parties are encouraged to describe "best practice" examples of regulatory policies, and their rationale, that have been proposed or implemented successfully in other states already undergoing electric industry restructuring, if the parties believe that Texas would benefit from application of the same policies. The commission is only interested in receiving "leading edge" examples which are specifically related and directly applicable to the Texas statute, rather than broad citations to other state restructuring efforts.

Gary M. Torrent, Ph.D., Economic Analyst, Office of Policy Development, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Dr. Torrent has determined that for each year of the first five years the proposed section is in effect the public will benefit from the promotion of the use of natural gas produced in Texas. There will be no effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Dr. Torrent also has determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

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 hearing will be conducted on November 8, 1999, at 9:30 a.m. in the Commissioner's Hearing Room.

The commission staff held a workshop in this project on August 11, 1999, to discuss the contents of the proposed rule. Stakeholders in the industry and commission staff held a task force meeting on August 16, 1999, to prepare a first draft of the proposed rule. In preparing the proposed rule, the commission staff considered the draft rule developed by the taskforce and comments from workshop participants.

The commission encourages interested parties to provide comments on relevant issues related to the proposed rule. In addition, as a result of the discussions at the workshop and the task force meeting, the commission requests that interested parties address the following issues: First, whether a credit for installed gas-fired capacity placed in commercial operation after January 1, 2000, should be cancelled if the owner retires the plant; second, whether the threshold designed to trigger the activation of the natural gas energy trading program proposed in subsection (e) is appropriate. If not, please suggest an alternative threshold and a rationale for the recommendation; third, whether §25.172 should contain explicit enforcement mechanisms or whether the commission should amend the rule when it activates the credit trading program; fourth, whether and what type of safeguards are required to ensure that the electricity generated using natural gas is "green" electricity as enunciated in PURA §39.9044(d); fifth, how should capacity additions to existing facilities, made after January 1, 2000, be treated with respect to the NGEC trading program. Finally, parties may suggest ways to track additions to capacity supplied by natural-gas fired distributed generation and monitor the performance of those distributed generation facilities.

Comments on the proposed new rule (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. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 21072.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.001 and §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 and specifically, PURA §39.9044 Goal for Natural Gas, which sets forth the state's policy regarding a goal for natural gas-fired capacity installed after January 1, 2000.

Cross Reference to Statutes: PURA §§14.001, 14.002 and 39.9044.

§25.172. Goal for Natural Gas.

(a) Applicability. This section shall apply to a power generation company, municipally owned utility, or electric cooperative that installs new generation capacity in this state after January 1, 2000. The provisions of subsection (g) of this section shall apply to a municipally owned utility or an electric cooperative only if it has adopted customer choice pursuant to the Public Utility Regulatory Act (PURA) §40.051(a) and §40.052(a) respectively.

(b) Purpose. The purpose of this section is to encourage owners of new generating capacity, other than capacity from renewable energy technologies, to use natural gas as the primary fuel source. The commission shall institute a natural gas energy credits trading program to ensure that at least 50% of all new generation capacity excepting capacity from renewable energy technologies, installed in this state after January 1, 2000, uses natural gas as its primary fuel.

(c) Definitions.

(1) New generating capacity - Nameplate generation capacity placed in commercial operation in this state after January 1, 2000, excepting capacity based on renewable energy technologies. This does not include modifications to generation facilities that merely increase efficiency of currently installed equipment. For the purposes of this section the phrase "new generating capacity purchased" refers to the purchase of all or part of an installed unit, and not to the right to purchase capacity or energy from an installed unit.

(2) Natural gas energy credit (NGEC) - A NGEC shall be granted for each megawatt (MW) of new generating capacity fueled by natural gas installed after January 1, 2000. The commission shall issue NGECs to each power generation company, municipally owned utility, or electric cooperative that installs new, qualifying gas-fired generating capacity. Each credit shall be issued once and shall be valid so long as the plant meets reasonable performance standards; if a plant no longer meets reasonable performance standards or is retired, its associated NGECs shall be revoked.

(3) RATIO - All natural gas-fired capacity qualifying for NGECs (MWs) as a percentage of all new generating capacity (MW). RATIO is calculated by dividing all existing NGECs (MW equivalent) by all new generating capacity (MW) and multiplying the result by 100.

(4) Reasonable performance standards - Those standards which, when applied to natural gas-fueled capacity installed after January 1, 2000, would reasonably be expected to maximize energy output consistent with industry standards widely accepted at that time for the type of facility installed.

(d) Natural gas energy credit requirement After the commission activates the NGEC trading program, the number of NGECs required to be owned or held by each power generation company, municipally owned utility, and electric cooperative in this state shall equal its new non-gas-fired generating capacity additions (MW), other

than capacity from renewable energy technologies, installed in this state after January 1, 2000.

(1) The requirements of this section may be satisfied by owning new generation capacity fueled primarily by natural gas, for which NGECs have not been sold to a third party, or by holding NGECs through contracts with third parties, either in connection with purchasing capacity or on a stand alone basis, or by any combination thereof.

(2) A power generation company, municipally owned utility, or electric cooperative that does not own new generation capacity shall not be required to obtain any natural gas credits.

(e) Program activation The commission shall activate the natural gas energy credits trading program, implemented on January 1, 2000, if either of the following events occurs: The commission deems that activating the trading program is in the public interest or determines that within the next three years, new generating capacity in Texas that is fueled primarily by natural gas may fall below 60% of all new generating capacity. Sixty-percent is the RATIO triggering the trading program. This analysis shall be based on the annual reports filed pursuant to subsection (h) of this section. If the commission activates the program, it shall:

(1) require power generators, municipally owned utilities, and electric cooperatives to demonstrate that for each MW of new generating capacity, excluding capacity using natural gas as a primary fuel or renewable energy technologies, it owns or holds natural gas energy credits equal to that amount of capacity.

(2) For each power generator, municipally owned utility, and electric cooperative deemed out of compliance, the commission shall determine and enforce an appropriate penalty pursuant to PURA, CHAPTER 15, Subchapter B, Enforcement and Penalties.

(f) Natural gas energy credit trading. The commission shall be responsible for assigning and tracking NGECs. The total number of NGECs at any time shall equal the total new generating capacity (MW) installed since January 1, 2000 that uses natural gas as its primary fuel less any NGECs revoked to reflect plant retirements or poor performance relative to the standards referred to in subsection (c)(4) of this section. The commission will be responsible for assigning a serial number to each NGEC. NGECs may be traded among power generators, municipally-owned utilities, electric cooperatives, and other interested parties.

(g) Environmental benefits. Each retail electric provider, municipally owned utility, or electric cooperative that has adopted customer choice:

(1) may emphasize that natural gas produced in this state is the cleanest burning fossil fuel;

(2) may market electricity generated using natural gas produced in this state as environmentally beneficial and may label such generation as "green" electricity; and

(3) shall provide sufficient proof upon request, that its "green" electricity is generated using natural gas produced in this state.

(h) Annual reports.

(1) Beginning in 2001, no later than February 14th of each year, each registered power generation company, municipally owned utility, and electric cooperative shall file with the commission on a form prescribed by the commission, the following information regarding generation facilities it owns or operates in Texas:

(A) For each unit of new generating capacity purchased or installed since January 1, 2000:

(i) plant location and name;

(ii) nameplate capacity (MW) of each unit;

(iii) ownership share of each unit;

(iv) primary fuel type of new generating capacity;

(v) Texas Natural Resource Conservation Commission turbine or boiler permit number and date; and

(vi) date that commercial operation began.

(B) Forecasted generation additions by fuel type for the next three calendar years (for the next five calendar years if the fuel type is coal or lignite):

(i) plant location and name;

(ii) nameplate capacity (MW) of each unit;

(iii) ownership share of each unit;

(iv) primary fuel type of new generating capacity;

(v) Texas Natural Resource Conservation Commission turbine or boiler permit number and date; and

(vi) date that commercial operation will begin.

(C) Data on holdings of natural energy gas credits:

(i) current holdings of credits by serial number; and

(ii) any purchase or sale of credits by serial number during the previous calendar year.

(2) Based on the annual reports, not later that April 15th of each year, the commission shall award NGECs for new-gas fired capacity installed in the previous year.

(3) Beginning in 2001, and no later than May 15th of each year, the commission shall publish in aggregate form only, the information submitted in compliance with this rule, including calculations that show whether the prior year's generating capacity in Texas is in compliance with the intent of this section and whether the next three years are likely to be in compliance with the natural gas usage goals based on the forecast information submitted.

This 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 10, 1999.

TRD-9905843
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 936-7308

♦ ♦ ♦

Subchapter I. TRANSMISSION AND DISTRIBUTION

Division 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.211, §25.212

The Public Utility Commission of Texas (commission) proposes new §25.211 relating to Interconnection of Distributed Generation and §25.212 relating to Technical Requirements for Interconnection and Parallel Operation of On-Site Distributed Generation Units. Project Number 21220 has been assigned to this proceeding. The commission began an investigation into distributed generation in 1998 as part of Project Number 19827, *Investigation into the Adequacy of Capacity for 1999 and 2000 Peak Periods* in Texas. In part, the commission initiated this project because it was interested in utilizing distributed generation as a beneficial resource to help meet the State's growing capacity shortfall during the summer months of 1999 and 2000. As part of this project, a task force was formed to develop interconnection guidelines for distributed generation. On February 4, 1999, the commission adopted interconnection guidelines for distributed generation and requested that staff continue its investigation of distributed resources. The Public Utility Regulatory Act (PURA) §39.101(b)(3) now entitles all Texas electric customers to access on-site distributed generation. The proposed sections state the terms and conditions that govern the connection and operation of small power generation. The proposed sections also establish technical requirements to promote the safe and reliable operation of distributed generation resources, while the customer is connected to both its own distributed generation facility and the utility distribution system (referred to as parallel operation). Additionally, the proposed sections promote the use of distributed resources in order to provide electric system benefits during periods of capacity constraints, to enhance both the reliability of electric service and economic efficiency in the production and consumption of electricity, and to provide customers greater opportunities to control the price and quality of electricity within their facilities.

The commission requests that interested parties provide relevant comments on the proposed rules. When commenting on specific subsections of the proposed section(s), parties are encouraged to describe "best practice" examples of regulatory policies and their rationale that have been proposed or implemented successfully in other states already undergoing electric industry restructuring, if the parties believe that Texas would benefit from application of the same policies. The commission is interested in receiving only "leading edge" examples that are specifically related and directly applicable to the Texas statute, rather than broad citations to other state restructuring efforts. In addition, the commission requests comments on several matters:

First, the commission seeks comment on the necessity of conducting pre-interconnection studies for distributed generation units. Section 25.211(g) allows utilities to conduct a service study, coordination study, or a utility system impact study prior to interconnection of a distributed generation facility. Please describe the differences between and applicability of these studies as they relate to requests for interconnecting distributed generation. Is it always necessary to conduct pre-interconnection studies for distributed generation units? Are there some instances where a pre-interconnection study would not be necessary? If so, under what circumstances? To what extent does the exportation of power from a distributed generation facility onto the electric network require the utility to conduct a study? Please state all of the components that would be included in any interconnection study and please explain why each of these study components is necessary. Additionally, is it necessary for the distribution company to conduct the pre-interconnection studies or would it be possible to allow an independent third- party to conduct the studies? For example, could a third party perform a role similar to the Independent System Operator (ISO) when it performs interconnection studies for large generators that seek interconnection to the transmission grid? Please state why you believe an independent third party should or should not conduct these studies and if you believe an independent third party should conduct these studies, please give examples of entities that you believe could be capable of performing such studies.

Second, the commission seeks comment on the appropriate level of fees, if any, a utility or other entity may charge to a customer to offset its costs incurred to conduct a pre-interconnection study for distributed generation units. Generally, what factors affect the costs of interconnection studies? Should the distribution company offer tariffed rates for studies? What is the appropriate pre-interconnection study fee, if any, for a distributed generation unit less than or equal to two megawatts (MW)? Additionally, please list all relevant items that would be included in such a pre-interconnection study and their associated costs. Please state why it would be necessary to include the listed items in the pre-interconnection study. Also, for a distributed generation unit that is greater than two MW what is the appropriate pre-interconnection study fee, if any? What are the relevant items that would be included in such a pre-interconnection study and what are their associated costs? Additionally, please state why it would be necessary to include the listed items in the pre-interconnection study. Please identify and explain any system benefits of distributed generation that warrant the spreading of some or all of the costs of the studies among all distribution customers?

Third, the commission seeks comment on the necessity of including a universal indemnification requirement in this section. If you believe that a universal indemnification requirement is necessary, please provide proposed language. If you do not believe that a universal indemnification requirement is necessary please state why.

Fourth, the commission seeks comment on interconnection of distributed generation to network systems. In what instances, if any, should there be exceptions to the interconnection guidelines set forth in §25.211(h)?

Fifth, the commission seeks comment on an expedited complaint handling and arbitration procedure for interconnection disputes. Should interconnection disputes be handled in an expedited manner? If your answer is no, please explain why. If you feel that complaints relating to interconnection disputes should be handled in an expedited manner, please provide examples of how this process should work. In your answer, please provide examples of expedited processes that have been utilized for handling complaints in the telecommunications industry or alternative dispute resolution under the provisions of this title relating to open-access comparable transmission service for electric utilities in the Electric Reliability Council of Texas (ERCOT). If you feel that only certain types of complaints relating to interconnection disputes should be handled in an expedited manner, please specify appropriate criteria for assessing which complaints should be handled in an expedited manner.

Sixth, the commission seeks comment on the term "inverter-based protective functions" as stated in §25.211(h)(1) of this title. Should this term be defined and does it need to be tied to a specific industry operating standard? If you believe that this term should be defined, please provide specific language.

Gillan Taddune, Economic Policy Analyst, in the 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.

Ms. Taddune 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 rate and reliability benefits to customers from increased use of distributed generation in Texas. There will be no effect on small businesses or micro-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.

Ms. Taddune has also determined that for each year of the first five years the proposed sections are in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

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, on Monday, October 25, 1999, at 9:00 a.m.

Comments on the proposed new rules (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 20 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 21220.

These new sections are 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, and PURA §39.101(b)(3) which requires the commission to ensure that customers have access to providers of energy efficiency services, to on-site distributed generation and to providers of energy generated by renewable energy resources.

Cross Reference to Statutes: Public Utility Regulatory Act: §§14.001, 14.002, 31.002, 39.101(a), 39.101(b)(3).

§25.211. Interconnection of On-Site Distributed Generation.

(a) Application. Unless the context clearly indicates otherwise, in this section the term "electric utility" applies to all electric utilities as defined in the Public Utility Regulatory Act (PURA) §31.002 that own and operate a distribution system in Texas.

(b) Purpose. The purpose of this section is to clearly state the terms and conditions that govern the interconnection and parallel operation of on-site distributed generation in order to implement PURA §39.101(b)(3), which entitles all Texas electric customers to access to on-site distributed generation, to provide cost savings and reliability benefits to customers, to establish technical requirements that will promote the safe and reliable parallel operation of on-site distributed generation resources, to enhance both the reliability of electric service and economic efficiency in the production and consumption of electricity, and to promote the use of distributed resources in order to provide electric system benefits during periods of capacity constraints. Sales of power by a distributed generator in the wholesale market are subject to the provisions of this title relating to open-access comparable transmission service for electric utilities in the Electric Reliability Council of Texas (ERCOT).

(c) Definitions. The following words and terms when used in this section and §25.212 of this title (relating to Technical Requirements for Interconnection and Parallel Operation of On-Site Distributed Generation) shall have the following meanings, unless the context clearly indicates otherwise:

(1) Application for interconnection and parallel operation with the utility system or application - The standard form of application approved by the commission.

(2) Company - An electric utility operating a distribution system.

(3) Customer - Any entity interconnected to the company's utility system for the purpose of receiving or exporting electric power from or to the company's utility system.

(4) Facility - An electrical generating installation consisting of one or more on-site distributed generation units. The total capacity of a facility's individual on site distributed generation units may exceed ten megawatts (MW); however, no more than ten MW of a facility's capacity will be subject to the provisions of this section and §25.212 of this title.

(5) Interconnection - The physical connection of distributed generation to the utility system in accordance with the requirements of this section so that parallel operation can occur.

(6) Interconnection agreement - The standard form of agreement, which has been approved by the commission. The interconnection agreement sets forth the contractual conditions under which a company and a customer agree that one or more facilities may be interconnected with the company's utility system.

(7) Network service - Network service consists of two or more utility primary distribution feeder sources electrically tied together on the secondary (or low voltage) side to form one power source for one or more customers. The service is designed to maintain service to the customers even after the loss of one of these primary distribution feeder sources.

(8) On-site distributed generation (or distributed generation) - An electrical generating facility located at a customer's point of delivery (point of common coupling) of ten megawatts (MW) or less and connected at a voltage less than or equal to 60 kilovolts (kV) which may be connected in parallel operation to the utility system.

(9) Parallel operation - The operation of on-site distributed generation by a customer while the customer is connected to the company's utility system.

(10) Point of common coupling - The point where the electrical conductors of the company utility system are connected to the customer's conductors and where any transfer of electric power between the customer and the utility system takes place, such as switchgear near the meter.

(11) Pre-certified equipment - A specific generating and protective equipment system or systems that have been certified as

meeting the applicable parts of this section relating to safety and reliability by an entity approved by the commission.

(12) Pre-interconnection study - A study or studies which may be undertaken by a company in response to its receipt of a completed application for interconnection and parallel operation with the utility system. Pre-interconnection studies may include, but are not limited to, service studies, coordination studies and utility system impact studies.

(13) Stabilized - A company utility system is considered stabilized when, following a disturbance, the system returns to the normal range of voltage and frequency for a duration of two minutes or a shorter time as mutually agreed to by the company and customer.

(14) Tariff for interconnection and parallel operation of distributed generation. - The commission-approved tariff for interconnection and parallel operation of distributed generation.

(15) Unit - A single power generator.

(16) Utility system - A company's distribution system below 60 kV to which the generation equipment is interconnected.

(d) Obligation to serve. No later than 30 days after the effective date of this section each electric utility shall modify existing tariffs or offer a new tariff for interconnection and parallel operation of distributed generation customers in conformance with the provisions of this section. Such tariffs shall ensure that back-up, supplemental, and maintenance power are available to all customers and customer classes that desire such service until January 1, 2002. Any modifications of existing tariffs or offerings of new tariffs relating to this subsection shall be submitted on the commission approved form.

(e) Disconnection and reconnection. A utility may disconnect a distributed generation unit under the following conditions:

(1) Expiration or termination of interconnection agreement. The interconnection agreement specifies the effective term and termination rights of company and customer. Upon expiration or termination of the interconnection agreement with a customer, in accordance with the terms of the agreement, the utility may disconnect customer's facilities.

(2) Non-compliance with the technical requirements specified in §25.212 of this title. A utility may disconnect a distributed generation facility if the facility is not in compliance with the technical requirements specified in §25.212 of this title. Within two business days from the time the customer notifies the utility that the facility is subsequently in compliance with the technical requirements of §25.212 of this title, the utility shall have an inspector verify such compliance. Upon such verification, the customer in coordination with the utility may reconnect the facility.

(3) System emergency. A utility may temporarily disconnect a customer's facility without prior written notice in cases where continuance of interconnection will endanger persons or property. During the forced outage of a utility system, the utility shall have the right to temporarily disconnect a customer's facility to make immediate repairs on the utility's system. When possible, the utility shall provide the customer with reasonable notice and reconnect the customer as quickly as reasonably practical.

(4) Routine maintenance, repairs, and modifications. A utility may disconnect a customer or a customer's facility with seven business days prior written notice of a service interruption for routine maintenance, repairs, and utility system modifications. The utility shall reconnect the customer as quickly as reasonably possible following any such service interruption.

(5) Lack of approved application and interconnection agreement. In order to interconnect distributed generation to a utility system, a customer must first submit to the utility an application for interconnection and parallel operation with the utility system and sign an interconnection agreement on the forms prescribed by the commission. The utility may disconnect the customer's facility if such application has not been received and approved.

(f) Incremental demand charges. During the term of an interconnection agreement a utility may require that a customer disconnect its distributed generation unit and/or take it off- line as a result of utility system conditions as described in subsection (e)(3) and (4) of this section. Incremental demand charges arising from disconnecting the distributed generator as directed by company during such periods shall not be assessed by company to the customer. After January 1, 2002, the distribution utility shall not be responsible for the provision of generation services or their related charges.

(g) Pre-interconnection studies. A utility may conduct a service study, coordination study or utility system impact study prior to interconnection of a distributed generation facility. In instances where such studies are deemed necessary, the scope of such studies shall be based on the characteristics of the particular distributed generation facility to be interconnected and the utility's system at the specific proposed location.

(1) Distributed generation facilities for which no pre-interconnection study fees may be charged. A utility may not charge a customer a fee to conduct a pre- interconnection study for the following types of distributed generation facilities:

(A) Distributed generation facilities that will not or do not export power to the utility system;

(B) Individual single-phase distributed generation units exporting less than 50 kilowatts (kW) to the utility system on a single transformer;

(C) Individual three-phase units exporting not more than 150 kW to the utility system on a single transformer;

(D) Pre-certified distributed generation units up to 500 kW that export not more than 15% of the total load on a single radial feeder and also contribute not more than 25% of the maximum potential short circuit current on a single radial feeder.

(2) Distributed generation facilities for which pre-interconnection study fees may be charged. Prior to the interconnection of a distributed generation facility not described in paragraph (1) of this subsection, a utility may charge a customer a fee to offset its costs incurred in the conduct of a pre-interconnection study. In those instances where a utility conducts an interconnection study the following shall apply:

(A) The conduct of such pre-interconnection study shall take no more than four weeks;

(B) A utility shall prepare written reports of the study findings and make them available to the customer;

(C) The study shall consider both the costs incurred and the benefits realized as a result of the interconnection of distributed generation to the company's utility system; and

(D) The customer shall receive an estimate of the study cost before the utility initiates the study.

(h) Network interconnection of distributed generation. Certain aspects of secondary network systems create technical difficulties that may make interconnection more costly to implement. In instances where customers request interconnection to a secondary network system, the utility and the customer shall use best reasonable efforts to complete the interconnection and the utility shall utilize the following guidelines:

(1) A utility shall approve applications for distributed generation facilities that use inverter-based protective functions unless total distributed generation (including the new facility) on affected feeders represents more than 25% of the total load on those feeders.

(2) A utility shall approve applications for other on-site generation facilities whose total generation is less than the local customer's load unless total distributed generation (including the new facility) on affected feeders represents more than 25% of the total load on those feeders.

(3) A utility may postpone processing an application for an individual distributed generation facility under this section if the total existing distributed generation on the targeted feeder represents more than 25% of the total load on that feeders. If that is the case, the utility should conduct interconnection and network studies to determine whether, and in what amount, additional distributed generation facilities can be safely added to the feeder or accommodated in some other fashion. These studies should be completed within six weeks, and application processing should then resume.

(4) A utility may reject applications for a distributed generation facility under this section if the utility can demonstrate specific reliability or safety reasons why the distributed generation should not be interconnected at the requested site. However, in such cases the utility shall work with the customer to attempt to resolve such problems to their mutual satisfaction.

(5) A utility shall make all reasonable efforts to seek methods to safely and reliably interconnect distributed generation facilities that will export power. This may include switching service to a radial feed if practical and if acceptable to the customer.

(i) Pre-Interconnection study fees for network interconnection of distributed generation. Prior to charging a pre-interconnection study fee for a network interconnection of distributed generation as permitted in subsection (g)(2) of this section, a utility shall first advise customer of the potential problems associated with interconnection of distributed generation with its network system. For potential interconnections to network systems there shall be no pre-interconnection study fee assessed for a facility with inverter systems under 20 kW. For all other facilities the utility may charge the customer a fee to offset its costs incurred in the conduct of the pre-interconnection study. In those instances where a utility conducts an interconnection study, the following shall apply:

(1) The conduct of such pre-interconnection studies shall take no more than four weeks;

(2) A utility shall prepare written reports of the study findings and make them available to the customer;

(3) The studies shall consider both the costs incurred and the benefits realized as a result of the interconnection of distributed generation to the utility's system; and

(4) The customer shall receive an estimate of the study cost before the utility initiates the study.

(j) Communications concerning proposed distributed generation projects. In the course of processing applications for interconnection and parallel operation and in the conduct of pre-interconnection studies, customers shall provide the utility detailed information concerning proposed distributed generation facilities. Such communications concerning the nature of proposed distributed generation facilities shall be made subject to the terms of §25.84 of this title (Relating to Annual Reporting of Affiliate Transactions for Electric Utilities), §25.272 of this title (Relating to Code of Conduct for Electric Utilities and their Affiliates), and §25.273 (Relating to Contracts between Electric Utilities and their Competitive Affiliates). A utility and its affiliates shall not use such knowledge of proposed distributed generation projects submitted to it for interconnection or study to prepare competing proposals to the customer that offer either discounted rates in return for not installing the distributed generation, or offer competing distributed generation projects.

(k) Equipment pre-certification.

(1) Entities performing pre-certification. The commission may approve one or more entities that shall pre-certify equipment as defined pursuant to this section.

(2) Standards for entities performing pre-certification. Testing organizations and/or facilities capable of analyzing the function, control, and protective systems of distributed generation units may request to be certified as testing organizations.

(3) Effect of pre-certification. Distributed generation units which are certified to be in compliance by an approved testing facility or organization as described in this subsection shall be installed on a company utility system in accordance with an approved interconnection control and protection scheme without further review of their design by the utility.

(l) Designation of utility contact persons for matters relating to distributed generation interconnection.

(1) Each electric utility shall designate a person or persons who will serve as the utility's contact(s) for all matters related to distributed generation interconnection.

(2) Each electric utility shall identify to the commission its distributed generation contact person(s).

(3) Each electric utility shall provide convenient access through its internet web site to the names, telephone numbers, mailing addresses and electronic mail addresses for its distributed generation contact person(s).

(m) Time periods for processing applications for interconnection with the utility system. In order to apply for interconnection the customer shall provide the utility a completed application for interconnection and parallel operation with the utility system. The interconnection of distributed generation to the utility system shall take place within the following schedule:

(1) For a facility with pre-certified equipment, interconnection shall take place within four weeks of the utility's receipt of a completed interconnection application.

(2) For other facilities, interconnection shall take place within six weeks of the utility's receipt of a completed application.

(3) If interconnection of a particular facility will require substantial capital upgrades to the utility system, the company shall provide the customer an estimate of the schedule and customer's cost for the upgrade. If the customer desires to proceed with the upgrade, the customer and the company will enter into a contract for the completion of the upgrade. The interconnection shall take place

no later than two weeks following the completion of such upgrades. The utility shall employ best reasonable efforts to complete such system upgrades in the shortest time reasonably practical.

(4) A utility shall use best reasonable efforts to interconnect facilities within the time frames described in this subsection. If in a particular instance, a utility determines that it can not interconnect a facility within the time frames stated in this subsection, it will notify the applicant in writing of that fact. The notification will identify the reason or reasons interconnection could not be performed in accordance with the schedule, and provide an estimated date for interconnection.

(5) All applications for interconnection and parallel operation of distributed generation shall be processed by the utility in a non-discriminatory manner. Applications will be processed in the order that they are received. It is recognized that certain applications may require minor modifications while they are being reviewed by the utility. Such minor modifications to a pending application shall not require that it be considered incomplete and treated as a new or separate application.

(n) Reporting requirements. Each electric utility shall maintain records concerning applications received for interconnection and parallel operation of distributed generation. Such records will include the date each application is received, documents generated in the course of processing each application, correspondence regarding each application, and the final disposition of each application. By March 30 of each year, every electric utility shall file with the commission a distributed generation interconnection report for the preceding calendar year that identifies each distributed generation facility interconnected with the utility's distribution system. The report shall list the new distributed generation facilities interconnected with the system since the previous year' report, any distributed generation facilities no longer interconnected with the utility's system since the previous report, the capacity of each facility, and the feeder or other point on the company's utility system where the facility is connected. The annual report shall also identify all applications for interconnection received during the previous one-year period, and the disposition of such applications.

(o) Interconnection disputes. Complaints relating to interconnection disputes under this section shall be handled in an expeditious manner.

§25.212. Technical Requirements for Interconnection and Parallel Operation of On-Site Distributed Generation.

(a) Purpose. The purpose of this section is to describe the requirements and procedures for safe and effective connection and operation of distributed generation.

(1) A customer may operate 60 Hertz (Hz), three-phase or single-phase generating equipment, whether qualifying facility (QF) or non-QF, in parallel with the utility system pursuant to an interconnection agreement, provided that the equipment meets or exceeds the requirements of this section.

(2) This section describes typical interconnection requirements. Certain specific interconnection locations and conditions may require the installation of more sophisticated protective settings or hardware, especially when the facility is exporting power to the utility system.

(3) If the utility concludes that an application for parallel operation describes facilities that may require additional protective settings or hardware, the utility shall make those additional requirements known to the customer at the time the interconnection studies are completed.

(4) Where the application of the technical requirements set forth in this section appears inappropriate for a specific facility, the customer and utility may agree to different requirements, or a party may petition the commission for a good cause exception.

(b) General interconnection and protection requirements.

(1) The customer's generation and interconnection installation must meet all applicable national, state, and local construction and safety codes.

(2) The customer's generator shall be equipped with protective hardware and software designed to prevent the generator from being connected to a de-energized circuit owned by the utility.

(3) The customer's generator shall be equipped with the necessary protective hardware and software designed to prevent connection or parallel operation of the generating equipment with the utility system unless the utility system service voltage and frequency is of normal magnitude.

(4) Pre-certified equipment may be installed on a company's utility systems in accordance with approved interconnection control and protection scheme without further review of their design by the utility. When the customer is exporting to the utility system using pre-certified equipment, the protective settings and operations shall be those specified by the utility.

(5) The customer will be responsible for protecting its generating equipment in such a manner that utility system outages, short circuits or other disturbances including zero sequence currents and ferroresonant over-voltages do not damage the customer's generating equipment. The customer's protective equipment shall also prevent unnecessary tripping of the utility system breakers that would affect the utility system's capability of providing reliable service to other customers.

(6) For facilities greater than two megawatts (MW), the utility may require that a communication channel be provided by the customer to provide communication between the utility and the customer's facility. The channel may be leased telephone circuit, power line carrier, pilot wire circuit, microwave, or other mutually agreed upon medium.

(7) Circuit breakers or other interrupting devices at the point of common coupling must be capable of interrupting maximum available fault current. Facilities larger than two MW and exporting to the utility system shall have a redundant circuit breaker unless a listed device suitable for the rated application is used.

(8) The customer will furnish and install a manual disconnect device that has a visual break that is appropriate to the voltage level (a disconnect switch, a draw-out breaker, or fuse block), and is accessible to the utility personnel, and capable of being locked in the open position. The customer shall follow the utility's switching, clearance, tagging, and locking procedures that the utility shall provide the customer.

(c) Prevention of interference. To eliminate undesirable interference caused by operation of the customer's generating equipment, the customer's generator shall meet the following criteria:

(1) Voltage. The customer will operate its generating equipment in such a manner that the voltage levels on the utility system are in the same range as if the generating equipment were not connected to the utility's system. The customer shall provide an automatic method of disconnecting the generating equipment from the utility system should a sustained voltage deviation in excess of +5.0 % or -10% from nominal voltage occur for more than 30 seconds.

Should a deviation in excess of +10% or -30% from nominal voltage occur, the customer shall automatically disconnect the equipment within ten cycles. The customer may reconnect when the utility system voltage and frequency return to normal range and the system is stabilized.

(2) Flicker. The customer's equipment shall not cause excessive voltage flicker on the utility system. This flicker shall not exceed 3.0% voltage dip, in accordance with Institute of Electrical and Electronics Engineers (IEEE) 519 as measured at the point of common coupling.

(3) Frequency. The operating frequency of the customer's generating equipment shall not deviate more than +0.5 Hertz (Hz) or -0.7 Hz on a 60 Hz base. The customer shall automatically disconnect the generating equipment from the utility system within 15 cycles if this frequency tolerance cannot be maintained. The customer may reconnect when the utility system voltage and frequency return to normal range and the system is stabilized.

(4) Harmonics. In accordance with IEEE 519 the total harmonic distortion (THD) voltage shall not exceed 5.0% of the fundamental 60 Hz frequency nor 3.0% of the fundamental frequency for any individual harmonic when measured at the point of common coupling with the utility system. THD is also limited to 5.0% by §25.51(c) of this title (relating to Power Quality).

(5) Fault and line clearing. The customer shall automatically disconnect from the utility system within ten cycles should the voltage on one or more phases fall below -30% of nominal voltage on the utility system serving the customer premises. This disconnect timing also ensures that the generator is disconnected from the utility system prior to automatic re-close of breakers. The customer may reconnect when the utility system voltage and frequency return to normal range and the system is stabilized. To enhance reliability and safety and with the utility's approval, the customer may employ a modified relay scheme with delayed tripping or blocking using communications equipment between customer and company.

(d) Control, protection and safety equipment requirements specific to single phase generators of 50 kilowatts (kW) or less connected to the utility's system. Exporting to the utility system may require additional operational/protection devices and will require coordination of operations with the host utility. The necessary control, protection, and safety equipment specific to single-phase generators of 50 kW or less connected to secondary or primary systems must include an interconnect disconnect device, a generator disconnect device, an over-voltage trip, an under-voltage trip, an over/under frequency trip, and a synchronizing check for synchronous and other types of generators with stand-alone capability.

(e) Control, protection and safety equipment requirements specific to three-phase synchronous generators, induction generators, and inverter systems. This subsection specifies the control, protection, and safety equipment requirements specific to three phase synchronous generators, induction generators, and inverter systems. Exporting to the utility system may require additional operational/protection devices and will require coordination of operations with the utility.

(1) Three phase synchronous generators. The customer's generator circuit breakers shall be three-phase devices with electronic or electromechanical control. The customer is solely responsible for properly synchronizing its generator with the utility. The excitation system response ratio shall not be less than 0.5. The generator's excitation system(s) shall conform, as near as reasonably achievable, to the field voltage versus time criteria specified in American National Standards Institute Standard C50.13-1989 in order to permit adequate field forcing during transient conditions. For generating systems greater than two MW the customer shall maintain the automatic voltage regulator (AVR) of each generating unit in service and operable at all times. If the AVR is removed from service for maintenance or repair, the utility's dispatching office shall be notified.

(2) Three-phase induction generators and inverter systems. Induction generation may be connected and brought up to synchronous speed (as an induction motor) if it can be demonstrated that the initial voltage drop measured on the utility system side at the point of common coupling is within the visible flicker stated in subsection (c)(2) of this section. Otherwise, the customer may be required to install hardware or employ other techniques to bring voltage fluctuations to acceptable levels. Line-commutated inverters do not require synchronizing equipment. Self-commutated inverters whether of the utility-interactive type or stand-alone type shall be used in parallel with the utility system only with synchronizing equipment. Direct-current generation shall not be operated in parallel with the utility system.

(3) Protective function requirements. The protective function requirements for three phase facilities of different size and technology are listed below.

(A) Facilities rated ten kilowatts (kW) or less must have an interconnect disconnect device, a generator disconnect device, an over-voltage trip, an under-voltage trip, an over/under frequency trip, and a manual or automatic synchronizing check (for facilities with stand alone capability).

(B) Facilities rated in excess of 10 kW but not more than 500 kW must have an interconnect disconnect device, a generator disconnect device, an over- voltage trip, an under-voltage trip, an over/under frequency trip, a manual or automatic synchronizing check (for facilities with stand alone capability), either a ground over-voltage trip or a ground over-current trip depending on the grounding system if required by the company, and reverse power sensing if the facility is not exporting (unless the generator is less than the minimum load of the customer.)

(C) Facilities rated more than 500 kW but not more than 2,000 kW must have an interconnect disconnect device, a generator disconnect device, an over- voltage trip, an under-voltage trip, an over/under frequency trip, either a ground over-voltage trip or a ground over-current trip depending on the grounding system, if required by the company, an automatic synchronizing check (for facilities with stand alone capability) and reverse power sensing if the facility is not exporting (unless the facility is less than the minimum load of the customer.) If the facility is exporting power, the power direction protective function may be used to block or delay the under frequency trip with the agreement of the utility.

(D) Facilities rated more than 2,000 kW but not more than 10,000 kW must have an interconnect disconnect device, a generator disconnect device, an over- voltage trip, an under-voltage trip, an over/under frequency trip, either a ground over-voltage trip or a ground over-current trip depending on the grounding system, if required by the company, an automatic synchronizing check and AVR for facilities with stand alone capability, and reverse power sensing if the facility is not exporting (unless the facility is less than the minimum load of the customer.) If the facility is exporting power, the power direction protective function may be used to block or delay the under frequency trip with the agreement of the utility. A telemetry/transfer trip may also be required by the company as part of a transfer tripping or blocking protective scheme.

(f) Facilities not identified. In the event that standards for a specific unit or facility are not identified in this section, the company and customer may interconnect a facility using mutually agreed upon technical standards.

(g) Requirements specific to a facility paralleling for sixty cycles or less (closed transition switching). The protective devices required for facilities ten MW or less which parallel with the utility system for 60 cycles or less are an interconnect disconnect device, a generator disconnect device, an automatic synchronizing check for generators with stand alone capability, an over-voltage trip, an under-voltage trip, an over/under frequency trip, and either a ground over-voltage trip or a ground over-current trip depending on the grounding system, if required by the utility.

(h) Inspection and start-up testing. The customer shall provide the utility with notice at least two weeks before the initial energizing and start-up testing of the customer's generating equipment and the utility may witness the testing of any equipment and protective systems associated with the interconnection. The customer shall revise and re-submit the application information for any proposed modification that may affect the safe and reliable operation of the utility system.

(i) Site testing and commissioning. Testing of protection systems shall include procedures to functionally test all protective elements of the system up to and including tripping of the generator and/or interconnection point. Testing will verify all protective set points and relay/breaker trip timing. The utility may witness the testing of installed switchgear, protection systems, and generator. The customer is responsible for routine maintenance of the generator, control and protective equipment. The customer will maintain records of such maintenance activities which the utility may review at reasonable times. For generation systems greater than 500 kW, a log of generator operations shall be kept. At a minimum, the log shall include the date, generator time on, and generator time off, and megawatt and megavar output. The utility may review such logs at reasonable times.

(j) Metering. Consistent with Chapter 25, Subchapter F of this title (relating to Metering), the utility may supply, own, and maintain all necessary meters and associated equipment to record energy purchases by the customer and/or energy sales/exports to the utility system. The customer shall supply at no cost to the utility a suitable location on its premises for the installation of the utility's meters and other equipment. If metering at the generator is required in such applications, metering that is part of the generator control package will be considered sufficient if it meets all the measurements criteria that would be required by a separate stand alone meter.

This 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 13, 1999.

TRD-9905868
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 936-7308

♦ ♦ ♦

Chapter 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

Subchapter L. WHOLESALE MARKET PROVISIONS

16 TAC §26.272

The Public Utility Commission of Texas (commission) proposes new §26.272 relating to Interconnection. The proposed new section will replace §23.97 of this title (relating to Interconnection). The proposed rule implements the Public Utility Regulatory Act (PURA), Chapter 60, Subchapter G, relating to Interconnection. The rule is necessary to set policies governing interconnection arrangements between all providers of telecommunications services that are certificated to provide local exchange service, basic local telecommunications service or switched access service within the state. The proposed rule also establishes principles of interconnection and minimum interconnection arrangements that would serve as a basis for negotiations and dispute resolutions between interconnecting certificated telecommunications utilities. The rule establishes timelines and procedures for negotiation, a dispute resolution process, and the filing of rates, terms and conditions. The rule also requires that certain customer safeguards be put in place by interconnecting certificated telecommunications utilities. Project Number 17709 has been assigned to this proceeding.

The Appropriations Act of 1997, House Bill 1, Article IX, §167 (§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 §167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers. The duplicative sections of Chapter 23 will be proposed for repeal as each new section is proposed for publication in the new chapter.

General changes to rule language:

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. Some text has been proposed for deletion as unnecessary in the new sections because the dates and requirements in the text no longer apply due to the passage of time and/or fulfillment of the requirements. The name "Advisory Commission on State Emergency Communications" is changed to "Commission on

State Emergency Communications" to be consistent with the expected change which will go into effect on September 1, 1999. The *Texas Register* will publish these sections as all new text. Persons who desire a copy of the proposed new section as it reflects changes to the existing section in Chapter 23 may obtain a redlined version from the commission's Central Records under Project Number 17709.

Other changes specific to each section:

The definitions currently in §23.97, with the exception of "customer", have not been included in proposed §26.272. These terms and definitions may be found in §26.5 of this title (relating to Definitions). The term "customer" remains in §26.272(b) as a section specific definition.

Subsection (c)(2)(B) delineates the application of the rule to small incumbent local exchange companies (ILEC). All exemptions provided to small ILECs until September 1998 in §23.97(c)(2)(B) have been deleted due to passage of time. Small ILECs are subject to the requirements of the rule to the extent required by §251(f) of the federal Telecommunications Act of 1996.

The term "customer proprietary network information" in subsection (d)(1)(E) is further clarified as "customer proprietary network information, customer-specific" as defined in §26.5 (relating to Definitions).

The provision in §23.97(d)(4)(A)(ii) which requires the commission to review the policies of the section as it relates to the application of local interconnections rates established in the section, no later than two years from the original effective date of the section is deleted due to passage of time. In Project Number 18758, the commission completed an initial review of the requirement for the application of local interconnection rates as required under subsection (d)(4)(A)(ii) and declined to change the scope of the application of local interconnection rates.

As a result of the deletion of subsection (d)(4)(A)(ii), subsection (d)(4)(A) is reorganized as follows: The phrase "As of the effective date of this section" in subsection (d)(4)(A)(i) is deleted because it relates to the original effective date of the section. The remaining language in subsection (d)(4)(A)(i) is moved to the end of previous subparagraph (4)(A) of subsection (d). Existing subclauses (I), (II), (III), (IV), (V) in subsection (d)(4)(A)(i) have been renumbered as clauses (i), (ii), (iii), (iv), (v) correspondingly. Similarly, existing items (-a-), (-b-), and (-c-) of subsection (d)(4)(A)(V) have been renumbered as subclauses (I), (II), and (III) under subsection (d)(4)(A)(v). Reference to original subsection (d)(4)(A)(i) in subsections (c)(1)(B)(ii), (c)(1)(C)(ii), and (c)(1)(D)(ii) have been changed to reflect the renumbered subsection (d)(4)(A).

The commission proposes deletion of §23.97(f)(8), (f)(9) and (g)(3) as unnecessary due to passage of time. The remaining paragraphs in subsection (f) and (g) have been renumbered. Language referring to the obligation of a certificated telecommunications provider to serve customers located outside the build out area in subsection (i)(3)(C) has been deleted in light of the deletion of provisions relating to build out requirements in Senate Bill 560, 76th Legislature, Regular Session (1999) (SB560).

Ms. Bih-Jau Sheu, Senior Economist, and Mr. Martin Wilson, Attorney, Office of Regulatory Affairs, have determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Sheu and Mr. Wilson have determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be to foster competition in the local exchange market by providing guidelines for interconnection arrangements that are necessary to achieve competition. There will be no effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Ms. Sheu and Mr. Wilson have also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the proposed new section (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. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. The commission also invites specific comments regarding the §167 requirement as to whether the reason for adopting or readopting the rule continues to exist. All comments should refer to Project Number 17709.

This section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §52.001 which states that the public interest requires rules, policies, and principles to be formulated and applied to protect the public interest and to provide equal opportunity to each telecommunications utility in a competitive marketplace; §60.124 which requires each telecommunications provider to maintain interoperable networks; and §60.125 which requires telecommunications providers to negotiate network interconnectivity, charges and terms.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 52.001, 60.124 and 60.125

§26.272. Interconnection.

(a) Purpose. The purpose of this section is to ensure that all providers of telecommunications services which are certificated to provide local exchange service, basic local telecommunications service, or switched access service within the state interconnect and maintain interoperable networks such that the benefits of local exchange competition are realized as envisioned under the provisions of the Public Utility Regulatory Act (PURA). The commission finds that interconnection is necessary to achieve competition in the local exchange market and is, therefore, in the public interest.

(b) Definition. The term "customer" when used in this section, shall mean an end-user customer.

(c) Application and Exceptions.

(1) Application. This section applies to all certificated telecommunications utilities (CTUs) providing local exchange service.

(2) Exceptions. Except as herein provided, all CTUs providing local exchange service must comply with the requirements of this section.

(A) Holders of a service provider certificate of operating authority (SPCOA).

(i) The holder of an SPCOA that does not provide dial tone and only resells the telephone services of another CTU shall be subject only to the requirements of subsections (e)(1)(B)(ii) and (e)(1)(D)(i)-(vii) of this section and subsection (i)(1)-(3) of this section.

(ii) The underlying CTU providing service to the holder of an SPCOA referenced in subparagraph (A)(i) of this paragraph shall comply with the requirements of this section with respect to the customers of the SPCOA holder.

(B) Small incumbent local exchange companies (ILECs).

(i) This section shall apply to small ILECs to the extent required by 47 United States Code §251(f) (1996).

(ii) Not withstanding the requirement in clause (i) of this subparagraph, small ILECs shall terminate traffic of a CTU which originates and terminates within the small ILEC's extended local calling service (ELCS) or extended area service (EAS) calling scope, where the small ILEC has an ELCS or EAS arrangement with another dominant certificated telecommunications utility (DCTU). The termination of this traffic shall be at rates, terms, and conditions as described in subsection (d)(4)(A) of this section.

(C) Rural telephone companies.

(i) This section shall also apply to rural telephone companies as defined in 47 United States Code §153 (1996) to the extent required by 47 United States Code §251(f) (1996).

(ii) Rural telephone companies shall terminate traffic of a CTU which originates and terminates within the rural telephone company's ELCS or EAS calling scope, where the rural telephone company has an ELCS or EAS arrangement with another DCTU. The termination of this traffic shall be at rates, terms, and conditions as described in subsection (d)(4)(A) of this section.

(D) Small CTUs.

(i) A small CTU may petition for a suspension or modification of the application of this section pursuant to 47 United States Code §251 (f)(2) (1996).

(ii) Small CTUs shall terminate traffic of a CTU which originates and terminates within the small CTU's ELCS or EAS calling scope, where the small CTU has an ELCS or EAS arrangement with another DCTU. The termination of this traffic shall be at rates, terms, and conditions as described in subsection (d)(4)(A) of this section.

(d) Principles of interconnection.

(1) General principles.

(A) Interconnection between CTUs shall be established in a manner that is seamless, interoperable, technically and economically efficient, and transparent to the customer.

(B) Interconnection between CTUs shall utilize nationally accepted telecommunications industry standards and/or mutually acceptable standards for construction, operation, testing and maintenance of networks, such that the integrity of the networks is not impaired.

(C) A CTU may not unreasonably:

(i) discriminate against another CTU by refusing access to the local exchange;

(ii) refuse or delay interconnections to another CTU;

(iii) degrade the quality of access provided to another CTU;

(iv) impair the speed, quality, or efficiency of lines used by another CTU;

(v) fail to fully disclose in a timely manner, on request, all available information necessary for the design of equipment that will meet the specifications of the local exchange network; or

(vi) refuse or delay access by any person to another CTU.

(D) Interconnecting CTUs shall negotiate rates, terms, and conditions for facilities, services, or any other interconnection arrangements required pursuant to this section.

(E) This section should not be construed to allow an interconnecting CTU access to another CTU's network proprietary information or customer proprietary network information, customer-specific as defined in §26.5 of this title (relating to Definitions) unless otherwise permitted in this section.

(2) Technical interconnection principles. Interconnecting CTUs shall make a good-faith effort to accommodate each other's technical requests, provided that the technical requests are consistent with national industry standards and are in compliance with §23.61 of this title (relating to Telephone Utilities) and implementation of the requests would not cause unreasonable inefficiencies, unreasonable costs, or other detriment to the network of the CTU receiving the requests.

(A) Interconnecting CTUs shall ensure that customers of CTUs shall not have to dial additional digits or incur dialing delays that exceed industry standards in order to complete local calls as a result of interconnection.

(B) Interconnecting CTUs shall provide each other non-discriminatory access to signaling systems, databases, facilities, and information as required to ensure interoperability of networks and efficient, timely provision of services to customers.

(C) Interconnecting CTUs shall provide each other Common Channel Signaling System Seven (SS7) connectivity where technically available.

(D) Interconnecting CTUs shall be permitted a minimum of one point of interconnection in each exchange area or group of contiguous exchange areas within a single local access and transport area (LATA), as requested by the interconnecting CTU, and may negotiate with the other CTU for additional interconnection points. Interconnecting CTUs shall agree to construct and/or lease and maintain the facilities necessary to connect their networks, either by having one CTU provide the entire facility or by sharing the construction and maintenance of the facilities necessary to connect their networks. The financial responsibility for construction and maintenance of such facilities shall be borne by the party who constructs and maintains the facility, unless the parties involved agree to other financial arrangements. Each interconnecting CTU shall be responsible for delivering its originating traffic to the mutually-agreed-upon point of interconnection or points of interconnection. Nothing herein precludes a CTU

from recovering the costs of construction and maintenance of facilities if such facilities are used by other CTUs.

(E) Interconnecting CTUs shall establish joint procedures for troubleshooting the portions of their networks that are jointly used. Each CTU shall be responsible for maintaining and monitoring its own network such that the overall integrity of the interconnected network is maintained with service quality that is consistent with industry standards and is in compliance with §23.61 of this title.

(F) If a CTU has sufficient facilities in place, it shall provide intermediate transport arrangements between other interconnecting CTUs, upon request. A CTU providing intermediate transport shall not negotiate termination on behalf of another CTU, unless the terminating CTU agrees to such an arrangement. Upon request, DCTUs within major metropolitan areas will contact other CTUs and arrange meetings, within 15 days of such request, in an effort to facilitate negotiations and provide a forum for discussion of network efficiencies and inter-company billing arrangements.

(G) Each interconnecting CTU shall be responsible for ensuring that traffic is properly routed to the connected CTU and jurisdictionally identified by percent usage factors or in a manner agreed upon by the interconnecting CTUs.

(H) Interconnecting CTUs shall allow each other nondiscriminatory access to all facility rights-of-way, conduits, pole attachments, building entrance facilities, and other pathways, provided that the requesting CTU has obtained all required authorizations from the property owner and/or appropriate governmental authority.

(I) Interconnecting CTUs shall provide each other physical interconnection in a non-discriminatory manner. Physical collocation for the transmission of local exchange traffic shall be provided to a CTU upon request, unless the CTU from which collocation is sought demonstrates that technical or space limitations make physical collocation impractical. Virtual collocation for the transmission of local exchange traffic shall be implemented at the option of the CTU requesting the interconnection.

(J) Each interconnecting CTU shall be responsible for contacting the North American Numbering Plan (NANP) administrator for its own NXX codes and for initiating NXX assignment requests.

(3) Principles regarding billing arrangements.

(A) Interconnecting CTUs shall cooperatively provide each other with both answer and disconnect supervision as well as accurate and timely exchange of information on billing records to facilitate billing to customers, to determine intercompany settlements for local and non-local traffic, and to validate the jurisdictional nature of traffic, as necessary. Such billing records shall be provided in accordance with national industry standards. For billing interexchange carriers for jointly provided switched access services, such billing records shall include meet point billing records, interexchange carrier billing name, interexchange carrier billing address, and Carrier Identification Codes (CICs). If exchange of CIC codes is not technically feasible, interconnecting CTUs shall negotiate a mutually acceptable settlement process for billing interexchange carriers for jointly provided switched access services.

(B) CTUs shall enter into mutual billing and collection arrangements that are comparable to those existing between and/or among DCTUs, to ensure acceptance of each other's non-proprietary calling cards and operator-assisted calls.

(C) Upon a customer's selection of a CTU for his or her local exchange service, that CTU shall provide notification to the primary interexchange carrier (IXC) through the Customer Account Record Exchange (CARE) database, or comparable means if CARE is unavailable, of all information necessary for billing that customer. At a minimum, this information should include the name and contact person for the new CTU and the customer's name, telephone number, and billing number. In the event a customer's local exchange service is disconnected at the option of the customer or the CTU, the disconnecting CTU shall provide notification to the primary IXC of such disconnection.

(D) All CTUs shall cooperate with interexchange carriers to ensure that customers are properly billed for interexchange carrier services.

(4) Principles regarding interconnection rates, terms, and conditions.

(A) Criteria for setting interconnection rates, terms, and conditions. Interconnection rates, terms, and conditions shall not be unreasonably preferential, discriminatory, or prejudicial, and shall be non- discriminatory. The following criteria shall be used to establish interconnection rates, terms, and conditions.

(i) Local traffic of a CTU which originates and terminates within the mandatory single or multiexchange local calling area available under the basic local exchange rate of a single DCTU shall be terminated by the CTU at local interconnection rates. The local interconnection rates under this subclause also apply with respect to mandatory EAS traffic originated and terminated within the local calling area of a DCTU if such traffic is between exchanges served by that single DCTU.

(ii) If a non-dominant certificated telecommunications utility (NCTU) offers, on a mandatory basis, the same minimum ELCS calling scope that a DCTU offers under its ELCS arrangement, an NCTU shall receive arrangements for its ELCS traffic that are not less favorable than the DCTU provides for terminating mandatory ELCS traffic.

(iii) With respect to local traffic originated and terminated within the local calling area of a DCTU but between exchanges of two or more DCTUs governed by mandatory EAS arrangements, DCTUs shall terminate local traffic of NCTUs at rates, terms, and conditions that are not less favorable than those between DCTUs for similar mandatory EAS traffic for the affected area. A NCTU and a DCTU may agree to terms and conditions that are different from those that exist between DCTUs for similar mandatory EAS traffic. The rates applicable to the NCTU for such traffic shall reflect the difference in costs to the DCTU caused by the different terms and conditions.

(iv) With respect to traffic that originates and terminates within an optional flat rate calling area, whether between exchanges of one DCTU or between exchanges of two or more DCTUs, DCTUs shall terminate such traffic of NCTUs at rates, terms, and conditions that are not less favorable than those between DCTUs for similar traffic. A NCTU and a DCTU may agree to terms and conditions that are different from those that exist between DCTUs for similar optional EAS traffic. The rates applicable to the NCTU for such traffic shall reflect the difference in costs to the DCTU caused by the different terms and conditions.

(v) A DCTU with more than one million access lines and an NCTU shall negotiate new EAS arrangements in accordance with the following requirements.

(I) For traffic between an exchange and a contiguous metropolitan exchange local calling area, as defined in §26.5

of this title (relating to Definitions), the DCTU shall negotiate with an NCTU for termination of such traffic if the NCTU includes such traffic as part of its customers' local calling area. These interconnection arrangements shall be not less favorable than the arrangements between DCTUs for similar EAS traffic.

(II) For traffic that does not originate or terminate within a metropolitan exchange local calling area, the DCTU shall negotiate with a NCTU for the termination of traffic between the contiguous service areas of the DCTU and the NCTU if the NCTU includes such traffic as part of its customers' local calling area and such traffic originates in an exchange served by the DCTU. These interconnection arrangements shall be not less favorable than the arrangements between DCTUs for similar EAS traffic.

(III) An NCTU shall have the same obligation to negotiate similar EAS interconnection arrangements with respect to traffic between its service area and a contiguous exchange of the DCTU if the DCTU includes such traffic as part of its customers' local calling area.

(vi) NCTUs are not precluded from establishing their own local calling areas or prices for purposes of retail telephone service offerings.

(B) Establishment of rates, terms, and conditions.

(i) CTUs involved in interconnection negotiations shall ensure that all reasonable negotiation opportunities are completed prior to the termination of the first commercial call. The date upon which the first commercial call between CTUs is terminated signifies the beginning of a nine-month period in which each CTU shall reciprocally terminate the other CTU's traffic at no charge, in the absence of mutually negotiated interconnection rates. Reciprocal interconnection rates, terms, and conditions shall be established pursuant to the compulsory arbitration process in subsection (g) of this section. In establishing these initial rates and three years from termination of the first commercial call, no cost studies shall be required from a new CTU.

(ii) An ILEC may adopt the tariffed interconnection rates approved for a larger ILEC or interconnection rates of a larger ILEC resulting from negotiations without providing the commission any additional cost justification for the adopted rates. If an ILEC adopts the tariffed interconnection rates approved for a larger ILEC, it shall file tariffs referencing the appropriate larger ILEC's rates. If an ILEC adopts the interconnection rates of a larger ILEC, the new CTU may adopt those rates as its own rates by filing tariffs referencing the appropriate larger ILEC's rates. If an ILEC chooses to file its own interconnection tariff, the new CTU must also file its own interconnection tariff.

(C) Public disclosure of interconnection rates, terms, and conditions. Interconnection rates, terms, and/or conditions shall be made publicly available as provided in subsection (h) of this section.

(e) Minimum interconnection arrangements.

(1) Pursuant to mutual agreements, interconnecting CTUs shall provide each other non-discriminatory access to ancillary services such as repair services, E-911, operator services, white pages telephone directory listing, publication and distribution, and directory assistance. The following minimum terms and conditions shall apply:

(A) Repair services. For purposes of this section, a CTU shall be required to provide repair services for its own facilities regardless of whether such facilities are used by the CTU for retail purposes, or provided by the CTU for resale purposes, or whether the facilities are ordered by another CTU for purposes of collocation.

(B) E-911 services. E-911 services include Automatic Number Identification (ANI), ANI and Automatic Location Identification (ALI), ANI and/or ALI and selective routing, and/or any other combination of enhanced 9-1-1 features required by the Regional Planning Commission or the 9-1-1 emergency communication district responsible for the geographic area involved. This requirement is in accordance with Health and Safety Code, Chapter 771, and the applicable regional plan approved by the Commission on State Emergency Communications or by the emergency communication district, defined in Health and Safety Code, §771.001(2), responsible for the geographic area involved or other local authority responsible for the geographic area involved.

(i) As a prerequisite to providing local exchange telephone service to any customer and thereafter, a CTU must meet the following requirements.

(I) The CTU is responsible for ordering or provisioning the trunk groups necessary to provide E-911 services.

(II) The CTU is responsible for enabling all its customers to dial the three digits 9, 1, 1, and only these numbers, to access 9-1-1 service.

(III) The CTU is responsible for providing the telephone number of the 9-1-1 calling customer to the appropriate CTU's E-911 tandems or appropriate 9-1-1 Public Safety Answering Point, as applicable. This number must include both the numbering plan area (NPA) code, or numbering plan digit (NPD), as appropriate and necessary, and the local telephone number of the 9-1-1 calling customer, that can be used to successfully complete a return call to the customer. ANI represents this capability.

(IV) The CTU is responsible for selectively routing a 9-1-1 customer call, as well as interconnecting traffic on its network, to the appropriate CTU's E-911 tandems or appropriate 9-1-1 Public Safety Answering Point, as applicable, based on the ANI and/or location of the calling party. The appropriate CTU and/or appropriate 9-1-1 entity, as applicable, shall provide routing information to the CTU for routing purposes.

(V) The CTU is responsible for providing appropriate information describing the location from which a CTU customer is placing a 9-1-1 call. This information shall consist of the calling customer name, physical location, appropriate emergency service providers, and other similar data. For purposes of this subclause, appropriate or other similar data shall be determined by the Regional Planning Commission responsible for the geographic area involved, in accordance with Health and Safety Code, Chapter 771, and the applicable regional plan approved by the Commission on State Emergency Communications or by the emergency communication district, defined in Health and Safety Code, §771.001(2), responsible for the geographic area involved or other local authority responsible for the geographic area involved.

(ii) Each interconnecting CTU is responsible for providing to the local authority and the appropriate CTU, accurate and timely current information for all published, nonpublished, and nonlisted information associated with its customers for the purposes of emergency or E-911 services.

(I) For purposes of this clause, the appropriate CTU refers to the CTU designated by the local authority for purposes of maintaining the 9-1-1 database.

(II) For purposes of this clause, the information is considered timely if within 24 hours of receipt of the information, it is delivered by the CTU to the appropriate CTU and the local authority, and/or placed into the database by the appropriate CTU.

(III) For purposes of this clause, the information sent by a CTU to the appropriate CTU or the information used by the appropriate CTU shall be maintained in a fashion to ensure that it is accurate at a percentage as close to 100% as possible. "Accurate" means a record that correctly routes a 9-1-1 call, and/or provides correct location information relating to the origination of such call. "Percentage" means the total number of accurate records in that database divided by the total number of records in that database. In determining the accuracy of records, a CTU shall not be held responsible for erroneous information provided to it by a customer or another CTU.

(IV) Interconnecting CTUs shall execute confidentiality agreements with each other, as necessary, to prevent the unauthorized disclosure of non-published/non-listed numbers. Interconnecting CTUs shall be allowed access to the ALI database by the appropriate CTU for verification purposes. The local 9-1-1 entity shall provide non- discriminatory access to the Master Street Address Guide.

(iii) Each CTU is responsible for developing a 9-1-1 disaster recovery, service restoration plan with input from the applicable Regional Planning Commission or emergency communication district and the Commission on State Emergency Communications. This plan shall identify the actions to be taken in the event of a network-based 9-1-1 service failure. The goal of such actions shall be the efficient and timely restoration of the 9-1-1 service. CTUs shall notify the applicable Regional Planning Commission or emergency communications district of any changes in CTU network based services and other services that may require changes to the plan.

(iv) Interconnecting CTUs shall provide each other and the appropriate 9-1-1 entity notification of scheduled outages for 9-1-1 trunks at least 48 hours prior to such outages. In the event of unscheduled outages for 9-1-1 trunks, interconnecting CTUs shall provide each other and the appropriate 9-1-1 entity immediate notification of such outages.

(v) Each NCTU's rates for 9-1-1 service to a Public Safety Answering Point shall be presumed to be reasonable if they do not exceed the rates charged by the ILEC for similar service.

(C) Operator services. Interconnecting CTUs shall negotiate to ensure the interoperability of operator services between networks, including but not limited to the ability of operators on each network to perform such operator functions as reverse billing, line verification, call screening, and call interrupt.

(D) White pages telephone directory and directory assistance. Interconnecting CTUs shall negotiate to ensure provision of white pages telephone directory and directory assistance services.

(i) The telephone numbers and other appropriate information of the customers of NCTUs shall be included on a non-discriminatory basis in the DCTU's white pages directory associated with the geographic area covered by the white pages telephone directory published by the DCTUs. Similarly, any white pages telephone directory provided by a NCTU to its customers shall have corresponding DCTU listings available on a non-discriminatory basis. The entries of NCTU customers in the DCTU white pages telephone directory shall be interspersed in correct alphabetical sequence among the entries of the DCTU customers and shall be no different in style, size, or format than the entries of the DCTU customers, unless requested otherwise by the NCTU. The CTU or its affiliate publishing a white pages telephone directory on behalf of the CTU shall not directly charge the customer of another CTU located in the geographic areas covered by the white pages telephone directory for white pages listings or directory.

(ii) Listings of all customers located within the local calling area of a NCTU, but not located within the local calling area of the DCTU publishing the white pages telephone directory, shall be included in a separate section of the DCTU's white pages telephone directory at the option of the NCTU.

(iii) CTUs shall provide directory listings and related updates to the CTU or its affiliate publishing a white pages telephone directory on behalf of the CTU or to any CTU providing directory assistance, in a timely manner to ensure inclusion in the annual white page listings and provision of directory assistance service that complies with §23.61 of this title. The CTU or its affiliate publishing a white pages telephone directory on behalf of the CTU shall be responsible for providing all other CTUs with timely information regarding deadlines associated with its published white pages telephone directory.

(iv) CTUs shall, upon request, provide accurate and current subscriber listings (name, address, telephone number) and updates in a readily usable format and in a timely manner, on a non-discriminatory basis, to publishers of yellow pages telephone directory. CTUs shall not provide listings of subscribers desiring non-listed status for publication purposes.

(v) White pages telephone directories shall be distributed to all customers located within the geographic area covered by the white pages telephone directory on non-discriminatory terms and conditions by the CTU or its affiliate publishing the white pages telephone directory.

(vi) A CTU or its affiliate that publishes a white pages telephone directory on behalf of the CTU shall provide a single page per CTU in the information section of the white pages telephone directory, for the CTU to convey critical customer contact information regarding emergency services, billing and service information, repair services and other pertinent information. The CTU's pages shall be arranged in alphabetical order. Additional access to the information section of the white pages telephone directory shall be subject to negotiations.

(vii) CTUs must provide information that identifies customers desiring non-listed and/or non-published telephone numbers and/or non- published addresses to the CTU or its affiliate publishing a white pages telephone directory on behalf of the CTU and to the CTU maintaining the directory assistance database. The CTU or its affiliate publishing a white pages telephone directory on behalf of the CTU shall not divulge such non-listed and/or non-published telephone numbers or addresses and the CTU maintaining the directory assistance database shall not divulge such non-published telephone numbers or addresses.

(viii) CTUs shall provide each other non-discriminatory access to directory assistance databases.

(2) At a minimum, interconnecting CTUs shall negotiate to ensure the following:

(A) Non-discriminatory access to databases such as 800 and Line Information Data Base (LIDB) where technically feasible, to ensure interoperability between networks and the efficient, timely provision of service to customers;

(B) non-discriminatory access to Telecommunications Relay Service;

(C) Common Channel Signaling interconnection including transmission of privacy indicator where technically available;

(D) non-discriminatory access to all signaling protocols and all elements of signaling protocols used in routing local and interexchange traffic, including signaling protocols used to query call processing databases, where technically feasible;

(E) number portability and the inclusion of the NCTU's NXX code(s) in the Local Exchange Routing Guide and related systems;

(F) non-discriminatory handling, including billing, of mass announcement/audiotext calls including, but not limited to, 900 and 976 calls;

(G) provision of intercept services for a specific telephone number in the event a customer discontinues service with one CTU, initiates service with another CTU, and the customer's telephone number changes;

(H) cooperative engineering, operations, maintenance and billing practices and procedures; and

(I) non-discriminatory access to Advanced Intelligent Network (AIN), where technically available.

(f) Negotiations.

(1) CTUs and other negotiating parties shall engage in good-faith negotiations and cooperative planning as necessary to achieve mutually agreeable interconnection arrangements.

(2) Before terminating its first commercial telephone call, each CTU requesting interconnection shall negotiate with each CTU or other negotiating party that is necessary to complete all telephone calls, including local service calls and EAS or ELCS calls, made by or placed to the customers of the requesting CTU. Upon request, DCTUs within major metropolitan calling areas will contact other CTUs and arrange meetings, within 15 days of such request, in an effort to facilitate negotiations and provide a forum for discussions of network efficiencies and intercompany billing arrangements.

(3) Unless the negotiating parties establish a mutually agreeable date, negotiations are deemed to begin on the date when the CTU or other negotiating party from which interconnection is being requested receives the request for interconnection from the CTU seeking interconnection. The request shall:

(A) be in writing and hand-delivered; sent by certified mail or by facsimile;

(B) identify the initial specific issues to be resolved, the specific underlying facts, and the requesting CTU's proposed resolution of each issue;

(C) provide any other material necessary to support the request, included as appendices; and

(D) provide the identity of the person authorized to negotiate for the requesting CTU.

(4) The requesting CTU may identify additional issues for negotiation without causing an alteration of the date on which negotiations are deemed to begin.

(5) The CTU or negotiating party from which interconnection is sought shall respond to the interconnection request no later than 14 working days from the date the request is received. The response shall:

(A) be in writing and hand-delivered; sent by certified mail or by facsimile;

(B) respond specifically to the requesting party's proposed resolution of each initial issue identified by the requesting party, identify the specific underlying facts upon which the response is based and, if the response is not in agreement with the requesting party's proposed resolution of each issue, the responding party's proposed resolution of each issue;

(C) provide any other material necessary to support the response, included as appendices; and

(D) provide the identity of the person authorized to negotiate for the responding party.

(6) At any point during the negotiations required under this subsection, any CTU or negotiating party may request the commission designee(s) to participate in the negotiations and to mediate any differences arising in the course of the negotiation.

(7) Interconnecting CTUs may, by written agreement, accelerate the requirements of this subsection with respect to a particular interconnection agreement except that the requirements of subsection (g)(1)(A) of this subsection shall not be accelerated.

(8) Any disputes arising under or pertaining to negotiated interconnection agreements may be resolved pursuant to Chapter 22, Subchapter Q, of this title (relating to Post-Interconnection Agreement Dispute Resolution).

(g) Compulsory arbitration process.

(1) A negotiating CTU that is unable to reach mutually agreeable terms, rates, and/or conditions for interconnection with any CTU or negotiating party may petition the commission to arbitrate any unresolved issues. In order to initiate the arbitration procedure, a negotiating CTU:

(A) shall file its petition with the commission during the period from the 135th to the 160th day (inclusive) after the date on which its request for negotiation under subsection (f) of this section was received by the other CTU involved in the negotiation;

(B) shall provide the identity of each CTU and/or negotiating party with which agreement cannot be reached but whose cooperation is necessary to complete all telephone calls made by or placed to the customers of the requesting CTU;

(C) shall provide all relevant documentation concerning the unresolved issues;

(D) shall provide all relevant documentation concerning the position of each of the negotiating parties with respect to those issues;

(E) shall provide all relevant documentation concerning any other issue discussed and resolved by the negotiating parties; and

(F) shall send a copy of the petition and any documentation to the CTU or negotiating party with which agreement cannot be reached, not later than the day on which the commission receives the petition.

(2) A non-petitioning party to a negotiation under subsection (f) of this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the commission receives the petition.

(3) The compulsory arbitration process shall be completed not later than nine months after the date on which a CTU receives a request for interconnection under subsection (f) of this section.

(4) Any disputes arising under or pertaining to arbitrated interconnection agreements may be resolved pursuant to Chapter 22, Subchapter Q, of this title (relating to Post-Interconnection Agreement Dispute Resolution).

(h) Filing of rates, terms, and conditions.

(1) Rates, terms and conditions resulting from negotiations, compulsory arbitration process, and statements of generally available terms.

(A) A CTU from which interconnection is requested shall file any agreement, adopted by negotiation or by compulsory arbitration, with the commission. The commission shall make such agreement available for public inspection and copying within ten days after the agreement is approved by the commission pursuant to subparagraphs (C) and (D) of this paragraph.

(B) An ILEC serving greater than five million access lines may prepare and file with the commission, a statement of terms and conditions that it generally offers within the state pursuant to 47 United States Code §252(f) (1996). The commission shall make such statement available for public inspection and copying within ten days after the statement is approved by the commission pursuant to subparagraph (E) of this paragraph.

(C) The commission shall reject an agreement (or any portion thereof) adopted by negotiation if it finds that:

(i) the agreement (or any portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.

(D) The commission shall reject an agreement (or any portion thereof) adopted by compulsory arbitration, under subsection (g) of this section, pursuant to guidelines found in 47 United States Code §252(e)(2)(B) (1996).

(E) The commission shall review the statement of generally available terms filed under subparagraph (B) of this paragraph, pursuant to guidelines found in 47 United States Code §252(f) (1996). The submission or approval of a statement under this paragraph shall not relieve an ILEC serving greater than five million access lines of its duty to negotiate the terms and conditions of an agreement pursuant to §47 United States Code §251 (1996).

(2) Rates, terms and/or conditions among DCTUs. Within 15 days of a request from a CTU negotiating interconnection arrangements with a DCTU, a non-redacted version of any agreement reflecting the rates, terms, and conditions between and/or among DCTUs which relate to interconnection arrangements for similar traffic shall be disclosed to the CTU, subject to commission-approved non-disclosure or protective agreement. A non-redacted version of the same agreement shall be disclosed to commission staff at the same time if requested, subject to commission-approved non-disclosure or protective agreement.

(i) Customer safeguards.

(1) Requirements for provision of service to customers. Nothing in this section or in the CTU's tariffs shall be interpreted as precluding a customer of any CTU from purchasing local exchange service from more than one CTU at a time. No CTU shall connect, disconnect, or move any wiring or circuits on the customer's side of the demarcation point without the customer's express authorization as specified in §26.130 of this title, (relating to Selection of Telecommunications Utilities).

(2) Requirements for CTUs ceasing operations. In the event that a CTU ceases its operations, it is the responsibility of the CTU to notify the commission and all of the CTU's customers at least 61 working days in advance that their service will be terminated. The notification shall include a listing of all alternative service providers available to customers in the exchange and shall specify the date on which service will be terminated.

(3) Requirements for service installations. DCTUs that interconnect with NCTUs shall be responsible for meeting the installation of service requirements under §23.61(e)(2) of this title in providing service to the NCTU. NCTUs shall make a good-faith effort to meet the requirements for installation in §23.61(e)(2) of this title, and may negotiate with the DCTU to establish a procedure to meet this goal.

(A) For those customers for whom the NCTU provides dial tone but not the local loop, 95% of the NCTU's service orders shall be completed in no more than ten working days from request for service, unless a later date is agreed to by the customer.

(B) For those customers for whom the NCTU does not provide dial tone and resells the telephone services of a DCTU, 95% of the NCTU's service orders shall be completed in no more than seven working days from request for service, unless the customer agrees to a later date.

(C) For those customers where the NCTU uses facilities other than a DCTUs' resale facilities obtained through PURA §60.041, the NCTU shall complete service orders within 30 calendar days from request of service, unless a later date is agreed to by the customer.

(D) The DCTU shall not discriminate between its customers and NCTUs if the DCTU is able to install service in less than the time permitted under §23.61(e)(2) of this title.

This 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 13, 1999.

TRD-9905881
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 936-7308

♦ ♦ ♦

Subchapter M. OPERATOR SERVICES

16 TAC §§26.311, 26.313, 26.315, 26.317, 26.319, 26.321

The Public Utility Commission of Texas (commission) proposes new §§26.311 relating to Information Relating to Operator Services; 26.313 relating to General Requirements Relating to Operator Services; 26.315 relating to Requirements for Dominant Certificated Telecommunications Utilities (DCTUs); 26.317 relating to Information to be Provided at the Telephone Set, 26.319 relating to Access to the Operator of a Local

Exchange Company (LEC); and 26.321 relating to 9-1-1 Calls, "0-" Calls, and End User Choice. Project Number 17709 is assigned to this proceeding. The proposed new sections will replace §23.55 of this title (relating to Operator Services).

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. Chapter 26 has been established for all commission substantive rules applicable to telecommunications 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.

General changes to rule language:

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. Some text has been proposed for deletion as unnecessary in the new sections because the dates and requirements in the text no longer apply due to the passage of time and/or fulfillment of the requirements. 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 the existing section in Chapter 23 may obtain a redlined version from the commission's Central Records under Project Number 17709.

Other changes specific to each section:

Proposed new §26.311 states the purpose of the subchapter on operator services, defines "rate information" as the term applies to Subchapter M, establishes standards for complaints relating to operator service providers, and establishes standards for enforcement of violations. This section will replace §23.55(a), (b), (h) and (n). Section 23.55(o) regarding severability is proposed for deletion with no corresponding section in the new rules, because the relevant language is now included in §26.3 of this title, relating to Severability Clause.

Proposed new §26.313 establishes the general requirements concerning operator services and replaces §23.55(c), (e), (f), (j), (l), and (m).

Proposed new §26.315 replaces §23.55(k) and establishes the requirements for dominant certificated telecommunications utilities.

Proposed new §26.317 replaces §23.55(d) and sets the standards for information to be provided at the telephone set.

Proposed new §26.319 replaces §23.55(i) and establishes access requirements for telephones intended to be utilized by the public. The phrase "Telephones intended to be utilized by the public" has been replaced with, "Telephones which are available for public use", in order to clarify the meaning. Proposed new §26.319 modifies §23.55(i)(3)(B)(iii) and deletes §23.55(i)(3)(B)(vii) as no longer necessary.

Proposed new §26.321 replaces §23.55(g) and sets minimum emergency standards for operator service providers that provide operator service to telephones intended to be utilized by the public.

Christopher Green, Attorney, Office of Regulatory Affairs, has determined that for each year of the first five-year period the proposed sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Green 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 to continue to require operator service providers to meet various technical and informational standards that are important for providing service to the public. There will be no effect on small businesses or micro-businesses as a result of enforcing these sections. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Mr. Green has also determined that for each year of the first five years the proposed sections are in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act 2001.022.

Comments on the proposed new 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. 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 or readopting the rule continues to exist. All comments should refer to Project Number 17709.

These new sections are 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. Specifically, these sections are proposed under PURA §§55.081-55.089 that grant the commission authority to adopt rules that regulate operator service providers.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, and 55.081-55.089.

§26.311. Information Relating to Operator Services.

(a) Purpose. The provisions of this subchapter are intended to ensure that competitive operator services are provided in a fair and reasonable manner and to maximize consumer choice by ensuring that consumers have access to their carriers of choice when using telephones intended for use by the public.

(b) Definition. The term "rate information", when used in this subchapter, shall mean all charges ultimately charged to the end user by the operator service provider (OSP), including any surcharges, fees, and any other form of compensation charged by the OSP on behalf of the call aggregator.

(c) Complaints Relating to Operator Services.

(1) The OSP shall have a toll-free telephone number that callers may use, during normal business hours, to voice complaints and make inquiries. After normal business hours, the OSP shall have an answering machine/mechanism to receive complaints.

(2) Section 26.30 of this title (relating to Complaints) shall apply to all complaints under this subchapter.

(3) The commission may formally investigate any complaint against any OSP, interexchange carrier or dominant certificated telecommunications utility alleged to have violated the provisions of this subchapter. The company shall be given an opportunity to informally resolve any complaint involving violation of these rules. If no resolution is achieved informally, the commission may formally investigate the complaint upon its own motion or upon request of the original complainant.

(d) Enforcement. Upon proper notice, evidentiary hearing, and determination that a violation has occurred or is about to occur, the commission may take action to stop, correct or prevent the violation. Any OSP found to be in violation of provisions of this subchapter is subject to administrative penalties, civil penalties, and injunctive relief pursuant to the Public Utility Regulatory Act §§15.023, 15.028, and 15.021.

§26.313. General Requirements Relating to Operator Services.

(a) Requirements to provide operator service.

(1) An operator service provider (OSP) that provides end user operator services for a call aggregator through a telephone which is available for public use must do so pursuant to a contract with the call aggregator, as a presubscribed interexchange carrier, or, in the case of a dominant certificated telecommunications utility (DCTU), pursuant to a tariff approved by the commission.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, an OSP that owns or otherwise controls telephones which are available for public use shall for those telephones comply with all provisions of this subchapter otherwise required to be included in contracts between OSPs and call aggregators, without the necessity of a contract.

(3) Where a different OSP is presubscribed for operator services at pay telephones owned by a DCTU, the DCTU shall for those telephones comply with all provisions of this subchapter otherwise required to be included in contracts between OSPs and call aggregators.

(4) If a DCTU or presubscribed interexchange carrier provides operator services through telephones which are available for public use, other than those telephones subject to paragraphs (2) and (3) of this subsection, and pays fees or other forms of compensation to a call aggregator, the DCTU or presubscribed interexchange carrier shall do so pursuant to a contract with the call aggregator.

(b) Requirements before call is completed. The provider of operator services shall:

(1) audibly and distinctly identify itself to the customer upon answering calls;

(2) audibly and distinctly identify itself to the billed party if the billed party is different from the caller;

(3) quote rate information at the caller's request, without charge, 24 hours a day, seven days a week; and

(4) permit the caller to terminate the call at no charge prior to completion of the call by the OSP.

(c) Requirements for uncompleted call. There shall be no charge to the caller for any uncompleted call.

(1) No OSP shall knowingly bill for uncompleted calls.

(2) If the OSP cannot determine with certainty that a call was completed, it shall provide a full credit for any call of one minute or less upon being informed by a customer that the call was not completed.

(3) An uncompleted call includes, but shall not be limited to:

(A) calls terminating to an intercept recording, line intercept operator, or a busy tone; or

(B) calls that are not answered.

(4) An uncompleted call does not include calls using busy line interrupt, line status verification, or directory assistance services.

(d) Requirement to provide access to a live operator.

(1) Each telecommunications utility that provides operator services shall ensure that a caller may access a live operator at the beginning of all automated operator-assisted calls through a method designed to be easily and clearly understandable and accessible to the caller. This requirement applies only to "0-" calls where the caller reaches an automated operator. Within 30 days of initially providing operator services each such telecommunications utility shall file in the Central Records Office of the commission, for review, a document describing the method by which the utility is providing access to a live operator, as provided by the Public Utility Regulatory Act §55.088.

(2) This subsection applies regardless of the method by which the telecommunications utility provides the operator service.

(3) The requirements of this subsection shall not apply to telephones located in confinement facilities.

(e) Call splashing. Call splashing is call transferring (whether caller requested or OSP initiated) that results in a call being rated and/or billed from a point different from that where the call originated. Call splashing shall not be allowed unless a waiver of the access requirements in §26.319(1)(A) of this title (relating to Access to the Operator of a Local Exchange Company (LEC)) has been granted pursuant to §26.319(3) of this title and unless:

(1) the originating OSP first clearly and explicitly notifies the caller that the call will be splashed and may result in rating and/or billing of the call from a point different from that where the call originated; and

(2) the originating OSP allows the caller to abort the call without charge after notification that the call will be splashed.

(f) Other requirements.

(1) OSPs that are not DCTUs are subject to the requirements contained in the Public Utility Regulatory Act and the commission's substantive rules for nondominant telecommunications utilities.

(2) If an OSP provides a local exchange company with access information, the OSP must provide a single access code; must

detail, by NPA-NXX, where the access code can be used to access the OSP; and must provide the local exchange company with appropriate instructions for use of the access code. The OSP is responsible for ensuring that the access code specified is available for each NPA-NXX listed and for updating the information.

§26.315. Requirements for Dominant Certificated Telecommunications Utilities (DCTUs).

(a) Each DCTU shall make validation information (e.g. DCTU calling card numbers, whether an access line is equipped with billed number screening, or whether an access line is a pay telephone) available to any interexchange carrier requesting it on the same prices, terms, and conditions that the DCTU provides the service to any other interexchange carrier. The DCTU may comply with the requirements of this paragraph by providing its own database, making arrangements with another DCTU to provide the information, or making arrangements with a third-party vendor.

(b) Each DCTU shall offer billing and collection services to any interexchange carrier requesting it on the same prices, terms, and conditions that the DCTU provides the services to any other interexchange carrier. If validation information is available for calls that the interexchange carrier (or a third-party billing and collection agent operating on behalf of the interexchange carrier) will bill through the DCTU, the interexchange carrier is required to validate the call and is allowed to submit the call for billing only if the call was validated.

(c) If a DCTU receives a request from a caller to access another carrier, the DCTU shall, using the same prices, terms, and conditions for all carriers, either:

(1) transfer the caller to the caller's carrier of choice if facilities that allow such transfer are available and if such transfer is otherwise allowed by law; or

(2) instruct the caller how to access the caller's carrier of choice if that carrier has provided the DCTU with the information referred to in §26.319(2) of this title (relating to Access to the Operator of a Local Exchange Company (LEC)).

§26.317. Information to be Provided at the Telephone Set.

(a) A contract between an operator service provider (OSP) and a call aggregator for the provision of operator services through telephones which are available for public use shall require the call aggregator to attach to each telephone set that has access to the operator service and that is available for public use, a card furnished by the OSP that provides:

(1) the name of the OSP;

(2) instructions for accessing the OSP, with a statement that the OSP will quote rate information upon request at no charge to the caller, 24 hours a day, seven days a week, or a statement that instructions for obtaining rate information are available at a designated toll-free telephone number, 24 hours a day, seven days a week;

(3) instructions for accessing the operator of a local exchange company that meets the requirements of §23.315(c) of this title (relating to Requirements for Dominant Certificated Telecommunications Utilities (DCTUs)), or a statement that instructions for accessing such local exchange company operator are available at a designated toll-free telephone number, 24 hours a day, seven days a week, except local exchange companies meeting the requirements of §26.315(c) of this title are exempt from this paragraph if the local exchange company is the OSP for which instructions are posted pursuant to paragraph (2) of this subsection;

(4) instructions for registering a complaint about the service at a designated toll- free telephone number;

(5) instructions in English and Spanish for accessing emergency service; and

(6) a notice that states, "You may use another long distance carrier. Follow your carrier's instructions, or contact the local exchange company operator for assistance." or, in the case of telephones that directly route "0-" calls to the local exchange company operator, a notice that states, "You may use another long distance carrier. Follow your carrier's instructions, or dial "0" for assistance." (The local exchange company referred to in this paragraph must serve the area and meet the requirements of §23.315(c) of this title.)

(b) Notwithstanding subsection (a) of this section, in the case of pay telephones owned by the DCTU, where the DCTU is the OSP for intraLATA operator service and another carrier is the OSP for interLATA operator service, the interLATA OSP shall inform the DCTU of the appropriate information to be posted, and the DCTU shall post the information required by subsection (a)(1), (2) and (4) of this section for the interLATA OSP. In addition, the DCTU shall post the information required by subsection (a)(5) and (6) of this section. After initial information cards are posted, DCTUs may file tariffs to recover from the OSPs presubscribed to pay telephones owned by the DCTUs the incremental cost for maintaining updated information cards plus a reasonable contribution.

(c) The commission may approve applications for modification of the requirements contained in this section upon showing of good cause. Applications for modification may be filed by the call aggregator or by the OSP. The commission shall process applications for modification using the following criteria and procedures:

(1) Each application for modification shall contain a certificate of service attesting that a copy of the request has been served upon the Office of Public Utility Counsel.

(2) Each application for modification shall clearly set forth the good cause for approval of the modification.

(3) Each application for modification shall initially be assigned a project control number, assigned to a presiding officer, and reviewed administratively.

(A) No later than 30 days after the filing date of the application, interested persons other than the commission staff and the Office of Public Utility Counsel may file written comments or recommendations concerning the application. No later than 60 days after the filing of the application, the commission staff shall, and the Office of Public Utility Counsel may, file written comments or recommendations concerning the application.

(B) Within 90 days of filing, after administrative review, the presiding officer shall approve, deny, or docket the application. The presiding officer may postpone a decision on the application beyond the 90th day after filing if he or she finds that additional information is needed.

(4) Any participating party may request, within ten days of the presiding officer's order approving or denying the application, that the application be docketed, and upon such request, the application shall be docketed.

(5) If the presiding officer either approves or denies the application for modification and no participating party has requested that the application be docketed, a copy of the presiding officer's ruling shall be provided to the commission. The commission may,

within 40 days of the presiding officer's ruling, overrule the approval or denial and order that the application for modification be docketed.

(d) The requirements of this section shall not apply to telephones located in confinement facilities.

§26.319. Access to the Operator of a Local Exchange Company (LEC).

A contract between an operator service provider (OSP) and a call aggregator for the provision of operator services through telephones which are available for public use shall require that the call aggregator allow access to the operator of a local exchange company that meets the requirements enumerated in §26.315(c) of this title (relating to Requirements for Dominant Certificated Telecommunications Utilities (DCTUs)) and serves the area from which the call is made, and to other telecommunications utilities unless otherwise provided in paragraph (3) of this section.

(1) The access required by this subsection shall be provided subject to the conditions contained in subparagraphs (A) - (C) of this paragraph.

(A) Access to such local exchange company operator shall be accomplished either:

(i) by directly routing all "0-" calls to the local exchange company operator, without charge to the caller; or

(ii) by transfer or redirection of the call by the OSP, without charge to the caller, in accordance with the requirements of subclauses (I)-(III) of this clause:

(I) the OSP shall transfer or redirect the call to such local exchange company operator serving the originating area;

(II) the OSP shall transfer or redirect the call to such local exchange company operator in such a way that the local exchange company operator receives all signaling information (e.g., ANI and OLS) that would have been received by the local exchange operator if the call had been directly routed to the local exchange company; and

(III) the OSP shall be in compliance with the requirements of §26.321 of this title (relating to 9-1-1 Calls, "0-" Calls, and End User Choice).

(B) Access to interexchange carriers by "950-XXXX" and "1-800" numbers shall not be blocked.

(C) Access to interexchange carriers by "1010XXX+0" (whether "1010XXX+0+" or "1010XXX+0-") dialing shall not be blocked if the end office serving the originating line has originating line screening capability. A nonpresubscribed interexchange carrier shall not bill the call aggregator or the presubscribed interexchange carrier for local or toll messages originated at the call aggregator's facility by use of "1010XXX+0" (whether "1010XXX+0+" or "1010XXX+0-") dialing, or where the calls originated at the call aggregator's facility and otherwise reached an operator, if the call aggregator has subscribed to the necessary local exchange company-provided outgoing call screening or has otherwise provided the necessary call screening to ensure that appropriate originating line screening is transmitted with each call.

(2) The local exchange company that provides local service to the call aggregator shall provide to the call aggregator, upon request, the names, with addresses or telephone numbers, of interexchange carriers that can be accessed by use of "1010XXX" dialing from the call aggregator's facilities.

(3) Waivers to the access requirement may be granted by the commission to prevent fraudulent use of telephone services or for other good cause. An application under subparagraph (B) of this paragraph is not required for any generic waiver granted by subparagraph (A) of this paragraph.

(A) The commission finds that the following generic waivers of the access requirement are required to prevent fraudulent use.

(i) Access to interexchange carriers by "1010XXX+0" (whether "1010XXX+0+" or "1010XXX+0-") dialing may be blocked if the end office serving the originating line does not have originating line screening capability.

(ii) Access to interexchange carriers by "1010XXX+1" dialing may be blocked.

(iii) Access to the local exchange carrier operator and to other telecommunications utilities from telephones located in confinement facilities may be blocked.

(B) Applications for waiver of the requirement for access to the local exchange carrier operator or to other telecommunications utilities to prevent fraudulent use of telephone service or for other good cause may be filed by the call aggregator or the OSP. The commission shall process such applications for waiver using the following criteria and procedures:

(i) Each application for waiver shall contain a certificate of service attesting that a copy of the application has been served upon the Office of Public Utility Counsel and affected telecommunications utilities, including those identified in paragraph (2) of this section and the local exchange companies serving the affected exchange. If the application for waiver pertains to technical limitations of certain equipment, the application for waiver shall contain a certificate of service attesting that a copy of the application has been served upon the Office of Public Utility Counsel and all telecommunications utilities registered with or certificated by the commission. The certificate shall list the telecommunications utilities on which copies of the application were served.

(ii) If the application for waiver pertains to technical limitations of certain equipment, the equipment shall be clearly identified in the application, including the manufacturer and the model. The application shall indicate the date of purchase of the equipment by the call aggregator, the extent to which equipment is available to allow the access requirements to be met, the associated costs, and the time requirements associated with equipment modifications.

(iii) The access requirement shall be enforced while the application for waiver is pending.

(iv) Each application for waiver shall initially be assigned a project control number, assigned to a presiding officer, and reviewed administratively.

(I) No later than 30 days after the filing date of the application, interested persons other than the commission staff and the Office of Public Utility Counsel may file written comments or recommendations concerning the application. No later than 60 days after the filing of the application, the commission staff shall, and the Office of Public Utility Counsel may, file written comments or recommendations concerning the application.

(II) Within 90 days of the filing, after administrative review, the presiding officer shall approve, deny, or docket the application. The presiding officer may postpone a decision on the

application beyond the 90th day after filing if he or she finds that additional information is needed to determine whether good cause exists.

(v) A participating party may request, within ten days of the presiding officer's ruling approving or denying the application, that the application be docketed, and upon such request, the application shall be docketed.

(vi) If the presiding officer either approves or denies the application for waiver and no participating party has requested that the application be docketed, a copy of the presiding officer's ruling shall be provided to the commission. The commission may, within 40 days of the presiding officer's ruling, overrule the approval or denial and order that the request for waiver be docketed.

§26.321. 9-1-1 calls, "0-" calls, and End User Choice.

(a) A contract between an operator service provider (OSP) and a call aggregator for the provision of operator services through telephones which are available for public use shall require the call aggregator to allow 9-1-1 calls to be outpulsed directly to the public service answering point without requiring a coin or credit card.

(b) Where end user choice, as defined in §26.5 of this title (relating to Definitions), is not available, a contract between an OSP and a call aggregator for the provision of operator services through telephones which are available for public use shall require the call aggregator to allow "0-" calls and to directly, without charge to the calling party, route all "0-" calls to an OSP that provides access to emergency services that meet the technical standards set forth in paragraphs (1)-(6) of this subsection. The OSP shall:

(1) identify the originating telephone number and the location of the originating telephone, except dominant certificated telecommunications utilities (DCTUs)shall be allowed to identify the location using internal sources such as repair service or business office records if such internal sources are accessible to operators for emergency purposes 24 hours a day;

(2) have a complete and current list of all emergency service provider telephone numbers for each NPA-NXX served, including, but not limited to, police or sheriff, fire, and ambulance;

(3) be available 24 hours a day, seven days a week, without requiring a coin or credit card;

(4) promptly connect the appropriate emergency service provider;

(5) stay on the line until such time as the operator determines that the caller has been connected to the proper emergency service provider; and

(6) require that the call aggregator make a test call when equipment providing access to the OSP is installed, serviced, or relocated and at least semi- annually from each originating telephone number subscribed to the OSP, in order to verify the originating telephone number and the location of the telephone, unless the OSP receives automatic number identification (ANI), as defined in §26.5 of this title (relating to Definitions) for that telephone number.

(c) When and where available, use of end user choice is required.

(d) The requirements of this section shall not apply to telephones located in confinement facilities.

(e) Nothing in this section shall be deemed to require the initial routing of "0-" calls from pay telephones owned by a local exchange company that provides access to emergency service providers and that meets the requirements enumerated in §26.315 of this title (relating to Requirements for Dominant Certificated Telecommunications Utilities (DCTUs)) to any OSP other than the local exchange company itself.

This 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 8, 1999.

TRD-9905781
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 936-7308

♦ ♦ ♦

Part VI. TEXAS MOTOR VEHICLE BOARD

Chapter 107. WARRANTY PERFORMANCE OBLIGATIONS

16 TAC §§107.1-107.11

The Motor Vehicle Board of the Texas Department of Transportation proposes amendments to §§107.1-107.11, Warranty Performance Obligations. The Board also proposes the repeal of §107.12 and proposes amendments incorporating the substance of §107.12 into §107.7. The sections set guidelines for filing a lemon law or warranty performance complaint and for holding hearings on these matters.

The Board held a public hearing on the proposed amendments and repeal at its September 9, 1999 meeting and tabled the matter. The previously published proposed amendments and repeal in the July 23, 1999 issue of the *Texas Register* (24 TexReg 5638) are withdrawn and simultaneously republished for consideration. Sections 107.8(3), 107.9(a)(6), 107.9(a)(7), 107.9(a)(8), 107.9(c) and 107.10(4) contain changes from the original publication.

The Appropriations Act of 1997, House Bill 1, Article IX, §167 requires that each state agency review and consider readoption of each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The Board conducted a review of Title 16, Chapter 107, relating to Warranty Performance Obligations, at its June 10, 1999 meeting. As a result of its review, the Board proposes these changes to Chapter 107.

General changes to rule language.

The Motor Vehicle Commission was renamed the Motor Vehicle Board in 1992. The title of "executive director" was also changed to "director". The amendments change all references from "Commission" to "Board" and "executive director" to "director" throughout the chapter. Changes are also proposed throughout the chapter to make it clear that the procedures in the chapter apply to complaints filed under the lemon law for repurchase or replacement of a vehicle (§6.07 of the Motor Ve-

hicle Commission Code) (Code) and to complaints filed for repair of a vehicle under general warranty agreements (§3.08(i) of the Code). Sections pertinent only to §6.07 or §3.08(i) are now clearly identified. Other proposals correct grammar, add acronyms to avoid repetition, and remove surplusage and gender-specific references.

Other changes specific to each section:

The proposed amendment to §107.1 removes the word "new" with reference to complaints filed under §3.08(i) because general warranty complaints may be filed regarding used vehicles if they are still under warranty. Proposed changes to §107.2 conform the section to the current practice of accepting complaints even if they do not initially include necessary information. The proposal adds converters and distributors as potential parties to a complaint, as permitted by the Code. Suggested amendments also delete an obsolete filing fee amount, add provisions clarifying no filing fee is due for complaints filed under §3.08(i) and indicate failure to remit a fee under §6.07 may result in dismissal of the complaint.

Proposed amendments to §107.3 clarify procedure references and Code provisions. Proposed changes to §107.4 and §107.5 add converters as entities who will be given notice and an opportunity to settle if a complaint is filed and give the Board the option of requiring a response from dealers.

Section 107.6, Hearings, contains a proposal that deletes the specific requirement that dealers be given notice of hearing, since all parties receive notice of hearing. Other proposed changes make the section apply to warranty performance complaints as well as lemon law complaints, increase the amount of time to notify the Board of attorney appearances and clarify that evidence presented is subject to admission by the hearing examiner so consumers will understand that the right is not absolute. Additional changes delete the requirement that an expert be independent to conform to current practice, and no longer require the presence of the expert at the hearing.

Proposed changes to §107.7(4) and (6) conform the sections to Government Code amendments effective September 1, 1999. Other proposed changes to §107.7 allow hearings under both the lemon law and general warranty complaints and add language conforming the section to statutory time limit and appeal provisions contained in the Government Code and the Motor Vehicle Commission Code. Proposed amendments to §107.8 state that the section only applies to lemon law (§6.07) complaints unless otherwise indicated, and conforms the overall application of the section relating to serious safety hazards to the language in the statute. Additional proposals no longer set out the items included in the purchase price of a vehicle, but continue to exclude interest, finance charges and insurance premiums from the purchase price. The proposal also includes converters and distributors as entities who may have obligations under the section, as set out in the statute. The proposed amendment to §107.8(9) conforms the section to the current practice of allowing reconsideration of the repurchase price for damage to the vehicle after the date of the hearing, instead of the date of delivery to the owner, since damage between the date of delivery and the date of hearing is considered at the hearing. Proposed changes to §107.8(10) make it clear that the Board will issue a written order in both lemon law and warranty performance complaints when a hearing is held.

Proposed amendments to §107.9 require that incidental expenses be reasonable and verified and make it clear that incidental expenses are not limited to the ones listed in the section. Other changes set out loss or damage to personal property, service contracts less cancellation refunds, attorney fees if the Complainant retains counsel after notification that Respondent is represented by counsel, and after-market items as incidental expenses that may be reimbursable. A new provision provides guidance to the hearing examiner in considering whether items or accessories should be reimbursed.

Proposed changes to §107.10 extends the disclosure requirement to all vehicles reacquired by a manufacturer, converter or distributor. The proposed amendments also delete the disclosure statement at Attachment 1 and allow the Board or director to prescribe the manner and form for disclosing that a vehicle has been reacquired. Additional changes clarify that manufacturers must provide information on vehicles transferred from out-of-state and require dealers to complete and return the disclosure statement within 60 days of the sale of a reacquired vehicle. Other proposed changes remove non-original equipment manufacturer items or accessories from manufacturer warranty requirements and clarify that the Board, through its director, may provide or approve the warranty form.

The proposed amendment to §107.11 clarifies that the director shall provide the Board with information about complaints resolved before and after hearings are set, rather than formal and informal resolutions of complaints.

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

Mr. Bray has also determined that for each year of the first five years the sections are in effect, the anticipated public benefit of the amendments to Chapter 107 will be to provide a clearer understanding of the hearings process for lemon law and warranty performance complaints and conserve the time and resources of the agency and entities appearing before it. The amendments will also create better notification to consumers concerning reacquired vehicles. There will be no effect on small businesses. Anticipated economic cost to persons who are required to comply with the sections as proposed is indeterminate, since manufacturers, converters and distributors may have to pay more to reimburse incidental expenses on a case-by-case basis and will incur additional minimal expense in meeting disclosure requirements for all reacquired vehicles instead of only those vehicles reacquired pursuant to final order. Mr. Bray has also certified that there will be no impact on local economies or overall employment as a result of enforcing or administering the sections.

Comments (15 copies) may be submitted to Brett Bray, Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas, 78768, (512) 416-4910. The Motor Vehicle Board will consider adoption of the proposals at its meeting on November 4, 1999. The deadline for receipt of comments on the proposed amendments is 5:00 p.m. on October 25, 1999.

The amendments are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules as necessary and convenient to effectuate the provisions of the Act and to govern practice and procedure before the agency.

Motor Vehicle Commission Code §3.08(i) and §6.07 are affected by the proposed amendments.

§107.1. Objective.

It is the objective of these sections to implement the intent of the legislature as declared in the Texas Motor Vehicle Commission Code[~~,~~] (TMVCC)§3.06 and §6.07(e), by prescribing rules to provide a simplified and fair procedure for the enforcement and implementation of the Texas lemon law (TMVCC, §6.07) and consumer complaints covered by general warranty agreements[~~,~~] (TMVCC, §3.08(i)) including the processing of complaints, the conduct of hearings, and the disposition of complaints filed by owners of [~~new~~] motor vehicles seeking relief under these provisions of the Code.

§107.2. Filing of Complaints.

(a) Complaints for relief under the lemon law must be in writing and filed with the Board [~~commission~~] at its office in Austin. Complaints may be in letter form or any other written format or may be submitted on complaint forms provided by the Board [~~commission~~].

(b) Complaints should state sufficient facts to enable the Board [~~commission~~] and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law.

(c) Complaints should [~~must~~] provide the following information:

(1) name, address, and phone number of vehicle owner;

(2) identification of vehicle by make, model, and year, and manufacturer's vehicle identification number;

(3) type of warranty coverage;

(4) name and address of dealer, or other person, from whom vehicle was purchased or leased, including the name and address of the current lessor, if applicable;

(5) date of delivery of vehicle to original owner; and in the case of a demonstrator, the date the vehicle was placed into demonstrator service;

(6) vehicle mileage at time vehicle was purchased or leased, mileage when problems with vehicle were first reported, name of dealer or manufacturer's, converter's, or distributor's agent to whom problems were first reported, and current mileage;

(7) identification of existing problems and brief description of history of problems and repairs on vehicle, including date and mileage of each repair, with copies of repair orders where possible;

(8) date on which written notification of complaint was given to the vehicle manufacturer, converter, or distributor, and if the vehicle has been inspected by manufacturer, converter, or distributor, the date and results of such inspection;

(9) any other information which the complainant believes to be pertinent to the complaint.

(d) The Board's [~~commission's~~] staff will provide information concerning the complaint procedure and complaint forms to any person requesting information or assistance.

(e) The Texas Motor Vehicle Commission Code (TMVCC) §6.07 [~~lemon law~~] complaint filing fee [~~of $75~~] should be remitted with the complaint by check or money order [~~payable to the Texas Motor Vehicle Commission~~]. No filing fee is required for a TMVCC §3.08(i) complaint. The filing fee is nonrefundable, but a complainant who prevails in a [~~lemon law~~] case is entitled to reimbursement of the amount of the filing fee. Failure to remit the filing fee with the complaint will result in delaying the commencement of the 150-day requirement provided in §107.6(11) of this title (relating to Hearings) and may result in dismissal of the complaint.

§107.3. Review of Complaints.

All complaints will be reviewed promptly by the Board's [~~commission's~~] staff to determine whether they satisfy the requirements of the Texas Motor Vehicle Commission Code §3.08(i) or §6.07 [~~lemon law~~].

(1) If it cannot be determined whether a complaint satisfies the requirements of §3.08(i) or §6.07, [~~the lemon law,~~] the complainant will be contacted for additional information.

(2) If it is determined that the complaint does not meet the requirements of §3.08(i) or §6.07, [~~the lemon law,~~] the complainant will be notified of this fact.

(3) If it is determined that the complaint does meet the requirements of §3.08(i) or §6.07, [~~the lemon law,~~] the complaint will be processed in accordance with the [~~following~~] procedures [~~in §§107.4-107.9 of this title (relating to Notification of Manufacturer and Distributor; Mediation, Settlement; Hearings; Hearing Officer's Report; Decisions; and Compliance)~~] set forth in this chapter.

(4) For purposes of §6.07(h), the commencement of a proceeding means the filing of a complaint with the Board, [~~commission,~~] and the date of filing is determined by the date of receipt by the Board [~~commission~~].

§107.4. Notification to Manufacturer, Converter, or [~~and~~] Distributor.

Upon receipt of a complaint for relief under the Texas Motor Vehicle Commission Code §3.08(i) or §6.07, [~~lemon law,~~] notification thereof, with a copy of the complaint, will be given to the appropriate manufacturer, converter, or distributor [~~against whom the complaint is made~~], and a response to the complaint will be requested. A copy of the complaint and notification thereof will also be provided to the selling dealer and any other dealers that have been involved with the complaint and a response may be requested. [~~Notification of the complaint and a request for a response will also be given to the selling dealer and any other dealer that has been involved with the complaint.~~]

§107.5. Mediation; Settlement.

If, from a review of the complaint and the responses received from the manufacturer, converter, distributor, or dealer, it appears to the Board [~~commission~~] staff that a settlement or resolution of the complaint may be possible without the necessity for a hearing, the Board [~~commission~~] staff will [~~contact all parties and~~] attempt to effect a settlement or resolution of the complaint [~~in a manner satisfactory to the parties~~].

§107.6. Hearings.

Complaints which satisfy the jurisdictional requirements of the Texas Motor Vehicle Commission Code, §3.08(i) and §6.07, will be set for hearing and notification of the date, time, and place of the hearing will be given to all parties by certified mail.

(1) Where possible, and subject to the availability of Board [~~commission~~] personnel and funds, hearings will be held in the city where the complainant resides or at a location reasonably convenient to the complainant.

(2) Hearings will be scheduled at the earliest date possible, provided that ten days prior notice, or as otherwise provided by law, must be given to all parties. [~~A notice of hearing will also be~~

provided to a dealer identified as a party who will be requested to have a representative appear at the hearing.]

(3) Hearings will be conducted by Board [commission] staff hearing officers or by independent hearing officers designated by the [executive] director of the Board [commission].

(4) Hearings will be informal [in nature], it being the intent of this section [the lemon law] to provide a procedure and forum which does not necessitate the services of attorneys and which does not involve strict legal formalities applicable to trials in county or district court.

(5) The parties have the right to be represented by attorneys at a hearing, although attorneys are not necessary [in hearings on lemon law complaints]. Any party who intends to be represented by an attorney at a hearing must notify the Board [commission] and the other party at least five business days prior to the hearing and failure to do so will constitute grounds for postponement of the hearing if requested by the other party.

(6) The parties have the right to present their cases in full, including testimony from witnesses; documentary evidence such as repair orders, warranty documents, vehicle sales contract, etc. , subject to the hearing officer's rulings.

(7) Each party will be subject to being questioned by the other party, within limits to be governed by the hearing officer.

(8) The complainant will be required to bring the vehicle in question to the hearing for the purpose of having the vehicle inspected and test driven, unless otherwise ordered by the hearing officer upon a showing of good cause as to why the complainant should not be required to bring the vehicle to the hearing.

(9) The Board [commission] may have the vehicle in question inspected prior to the hearing by an [independent] expert, where the opinion of such expert will be of assistance to the hearing officer and the Board [commission] in arriving at a decision. Any such inspection shall be made upon prior notice to all parties who shall have the right to be present at such inspection, and copies of any findings or report resulting from such inspection will be provided to all parties prior to, or at, the hearing. [Any such expert will be present at the hearing to present his report on the inspection of the vehicle and to respond to questions by the parties.]

(10) All hearings will be recorded on tape by the hearing officer. Copies of the tape recordings of a hearing will be provided to any party upon request and upon payment as provided by law. [for the cost of the tapes.]

(11) All hearings will be conducted expeditiously. However, if a Board hearing [commission hearings] officer has not issued a [proposal for] decision within 150 days after the Texas Motor Vehicle Commission Code §6.07 complaint and filing fee were received, Board [commission] staff shall notify the parties by certified mail that complainant has a right to file a civil action in state district court to pursue [his] rights under §6.07[the lemon law]. The 150-day period shall be extended upon request of the complainant or if a delay in the proceeding is caused by the complainant. The notice will inform the complainant of the [his] right to elect to continue the [his] lemon law complaint through the Board. [commission if he chooses.]

§107.7. Contested Cases: Decisions and Final Orders.

To expedite the resolution of Texas Motor Vehicle Commission Code §3.08(i) and §6.07 [lemon law] cases, the [executive] director is authorized to conduct hearings and issue final orders for the enforcement of these sections, including the delegation of this duty to hearing officers. [delegate final decision-making authority to hearings officers.] Review of the hearing [hearings] officers' decisions and final orders shall be according to the procedures set forth as follows.

(1) A hearing [hearings] officer will prepare a written decision and final order as soon as possible but not later than 60 days after the hearing is closed, or as otherwise provided by law. The decision and order will include the hearing [hearings] officer's findings of fact and conclusions of law.

(2) The decision and final order shall be sent to all parties of record by certified mail.

(3) The decision and order is final and binding on the parties, in the absence of a timely motion for rehearing, on the expiration of the period for filing a motion for rehearing.

(4) A party who disagrees with the decision and final order may file a motion for rehearing within 20 days from the date of the notification [mailing] of the final order. A motion for rehearing must include all the specific reasons, exceptions, or grounds that are asserted by a party as the basis of the request for a rehearing. It shall recite, if applicable, the specific findings of fact, conclusions of law, or any other portions of the decision to which the party objects. Replies to a motion for rehearing must be filed with the agency within 30 days after the date of the notification [mailing] of the final order. A party or attorney of record notified by mail is presumed to have been notified on the third day after the date on which the order was mailed.

(5) A motion for rehearing may be directed either to the [executive] director or to the Board [commission], as a body, at the election of the party filing the motion. If the party filing the motion does not include a specific request for a rehearing by the members of the Board [commission], the motion shall be deemed to be a request for a rehearing by the [executive] director.

(6) The [executive] director or the Board [commission], as appropriate, must act on the motion within 45 days after the date of notification [mailing] of the final order , or as otherwise provided by law, or it is overruled by operation of law. The [executive] director or the Board [commission], as appropriate, may, by written order, extend the period for filing, replying to, and taking action on a motion for rehearing, not to exceed 90 days after the date of notification of [mailing] the final order. In the event of an extension of time, the motion for rehearing is overruled by operation of law on the date fixed by the written order of extension, or in the absence of a fixed date, 90 days after the date of notification [mailing] of the final order.

(7) If the [executive] director or the Board [commission] grants a motion for rehearing, the parties will be notified by first class mail. A rehearing before the [executive] director will be scheduled as promptly as possible. A rehearing before the Board [commission] will be scheduled at the earliest possible meeting of the Board [commission]. After rehearing, the [executive] director or Board [commission] shall issue a final order and any additional findings of fact or conclusions of law necessary to support the decision or order. The [executive] director or the Board [commission] may also issue an order granting the relief requested in a motion for rehearing or replies thereto without the need for a rehearing. If a motion for rehearing and the relief requested is denied, an order so stating will be issued.

(8) A party [person] who has exhausted all administrative remedies, and who is aggrieved by a final decision in a contested case from which appeal may be taken is entitled to judicial review pursuant to Section 7.01 of the Texas Motor Vehicle Commission Code, under the substantial evidence rule. The petition shall be filed in a district court of Travis County or in the Court of Appeals for the

Third Court of Appeals District within 30 days after the decision or order of the agency is final and appealable. A copy of the petition must be served on the agency and any other parties of record. After service of the petition on the agency and within the time permitted for filing an answer, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding. If the court orders new evidence to be presented to the agency, the agency may modify its findings and decision or order by reason of the new evidence, and shall transmit the additional record to the court.

§107.8. Decisions.

Unless otherwise indicated, this section applies to decisions made pursuant to Texas Motor Vehicle Commission Code §6.07. [~~Any decisions by the Board and recommended decision by a hearing officer~~] Decisions shall give effect to the presumptions provided in the Texas Motor Vehicle Commission Code, §6.07(d), where applicable.

(1) If it is found that the manufacturer, distributor, or converter is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect in the complainant's vehicle which creates a serious safety hazard or substantially impairs the use[~~,~~] or market value[~~, or safety~~] of the vehicle after a reasonable number of attempts, and that the affirmative defenses provided under the Texas Motor Vehicle Commission Code, §6.07(c), are not applicable, the Board [~~commission~~] shall order the manufacturer, distributor, or converter to replace the vehicle with a comparable vehicle, or accept the return of the vehicle from the owner and refund to the owner the full purchase price of the vehicle, less a reasonable allowance for the owner's use of the vehicle.

[~~(A) In a complaint involving a defect or condition that creates a serious safety hazard in the vehicle, an owner shall be deemed to have given the manufacturer, distributor, or converter a reasonable number of attempts to repair the vehicle if he reported and allowed an opportunity to repair the defect or condition at least once during the period of 12 months or 12,000 miles, whichever occurs first, immediately following the date of delivery and at least once more in the period of 12 months or 12,000 miles, whichever occurs first, following the first repair attempt.~~]

[~~(B) A defect or condition that creates a serious safety hazard is one that results in a life-threatening malfunction or nonconformity that substantially impedes a person's ability to control or operate a motor vehicle for ordinary use or intended purposes or that creates a substantial risk of fire or explosion.~~]

(2) In any decision in favor of the complainant, the Board [~~commission~~] will accommodate the complainant's request with respect to replacement or repurchase of the vehicle, to the extent possible.

(3) Where a refund of the purchase price of a vehicle is ordered, the purchase price shall be the amount of the total purchase price of the vehicle, [~~and shall include the amount of the sales taxes and title, registration, and documentary fees,~~] but shall not include the amount of any interest or finance charge or insurance premiums. The award to the vehicle owner shall include reimbursement for the amount of the lemon law complaint filing fee paid by or on behalf of the vehicle owner. The refund shall be made payable to the vehicle owner and the lienholder, if any, as their interests require.

(4) Except in cases where clear and convincing evidence shows that the vehicle has a longer or shorter expected useful life than 100,000 miles, the reasonable allowance for the owner's use of the vehicle shall be that amount obtained by adding the following:

(A) the product obtained by multiplying the purchase price of the vehicle, as defined in paragraph (3) of this section, by a fraction having as its denominator 100,000 and having as its numerator the number of miles that the vehicle traveled from the time of delivery to the owner to the first report of the defect or condition forming the basis of the repurchase order; and

(B) 50% of the product obtained by multiplying the purchase price by a fraction having as its denominator 100,000 and having as its numerator the number of miles that the vehicle traveled after the first report of the defect or condition forming the basis of the repurchase order. The number of miles during the period covered in this paragraph shall be determined from the date of the first report of the defect or condition forming the basis of the repurchase order through the date of the TMVC hearing.

(5) Except in cases where clear and convincing evidence shows that the vehicle has a longer or shorter expected useful life than 120 months, the reasonable allowance for the owner's use of the towable recreational vehicle shall be the greater of 10% of the purchase price, as defined in paragraph (3) of this section, or that amount obtained by adding the following:

(A) The product obtained by multiplying the purchase price of the towable recreational vehicle, as defined in paragraph (3) of this section, by a fraction having as its denominator 120 months, except the denominator shall be 60 months, if the towable recreational vehicle is occupied on a full time basis, and having as its numerator the number of months from the time of delivery to the owner to the first report of the defect or condition forming the basis of the repurchase order; and

(B) 50% of the product obtained by multiplying the purchase price by a fraction having as its denominator 120 months, except the denominator shall be 60 months, if the towable recreational vehicle is occupied on a full time basis, and having as its numerator the number of months of ownership after the first report of the defect or condition forming the basis of the repurchase order. The number of months during the period covered in this paragraph shall be determined from the date of the first report of the defect or condition forming the basis of the repurchase order through the date of the Board hearing.

(6) Except in cases involving unusual and extenuating circumstances, supported by a preponderance of the evidence, where refund of the purchase price of a leased vehicle is ordered, the purchase price shall be allocated and paid to the lessee and the lessor, respectively as follows.

(A) The lessee shall receive the total of:

(i) all lease payments previously paid by him to the lessor under the terms of the lease; and

(ii) all sums previously paid by him to the lessor in connection with the entering into the lease agreement, including, but not limited to, any capitalized cost reduction, down payment, trade-in, or similar cost, plus sales tax, license and registration fees, and other documentary fees, if applicable.

(B) The lessor shall receive the total of:

(i) the actual price paid by the lessor for the vehicle, including tax, title, license, and documentary fees, if paid by lessor, and as evidenced in a bill of sale, bank draft demand, tax collector's receipt, or similar instrument; plus

(ii) an additional 5.0% of such purchase price plus any amount or fee, if any, paid by lessor to secure the lease or interest in the lease;

(iii) provided, however, that a credit, reflecting all of the payments made by the lessee, shall be deducted from the actual purchase price which the manufacturer, converter, or distributor is required to pay the lessor, as specified in causes (i) and (ii) of this subparagraph.

(C) When the Board [~~commission~~] orders a manufacturer, converter, or distributor to refund the purchase price in a lease vehicle transaction, the vehicle shall be returned to the manufacturer, converter or distributor with clear title upon payment of the sums indicated in subparagraphs (A) and (B) of this paragraph. The lessor shall transfer title of the vehicle to the manufacturer, converter, or distributor, as necessary in order to effectuate the lessee's rights under this rule. In addition, the lease shall be terminated without any penalty to the lessee.

(D) Refunds shall be made to the lessee, lessor, and any lienholders as their interest may appear. The refund to the lessee under subparagraph (A) of this paragraph shall be reduced by a reasonable allowance for the lessee's use of the vehicle. A reasonable allowance for use shall be computed according to the formula in paragraph (4) or (5) of this section, using the amount in subparagraph (B) (i) of this paragraph as the applicable purchase price.

(7) In any award in favor of a complainant, the [~~executive~~] director may require the dealer involved to reimburse the complainant, manufacturer, [~~distributor, or~~] converter, or distributor, for the cost of any items or options added to the vehicle but only to the extent that one or more of such items or options contributed to the defect that served as the basis for the order of repurchase or replacement. In no event shall this paragraph be interpreted to mean that a manufacturer, [~~distributor, or~~] converter, or distributor, will be required to repurchase a vehicle due to a defect or condition that was solely caused by a dealer add-on item or option.

(8) If it is found by the Board [~~commission~~] that a complainant's vehicle does not qualify for replacement or repurchase, then the Board [~~commission~~] shall enter an order dismissing the complaint insofar as relief under the Texas Motor Vehicle Commission Code §6.07(c) [~~lemon law~~] is concerned. However, the Board [~~commission~~] may enter an order in any proceeding, where appropriate, requiring repair work to be performed or other action taken to obtain compliance with the manufacturer's, [~~distributor's, or~~] converter's, or distributor's, warranty obligations.

(9) If the vehicle is substantially damaged or there is an adverse change in its condition, beyond ordinary wear and tear, from the date of the hearing [~~delivery to the owner~~] to the date of repurchase, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party shall have the right to request reconsideration by the Board [~~commission~~] of the repurchase price contained in the final order.

(10) The Board [~~commission~~] will issue a written order in each Texas Motor Vehicle Commission Code §3.08(i) or §6.07 case in which a hearing is held and a copy of the order will be sent to all parties.

§107.9. Incidental Expenses.

(a) When a refund of the purchase price of a vehicle is ordered, the complainant shall be reimbursed for certain incidental expenses incurred by the complainant from loss of use of the motor vehicle because of the defect or nonconformity which is the basis of the complaint. The expenses must be reasonable and verified [~~verifiable~~] through receipts or similar written documents. Reimbursable incidental expenses include but are not limited to the following costs:

(1) [~~reasonable cost of~~] alternate transportation;

(2) [~~charges for~~] towing;

(3) [~~costs of~~] telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; [~~and~~]

(4) [~~reasonable costs of~~] meals and lodging necessitated by the vehicle's failure during out-of-town trips;

(5) loss or damage to personal property;

(6) service contracts less cancellation refunds;

(7) attorney fees if the complainant retains counsel after notification that the respondent is represented by counsel; and

(8) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use.

(b) [~~Only reasonable incidental expenses shall be reimbursed to a complainant.~~] Incidental expenses shall be included in the final repurchase price required to be paid by a manufacturer, [~~distributor, or~~] converter, or distributor to a prevailing complainant or in the case of a vehicle replacement, shall be tendered to the complainant at the time of replacement.

(c) In regards to the cost of items or accessories presented under subsection (a)(8) of this section, the hearing officer shall consider the permanent nature, functionality and value added by the items or accessories and whether the items or accessories are original equipment manufacturer parts (OEM) or non-OEM parts.

§107.10. Compliance with Order Granting Relief.

Compliance with the Board's [~~board's~~] order will be monitored by the Board [~~board~~].

(1) A complainant is not bound by the Board's [~~commission's~~] decision and order and may either accept or reject the decision.

(2) If a complainant does not accept the Board's [~~commission's~~] final decision, the proceeding before the Board [~~commission~~] will be deemed concluded and the complaint file closed.

(3) If the complainant accepts the Board's [~~commission's~~] decision, then the manufacturer, [~~distributor, or~~] converter, or distributor and the dealer to the extent of the dealer's responsibility, if any, shall immediately take such action as is necessary to implement the Board's [~~commission's~~] decision and order.

(4) If a manufacturer, converter, or distributor replaces or repurchases a vehicle pursuant to a Board order, reacquires a vehicle to settle a Texas Motor Vehicle Commission Code §3.08(i) or §6.07 complaint, or brings a vehicle into the state of Texas which has been reacquired to resolve a warranty claim in another jurisdiction, [~~If complainant's vehicle is replaced or repurchased pursuant to a board order,~~] the manufacturer, [~~distributor, or~~] converter, or distributor shall, prior to resale of such vehicle, issue a disclosure statement [~~in the format of Attachment 1 or~~] on a form provided by or approved by the Board through its director [~~board~~]. In addition, the manufacturer, [~~distributor, or~~] converter, or distributor reacquiring [~~repurchasing or replacing~~] the vehicle shall affix a disclosure label provided by or approved by the Board through its director on an approved location in or on the vehicle. Both the disclosure statement and the disclosure label shall accompany the vehicle through the first

retail purchase [after the board order]. Neither the manufacturer, [distributor,] converter, or distributor nor any person holding a license or general distinguishing number issued by the Board under the Code or Chapter 503, Transportation Code, shall remove or cause the removal of the disclosure label until delivery of the vehicle to the first retail purchaser. A manufacturer, [distributor or] converter, or distributor shall provide the Board [board], in writing, the name, address and telephone number of any [the] transferee, regardless of residence, to whom the manufacturer, distributor or converter, as the case may be, transfers the vehicle within 60 days of each transfer. The selling dealer shall return the completed disclosure statement to the Board within 60 days of the retail sale of a reacquired vehicle. Any manufacturer, [distributor,] converter, or distributor or holder of a general distinguishing number who violates this section is liable for a civil penalty or other sanctions prescribed by the Code. In addition, the manufacturer, [distributor, or] converter, or distributor must repair the defect or condition in the vehicle that resulted in the vehicle being reacquired [in the repurchase or replacement] and issue, at a minimum, a basic warranty (12 months/12,000 mile, whichever comes first), except for non-original equipment manufacturer items or accessories, on a form provided by or approved by the Board through its director, [board] which warranty shall be provided to the first retail purchaser of the vehicle [following the board order].
[Figure: 16 TAC §107.10(4)]

[(5) If a manufacturer, distributor, or converter brings a vehicle into this state, which has been reacquired under the lemon law of another jurisdiction, the manufacturer, distributor, or converter shall, prior to the first retail sale, issue a disclosure statement on a form provided by or approved by the board. In addition, the manufacturer, distributor, or converter repurchasing or replacing the vehicle shall affix a disclosure label provided by or approved by the board through its director on an approved location in or on the vehicle. Both the disclosure statement and the disclosure label shall accompany the vehicle through the first retail purchase. Neither the manufacturer, distributor, converter nor any person holding a license or general distinguishing number issued by the board under the Code or Chapter 503, Transportation Code, shall remove or cause the removal of the disclosure label until delivery to the first retail purchaser. Any manufacturer, distributor, converter, or holder of a general distinguishing number who violates this section is liable for a civil penalty or other sanction prescribed by the Code.]

(5) [(6)] In the event of any conflict between this rule and the terms contained in a cease and desist order, the terms of the cease and desist order shall prevail.

(6) [(7)] The failure of any manufacturer, [distributor,] converter, distributor or dealer to comply with a decision and order of the Board [board] within the time period prescribed in the order may subject the manufacturer, [distributor,] converter, or distributor, or dealer to formal action by the Board [board] and the assessment of civil penalties or other sanctions prescribed by the Texas Motor Vehicle Commission Code for the failure to comply with an order of the Board.

§107.11. Reports to Board [Commission].

The [executive] director shall inform the Board [commission] concerning the administration and enforcement of the lemon law. The director [He] shall provide monthly reports to the Board [commission] which include data about the number of complaints received, number of complaints resolved before a hearing is set and after a hearing is set, [informally and formally,] pursuant to written orders, number of vehicles ordered repurchased, and any other information that may be requested by the Board [commission].

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

Filed with the Office of the Secretary of State, on September 13, 1999.

TRD-9905892
Brett Bray
Division Director
Texas Motor Vehicle Board
Proposed date of adoption: November 4, 1999
For further information, please call: (512) 416-4899

♦ ♦ ♦

16 TAC §107.12

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

The Motor Vehicle Board of the Texas Department of Transportation proposes the repeal of §107.12, Contested Cases under General Warranty Provisions: Decisions and Final Orders.

The Board held a public hearing on the proposed repeal and other amendments to Chapter 107 at its September 9, 1999 meeting and tabled the matter. The previously published proposed repeal and amendments in the July 23, 1999 issue of the *Texas Register* (24 TexReg 5644) are withdrawn and simultaneously republished for consideration with minor changes from the original publication.

The Appropriations Act of 1997, House Bill 1, Article IX, §167 requires that each state agency review and consider readoption of each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The Board conducted a review of Title 16, Chapter 107, relating to Warranty Performance Obligations, at its June 10, 1999 meeting.

As a result of its review, the Board determined that §107.12, Contested Cases under General Warranty Provisions: Decisions and Final Orders, is unnecessary, since proposed amendments to §107.7 incorporate the authority contained in §107.12. Section 107.12 states that the director has authority to conduct hearings and issue final orders in warranty performance complaints filed under Section 3.08(i) of the Texas Motor Vehicle Commission Code (Code). Amendments to §107.7 now authorize the director to conduct hearings and issue final orders in complaints filed under both §6.07 and §3.08(i) of the Code, relating to lemon law and warranty performance complaints respectively, making §107.12 redundant.

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

Mr. Bray has also determined that for each year of the first five years the repeal is in effect, the anticipated public benefit of the repeal of §107.12 and simultaneous amendment of §107.7 will be to simplify the procedures for filing and hearing a warranty performance complaint and conserve the time and resources of the agency and entities appearing before it. There will be

no effect on small businesses and no anticipated economic cost to persons who are required to comply with the repeal as proposed. Mr. Bray has also certified that there will be no impact on local economies or overall employment as a result of enforcing or administering the repeal.

Comments (15 copies) may be submitted to Brett Bray, Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas, 78768, (512) 416-4910. The Motor Vehicle Board will consider adoption of the repeal at its meeting on November 4, 1999. The deadline for receipt of comments on the proposed repeal is 5:00 p.m. on October 25, 1999.

The repeal is proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules as necessary and convenient to effectuate the provisions of the Act and to govern practice and procedure before the agency.

Motor Vehicle Commission Code §3.08(i) and §6.07 are affected by the proposed repeal.

§107.12. Contested Cases under General Warranty Provisions: Decisions and Final Orders.

This 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 13, 1999.

TRD-9905890
Brett Bray
Division Director
Texas Motor Vehicle Board
Proposed date of adoption: November 4, 1999
For further information, please call: (512) 416-4899

♦ ♦ ♦

Chapter 111. GENERAL DISTINGUISHING NUMBERS

16 TAC §111.8, §111.17

The Texas Motor Vehicle Board proposes amendments to §111.8, Temporary Cardboard Tags, and new §111.17, Metal Converter License Plates and Temporary Cardboard Tags, to implement the provisions of House Bill 2539, which creates a new type of metal plate and cardboard tag for licensed converters. The amendments and new section set out the design of cardboard tags and proper use of metal plates and cardboard tags by converters.

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

Mr. Bray has also determined that for each of the first five years the rule is in effect the public benefit anticipated from enforcement of the proposed rule will be a clearer understanding of the proper use of metal converter plates and a uniform design for converter temporary cardboard tags. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments (15 copies) may be submitted to Brett Bray, Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas, 78768, (512) 416-4910. The Motor Vehicle Board will consider the adoption of the proposed rules at its meeting on November 4, 1999. The deadline for receipt of comments is October 25, 1999. Please submit written requests to testify by facsimile to Division offices at (512) 416-4890 by October 6, 1999.

The amendments and new rule are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules as necessary and convenient to effectuate the provisions of this act.

Texas Motor Vehicle Commission Code Sections 503.0618 and 603.0625 of the Transportation Code are affected by the proposed amendments and new rule.

§111.8. Temporary Cardboard Tags.

(a) Motor vehicle, travel trailer, [~~and~~] trailer/semitrailer, and converter tags shall be printed on not less than six-ply cardboard with bolt holes to be horizontally punched on 7-inch [~~seven-inch~~] centers and vertically punched on 4 1/2-inch centers and the numerals in the expiration date shall not be less than two inches high. Motorcycle tags shall be printed on not less than six-ply cardboard with bolt holes to be horizontally punched on 5 3/4-inch centers and vertically punched on 2 3/4-inch centers and the numerals in the expiration date shall not be less than one inch high. Homemade cardboard tags or cardboard tags which have buyer's tag information printed on one side and dealer's tag information printed on the other side are not acceptable.

(b) The following appendices indicate the design and the instructions for printing and use of each of the respective temporary tags:

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

(5) Appendix D-1–Converter (design); Appendix D-2–Converter (instructions).
Figure 9: 16 TAC §111.8(b)(5)
Figure 10: 16 TAC §111.8(b)(5)

(c) (No change.)

§111.17. Metal Converter's License Plates and Temporary Cardboard Tags.

(a) Metal converter's license plates shall be attached to the rear license plate holder of vehicles on which such plates are to be displayed pursuant to Transportation Code, § 503.0618.

(b) Converter's temporary cardboard tags may be displayed either in the rear window or on the rear license plate holder of unregistered vehicles. When displayed in the rear window, the tag shall be attached in such a manner that it is clearly visible and legible when viewed from the rear of the vehicle.

(c) Converter's temporary cardboard tags may only be used on unregistered vehicles by the converter or the converter's employees to:

(1) demonstrate or cause to be demonstrated the vehicle to a prospective buyer who is an employee of a franchised motor vehicle dealer;

(2) convey or cause to be conveyed the vehicle:

(A) from one of the converter's places of business in this state to another of the converter's places of business in this state;

(B) from the converter's place of business to a place the vehicle is to be assembled, repaired, reconditioned, modified, or serviced;

(C) from the state line or a location in this state where the vehicle is unloaded to the converter's place of business;

(D) from the converter's place of business to a place of business of a franchised motor vehicle dealer; or

(E) to road test the vehicle.

(d) Prospective buyers who are employees of a franchised dealer may operate a vehicle displaying converter's temporary cardboard tags during a demonstration.

(e) A vehicle being conveyed while displaying a converter's temporary cardboard tag is exempt from the inspection requirements of Chapter 548 of the Transportation Code.

(f) Converter's temporary cardboard tags may not be used as authorization to operate a vehicle for the converter's or a converter's employee's personal use.

(g) Each unregistered vehicle being transported by a licensed converter utilizing the full mount method, the saddle mount method, the tow bar method, or any combination thereof, shall have a converter's temporary cardboard tag affixed to that vehicle. If the vehicle being transported is of a type which is prohibited from operating upon the public streets and highway (i.e., off-highway vehicle or self-propelled machine) and, thus, cannot qualify for registration, a cardboard tag shall be displayed thereon; and such tag shall be marked in bold letters with the notation "For Off Highway Use Only."

(h) Metal converter's license plates and temporary cardboard tags may be displayed only on the type of vehicle that the converter is engaged in the business of assembling or modifying.

(i) When an unregistered new motor vehicle is sold to a converter, the selling dealer shall remove a dealer's temporary cardboard tag. In such instances, the selling dealer may attach a buyer's temporary cardboard tag to the vehicle; or the purchasing converter may display a converter's temporary cardboard tag or metal converter plate on the vehicle.

(j) A converter may have printed orange converter's temporary cardboard tags according to the specifications of §111.8(b)(5) of this title (relating to.

(k) A converter shall maintain a record of all converter metal plates issued to that converter and as to each vehicle such record shall consist of:

(1) the assigned metal plate number;

(2) the make;

(3) the vehicle identification number; and

(4) the name of the person in control.

(l) The converter's records as referenced in subsection (k) of this section, shall be available at the converter's location during normal working hours for review by a representative of the department. Converter metal plates which cannot be accounted for shall no longer be valid for use and shall be voided.

This 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 13, 1999.

TRD-9905888
Brett Bray
Division Director
Texas Motor Vehicle Board
Proposed date of adoption: November 4, 1999
For further information, please call: (512) 416-4899

♦ ♦ ♦

TITLE 19. EDUCATION

Part 2. TEXAS EDUCATION AGENCY

Chapter 61. SCHOOL DISTRICTS

Subchapter CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

19 TAC §61.1034, §61.1035

The Texas Education Agency (TEA) proposes new §61.1034 and §61.1035, concerning school facilities. The new sections create an allotment for new instructional facilities as authorized under Texas Education Code (TEC), §42.158, and a state allotment for the payment of existing debt as authorized under TEC, Chapter 46.

Senate Bill (SB) 4, 76th Texas Legislature, 1999, created the new instructional facility allotment (NIFA) within the first tier of the Foundation School Program pursuant to TEC, Chapter 42. The NIFA provides funding of $250 for each student in average daily attendance at a new instructional facility allotment during the first school year of operation, and $250 for each new student in attendance at the facility for the second school year.

SB 4, 76th Texas Legislature, 1999, created the program of assistance with payment of existing debt as a third tier of the Foundation School Program pursuant to TEC, Chapter 46. The new tier, called the existing debt allotment (EDA), provides a guaranteed amount of state and local funds for each cent of tax effort to pay the principal and interest on eligible bonds. The amount of state support, subject to certain limitations, is determined by formula. Proposed new §61.1035 explains the eligibility criteria for the EDA, limits on assistance, data elements, payment cycle, use of funds, and refinancing of eligible debt.

Joe Wisnoski, coordinator for school finance and fiscal analysis, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the new sections.

Mr. Wisnoski and Criss Cloudt, associate commissioner for policy planning and research, have determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be providing support to school districts for costs associated with opening new facilities and for debt service and alleviating the tax burden on local taxpayers. The sections would also clarify the changes authorized by SB 4, 76th Texas Legislature, 1999, for school districts. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed new sections.

Comments on the proposal may be submitted to Criss Cloudt, Policy Planning and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@tmail.tea.state.tx.us* or faxed to (512) 475-3499. All requests for a public hearing on the proposed sections submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of a proposed change in the sections has been published in the *Texas Register*.

The new sections are proposed under the Texas Education Code, §42.158, as added by Senate Bill 4, 76th Texas Legislature, 1999, which authorizes the commissioner of education to adopt rules for implementation of the new instructional facilities allotment; and Texas Education Code, §46.031, as added by Senate Bill 4, 76th Texas Legislature, 1999, which authorizes the commissioner of education to adopt rules for the administration of assistance with payment of existing debt.

The new sections implement the Texas Education Code, §42.158 and §46.031.

§61.1034. New Instructional Facility Allotment.

(a) Definitions and eligibility. The following definitions and eligibility criteria apply to the new instructional facility allotment (NIFA) in accordance with Texas Education Code (TEC), §42.158.

(1) A facility eligible for the NIFA is a newly constructed instructional site (campus), not occupied prior to the 1999-2000 school year, used for teaching the curriculum required by TEC, Chapter 28. The facility must have a full-time principal, its own campus ID number as designated by the Texas Education Agency (TEA), and its own record of attendance and expenditures that is not a subset of another school budget. With the exception of a covered walkway connecting the new facility to another building, the new facility must be physically separate from other existing school structures. It must have its own assigned instructional staff and instructional program distinct from other facilities, and cannot be a program for students enrolled in another public school (summer school, evening school, etc.). Expansion or renovation of existing facilities, as well as portable and temporary structures, are not eligible for the NIFA.

(2) The allotment for the NIFA is a part of the cost of the first tier of the Foundation School Program (FSP). This allotment is not counted in the calculation of weighted average daily attendance (WADA) for the second tier of the FSP.

(b) Application process. School districts must complete an application process requesting funding pursuant to the NIFA.

(1) The initial (first-year) application must include the following:

(A) a written request for funds;

(B) a brief description and photograph of the newly constructed instructional site;

(C) a copy of contracts that document the nature and dates of the construction; and

(D) an estimate of the number of students in average daily attendance (ADA).

(2) For the 1999-2000 school year, applications must be postmarked by the last day in September in order to qualify for the allotment. For school years beginning with 2000-2001, applications must be postmarked by July 15.

(3) All applications must be submitted to the TEA by certified mail through the U.S. Postal Service or other common postal carrier.

(4) Second-year applications require only the submission of an estimate of students in ADA.

(c) Costs and payments. The cost and payments for the NIFA are determined by the commissioner of education.

(1) If, for all eligible districts combined, the total cost of the NIFA exceeds the amount appropriated, each allotment is reduced so that the total amount to be distributed equals the amount appropriated. Reductions to allotments are made by applying the same number of cents of tax rate in each district to the district's taxable value of property so that the reduced total for all districts equals the amount appropriated. For each district, the taxable value of property is the property value certified by the Comptroller of Public Accounts for the preceding school year as determined under Government Code, Chapter 403, Subchapter M, or, if applicable, a reduced property value that reflects either a rapid decline pursuant to TEC, §42.2521, or a grade level adjustment pursuant to TEC, §42.106.

(2) For the 1999-2000 school year, districts not subject to the requirements of wealth equalization pursuant to TEC, Chapter 41, will begin receiving payments of the NIFA in October based on the estimate of ADA submitted in the funding application. For the remainder of 1999-2000 and for subsequent years, allocations will be made in conjunction with allotments for the FSP in accordance with the district's payment class. For districts that are not subject to the requirements of TEC, Chapter 41, and do not receive payments from the Foundation School Fund, NIFA distributions will correspond to the schedule for payment class 3.

(3) For districts that are required to reduce wealth pursuant to TEC, Chapter 41, any NIFA funds for which the district is eligible are applied as credits to the amounts owed to equalize wealth.

(4) For all districts receiving the NIFA, a final (settle-up) amount earned is determined by the commissioner when final counts of ADA as reported through the Public Education Information Management System (PEIMS) are available for the eligible campus, at the close of business for the school year.

(5) The amount of funds to be distributed for the NIFA to a school district is in addition to any other state aid entitlements.

§61.1035. Assistance with Payment of Existing Debt.

(a) Eligibility. Certain restrictions apply to debt and to school districts eligible for the existing debt allotment (EDA).

(1) Debt eligible for the EDA is an existing obligation of a school district made through the issuance of a bond for instructional or non-instructional purposes pursuant to Texas Education Code (TEC), Chapter 45, Subchapter A, or through the refunding of bonds as defined in TEC, §46.007. Lease-purchase arrangements authorized by Local Government Code, §271.004, are not eligible. Taxes must have been levied for payment of the principal and/or interest on eligible debt in the 1998-1999 school year.

(2) Eligible debt does not include any portion of an existing obligation that has been approved for financial assistance with the instructional facilities allotment (IFA) as defined in §61.1032 of this title (relating to Instructional Facilities Allotment), in accordance with TEC, Chapter 46.

(3) A district must collect its share of the EDA to be eligible for state assistance.

(b) Limits on assistance. The amount of state assistance is limited by the lesser of a calculated existing debt tax rate (EDTR) for eligible debt or an appropriated debt tax limit.

(1) The calculated EDTR is a rate determined with the debt limit resulting from calculations specified in subparagraphs (A) or (B) of this paragraph, as appropriate, multiplied by $100. The product is then divided by an estimate of current average daily attendance (ADA) multiplied by either a $35 yield or a greater amount provided by legislative appropriations.

(A) For the 1999-2000 and 2000-2001 school years, the debt limit on the calculated EDTR is based on the lesser of 1998-1999 or current year debt service.

(i) For this purpose, 1998-1999 debt service is the greater of either:

(I) the actual 1998-1999 debt service payment for bonded debt minus any 1998-1999 state and local shares of the IFA; or

(II) the 1998-1999 interest and sinking fund collection amount minus the 1998-1999 local share of the IFA.

(ii) For this purpose, the current year debt service payment excludes the state and local shares of an IFA for bonded debt for which state aid was paid in 1998- 1999.

(B) Beginning with the 2001-2002 school year, the debt limit on the calculated EDTR is based on the lesser of the current year debt service payment or the interest and sinking fund tax collection amount for eligible bonds for the final year of the preceding fiscal biennium.

(i) For this purpose, the interest and sinking fund tax collection amount excludes any local share of the IFA for the final year of the preceding fiscal biennium.

(ii) For this purpose, the current year debt service payment excludes the state and local shares of an IFA for bonded debt for which state aid was paid in the last year of the preceding biennium.

(2) The EDTR used in the funding formula cannot exceed the appropriated limit ($.12 for 1999-2000 and 2000-2001) or a greater rate as provided by TEC, §46.034(d).

(c) Data and payment cycles. The necessary data elements to calculate state assistance for existing debt and the associated payment cycle are determined by the commissioner of education.

(1) An initial, preliminary payment of state assistance will be made as soon as practicable after September 1 of each year. This payment will be based on an estimate of ADA; the taxable value of property certified by the Comptroller of Public Accounts for the preceding school year as determined in accordance with Government Code, Chapter 403, Subchapter M; and the amount of taxes budgeted to be collected for payment of eligible bonds. Districts will supply information about budgeted taxes in July on a data collection survey.

(2) A final determination of assistance for a school year will be made at the close of business for the current school year when final counts of ADA and collection amounts for eligible debt are available. This determination will also take into account, if applicable, a reduced property value that reflects either a rapid decline pursuant to TEC, §42.2521, or a grade level adjustment pursuant to TEC, §42.106.

(A) Any additional amounts owed will be paid as soon as practicable after the final determination is made.

(B) Any overpayment will be subtracted from the EDA in the subsequent year. If no such assistance is due in the subsequent school year, the Foundation School Fund will be reduced accordingly. If no payments are due from the Foundation School Fund, the district will be notified about the overpayment and must remit that amount to the Texas Education Agency (TEA) no later than three weeks after notification.

(d) Deposit and uses of funds.

(1) Funds received from the state for assistance with existing debt must be deposited in the district's interest and sinking fund and must be taken into account before setting the interest and sinking fund tax rate.

(2) State and local shares of the existing debt allotment must be used for the exclusive purpose of making principal and interest payments on eligible debt.

(e) Refinancing of eligible debt.

(1) A district that refinances eligible debt in part or in full must inform the TEA's division responsible for state funding in writing and must provide appropriate documentation related to the refinancing.

(2) The portion of the debt eligible for state assistance on refunded bonds is subject to the same limits as eligible debt that has not been refinanced.

This 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 13, 1999.

TRD-9905884
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-9701

♦ ♦ ♦

Chapter 62. COMMISSIONER'S RULES CONCERNING THE EQUALIZED WEALTH LEVEL

19 TAC §62.1071

The Texas Education Agency (TEA) proposes an amendment to §62.1071, concerning administration of wealth equalization. The section specifies provisions relating to identification of school districts; actions and costs to equalize wealth; administrative requirements; noncompliance; excellence exemption; and property value decline.

The proposed amendment to 19 TAC §62.1071 includes revisions to procedures and administration of actions for reducing property wealth per student in order to conform to changes to the Texas Education Code (TEC), Chapter 41, enacted by Senate Bill (SB) 4, 76th Texas Legislature, 1999. The revisions include modifying the definition of weighted students in accounting for resident and transfer students, clarifying state aid for an increase in professional salaries, and describing compensation for a decline in property valuation. In the near future, the TEA anticipates filing proposed new rules relating to contracts and tuition for education outside district, as cross- referenced in the proposed amendment to §62.1071.

Joe Wisnoski, coordinator for school finance and fiscal analysis, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Wisnoski and Criss Cloudt, associate commissioner for policy planning and research, have determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be clarification of the options available for reducing a school district's wealth and the operating procedures necessary to implement provisions in TEC, Chapter 41. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Criss Cloudt, Policy Planning and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@tmail.tea.state.tx.us* or faxed to (512) 475-3499. All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of a proposed change in the section has been published in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §41.006, which authorizes the commissioner of education to adopt rules relating to equalized wealth level.

The amendment implements the Texas Education Code, §41.006.

§62.1071. Administration of Wealth Equalization.

(a) Identification. Identification of districts subject to the wealth equalization provisions of the Texas Education Code (TEC), Chapter 41, is based on estimates of weighted ADA (WADA) available in July of each year. WADA is projected in accordance with TEC, Chapter 42, Subchapter F, and derived from student counts adopted by the legislature in the appropriation process under the provisions of TEC, §42.254.

[(1) The calculation of wealth per WADA pursuant to TEC, Chapter 41, is based on a projection of WADA in accordance with TEC Chapter 42, Subchapter F, derived from student counts adopted by the legislature in the appropriation process and adjusted for resident students according to the requirements of TEC, Chapter 41, Subchapter A.]

[(2) The resident student adjustment to WADA for TEC, Chapter 42, Subchapter F, is made using prior year Public Education Information Management System (PEIMS) data for student transfers. The number of transferring students is converted to a WADA count by multiplying it by a WADA- to- enrollment ratio. For purposes of identification only, prior year data are used to compute the WADA-to-enrollment ratio.]

(b) Actions to equalize wealth. The commissioner may require specific actions to ensure that the wealth of a district subject to the provisions of TEC, Chapter 41, is properly equalized.

(1) Districts subject to the provisions of TEC, Chapter 41, may consolidate with another district in accordance with TEC, Subchapter B (Option 1), detach territory in accordance with TEC, Subchapter C (Option 2), or consolidate tax bases with another district in accordance with TEC, Subchapter F (Option 5). [Consolidation with another district in accordance with TEC, Chapter 41, Subchapter B (Option 1), detachment of territory in accordance with TEC, Chapter 41, Subchapter C (Option 2), or consolidation of tax bases with another district in accordance with TEC, Chapter 41, Subchapter F (Option 5),] These actions are not subject to change once approved by the commissioner and executed by the participants. The commissioner may require the exercise of other options in addition to options 1, 2, or 5 to ensure that wealth will be properly equalized.

(2) A student who transfers to and is educated tuition-free by a district subject to the provisions of TEC, Chapter 41, may be counted as WADA for the purpose of wealth equalization. No agreement with the home district is required, but the district must provide the commissioner with a written statement certifying that no tuition or other benefit has been received in exchange for the student's education. The number of transferring students is converted to a WADA count by multiplying it by the district's current WADA-to-enrollment ratio. [A tuition-free transfer is a student who transfers to and is educated by a district subject to the provisions of wealth equalization but who is not charged tuition. The district may count the transfer student as part of its resident WADA for the purpose of wealth equalization if an agreement is obtained with the home district pursuant to TEC, Chapter 41, Subchapter E.]

(3) A student who transfers as a Public Education Grant (PEG) student pursuant to TEC, Chapter 29, Subchapter G, to a district subject to the provisions of TEC, Chapter 41, may be counted under subsection (b)(2) of this section as WADA by the receiving district for the purposes of wealth equalization. No contract with the home district is required. The sending district may not count the student for state aid purposes. [A contract is required for a district subject to the wealth equalization provisions of TEC, Chapter 41, to claim a Public Education Grant (PEG) student pursuant to TEC, Chapter 29, Subchapter G, as a tuition-free transfer if that student is a resident of a district that is also subject to the wealth equalization provisions of TEC, Chapter 41. A contract is not required if the student is a resident of a district that is not subject to wealth equalization.]

(4) Regardless of any applicable credits, a district identified as subject to the provisions of TEC, Chapter 41, must exercise one or more of the available options to reduce wealth to ensure that wealth will be properly equalized. [The claim of tuition-free transfer students pursuant to TEC, Chapter 41, Subchapter E (Option 4), and/or PEG students pursuant to TEC, Chapter 29, Subchapter G, as the sole action to equalize wealth is insufficient to satisfy the requirements of wealth equalization. Such action must be accompanied by the exercise of one or more other option(s) provided by TEC, §41.003, to ensure that wealth will be properly equalized.]

(c) Costs to equalize wealth. For each year in which one or more options to equalize wealth is exercised, the commissioner determines the cost and the associated cycle.

(1) Districts purchasing attendance credits from the state in accordance with TEC, Chapter 41, Subchapter D (Option 3), may obtain a discount in the form of an early agreement credit in accordance with TEC, §41.098. The discount is limited to 4% of the computed cost of Option 3 or $80 multiplied by the number of WADA purchased, whichever is less. [Districts educating nonresident students from a partner district in accordance with TEC, Chapter 41, Subchapter E (Option 4), may obtain a discount in the form of an efficiency credit in accordance with TEC, §41.121. Such discounts may be obtained for certain programs approved by the commissioner and described in the wealth equalization handbook published yearly by the commissioner. For Option 4, the discount is limited to 5% of

the computed cost of Option 4, or $100 multiplied by the district's Chapter 41 WADA, whichever is less.]

(2) Districts paying to educate nonresident students from a partner district in accordance with TEC, Chapter 41, Subchapter E (Option 4), may obtain a discount in the form of an efficiency credit in accordance with TEC, §41.121. Such discounts may be obtained for certain programs approved by the commissioner and described in the wealth equalization handbook published yearly by the commissioner. The discount is limited to 5.0% of the computed cost of Option 4 or $100 multiplied by the district's WADA for TEC, Chapter 41, whichever is less. [Initially, the cost to equalize wealth is projected by the commissioner based on estimates of the district's WADA for Chapter 41 and expected tax collections. For districts exercising Option 3 or 4, the commissioner may update the cost estimate periodically.]

(3) For Options 3 and 4, the projected cost estimate provided by the commissioner to the district by February of the year serves as the basis for initial payments made to the state and/or partner(s). For Option 4, payments to the partner(s) must be made between February and August of the year but otherwise may adhere to a mutually acceptable schedule. A school district subject to the provisions of wealth equalization that pays tuition to another district to educate its students may apply the cost of the tuition toward the cost of the option chosen to reduce wealth. The credit amount per student cannot be greater than the district's cost per WADA. Written documentation must be provided to the commissioner to verify the total tuition paid and the amount per student. The maximum tuition amount that may be charged by the receiving district and the state aid reduction as a result of the tuition charge is described in §61.1012 of this title (relating to Contracts and Tuition for Education Outside District).

(4) For each school district subject to the provisions of wealth equalization, transitional state aid for professional staff salaries is computed in accordance with §105.1012 of this title (relating to Additional State Aid for Professional Staff Salaries). Any amount earned by a district is deducted as a credit against the amount owed to equalize wealth. If a credit exceeds an amount owed, the difference is paid to the district. An initial payment will be made as soon as the Texas Education Agency (TEA) has estimated an assistance amount. A final settle-up will be made during September of the following year. [For Options 3 and 4, the final cost to equalize wealth is determined by the commissioner when audited tax collections and data elements for the calculation of WADA for TEC, Chapter 41, are final and available, after the close of business for the school year. The calculation of WADA for TEC, Chapter 41, incorporates final values for WADA for TEC, Chapter 42, and current-year data for the number of student transfers. The final WADA for TEC, Chapter 42, is based in part, on attendance data submitted at year-end through the PEIMS. Student transfer data are obtained from the PEIMS fall submission. Final values for WADA for TEC, Chapter 42, and current-year fall PEIMS data for enrollment are used in the WADA-to-enrollment ratio that is applied to the number of transfers to calculate a corresponding resident WADA.]

(5) Initially, the cost to equalize wealth is projected by the commissioner based on estimates of the district's WADA for TEC, Chapter 41, and expected tax collections. For districts exercising Option 3 or 4, the cost estimate may be updated by the commissioner periodically throughout the year. [When final costs for the fiscal year are determined for Options 3 and 4, the payments are compared to the final cost. Districts that have not sufficiently reduced wealth must remedy the shortfall in accordance with the directives of the commissioner before the end of that fiscal year. Districts that have overpaid in the process of reducing their wealth level will receive either appropriate refunds from the state and/or partner district(s) or credits against future costs.]

(6) For Options 3 and 4, the projected cost estimate provided by the commissioner to the district by February of the year serves as the basis for initial payments made to the state and/or partner(s). For Option 4, payments to the partner(s) must be made between February and August of the year but otherwise may adhere to a mutually acceptable schedule.

(7) For Options 3 and 4, the final cost to equalize wealth is determined by the commissioner when audited tax collections and data elements for the calculation of WADA for TEC, Chapter 41, are final and available, after the close of business for the school year. The calculation of WADA for TEC, Chapter 41, incorporates final values for WADA for TEC, Chapter 42, and current-year data for the number of student transfers. The final WADA for TEC, Chapter 42, is based, in part, on attendance data submitted at year-end through the Public Education Information Management System (PEIMS). Student transfer data are obtained from the PEIMS fall submission. Final values for WADA for TEC, Chapter 42, and current-year fall PEIMS data for enrollment are used in the WADA-to-enrollment ratio that is applied to the number of transfers to calculate a corresponding WADA.

(8) When final costs for the fiscal year are determined for Options 3 and 4, the payments are compared to the final cost. Districts that have not sufficiently reduced wealth must remedy the shortfall in accordance with the directives of the commissioner before the end of that fiscal year. Districts that have overpaid in the process of reducing their wealth level will receive either appropriate refunds from the state and/or partner district(s) or credits against future costs.

(d) Administrative requirements. Districts taking action to equalize wealth must abide by all fiscal, procedural, and administrative requirements published yearly by the commissioner in a wealth equalization handbook including adherence to any adopted schedule and to the submission of forms and contracts.

(1) Unless other definitive action (such as submission of a contract) has already been taken by a district subject to the provisions of TEC, Chapter 41, the district must inform the TEA [Texas Education Agency] in writing of intended actions to equalize wealth. A "letter of intent" must be postmarked (or have some other postal carrier verification of date mailed) by September 1 of the applicable year.

(2) Pursuant to TEC, Chapter 41, Subchapters D and E, any contract submitted for Option 3 or 4 [, including contracts to claim students as tuition-free transfers,] must be submitted to the TEA [Texas Education Agency] by certified mail through the U.S. Postal Service or other common postal carrier.

(3) Option 3 contracts must be postmarked by September 1 of each year in order to qualify for the early agreement credit. Option 4 contracts and any Option 3 contracts not incorporating the discount must be postmarked by a date specified in a schedule published each year by the commissioner in the wealth equalization handbook.

(4) All contractual arrangements must be approved yearly by the commissioner, regardless of continuing or long-term arrangements between contracting parties.

(5) Contracts and forms submitted to the TEA [Agency] that require signatures must be originals.

(6) All written correspondence pertaining to TEC, Chapter 41, including contracts and data forms, must be sent to an address published yearly by the commissioner in the wealth equalization handbook.

(e) Noncompliance. Noncompliance with the requirements of wealth equalization is determined by the commissioner and may result in corrective action, including detachment and annexation or consolidation in accordance with TEC, Chapter 41, Subchapters G or H, by the commissioner.

(1) Refusal by a district subject to the provisions of TEC, Chapter 41, to declare an intent to exercise an option to equalize wealth, to take action to equalize wealth, or to comply with the terms of a contractual agreement will result in corrective action by the commissioner in accordance with TEC, Chapter 41, Subchapters G and H, to consolidate or to detach and annex property. Any such action taken after November 8 of a school year will take effect in the subsequent school year.

(2) Noncompliance with requirements other than those listed in subsection (e)(1) of this section [~~above~~] may result in loss of an efficiency credit for Option 4, the early agreement credit for Option 3, or in a financial audit.

(f) Excellence exemption. An excellence exemption pursuant to the provisions of TEC, §39.112, does not apply to options for or requirements of wealth equalization.

(g) Property value decline. If a district subject to the provisions of wealth equalization experiences a property value decline from the prior tax year and funds made available [~~specifically appropriated~~] by the legislature to compensate for such a decline are insufficient, the district's taxable value for the prior tax year will be adjusted [~~only to the extent necessary~~] so that the allocation of the shortfall is shared among all districts participating in this appropriation in accordance with TEC, §42.252. The adjustment will be sufficient to exhaust the district's share of the amount appropriated.

(1) The cost of recognizing the applicable [~~total amount of~~] property value decline is computed as the difference in the cost of equalizing wealth using the property value for the prior tax year and the cost of equalizing wealth using the property value for the current tax year using the same (current year) tax collection amount. This difference is then adjusted for the percent of decline not recognized in accordance with TEC, §42.252.

(2) If the cost of recognizing the applicable [~~total~~] amount of property value decline exceeds the amount appropriated, [~~the excess cost is allocated to~~] each district with a decline in value will have its value adjusted in proportion to its share of the total property value decline [~~among those districts with declines~~].

~~[(3) The allocated share of the excess cost will be subtracted from the cost of equalizing wealth using the property value for the current tax year. The resulting adjusted cost will serve as the basis for determining an adjusted property value for the prior tax year.]~~

This 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 13, 1999.

TRD-9905885
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-9701

♦ ♦ ♦

Chapter 153. SCHOOL DISTRICT PERSONNEL

Subchapter CC. COMMISSIONER'S RULES ON CREDITABLE YEARS OF SERVICE

19 TAC §153.1022

The Texas Education Agency (TEA) proposes new §153.1022, concerning school district personnel. The new section revises the minimum salary schedule for certain professional staff as authorized under Texas Education Code (TEC), §21.402.

Proposed new 19 TAC §153.1022 adds content and modifies existing language to conform to changes enacted by Senate Bill (SB) 4, 76th Texas Legislature, 1999, to TEC, Chapter 21. The new section revises definitions of qualifying staff, details eligibility criteria for placement on the salary schedule, and explains the base pay for the 1999-2000 biennium.

Joe Wisnoski, coordinator for school finance and fiscal analysis, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the new section.

Mr. Wisnoski and Criss Cloudt, associate commissioner for policy planning and research, have determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be clarification of changes enacted by SB 4 such as the addition of nurses and counselors to the classification of personnel for school districts to properly implement the minimum salary schedule. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

Comments on the proposal may be submitted to Criss Cloudt, Policy Planning and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@tmail.tea.state.tx.us* or faxed to (512) 475-3499. All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of a proposed change in the section has been published in the *Texas Register*.

The new section is proposed under the Texas Education Code, §21.402(g), as amended by Senate Bill 4, 76th Texas Legislature, 1999, which authorizes the commissioner of education to adopt rules to govern the application of the minimum salary schedule for certain professional staff.

The new section implements the Texas Education Code, §21.402(g).

§153.1022. Minimum Salary Schedule for Certain Professional Staff.

(a) Definitions and eligibility. The following definitions and eligibility criteria apply to the increases in the minimum salary schedule in accordance with Texas Education Code (TEC), Chapter 21.

(1) The staff positions that qualify for the salary increase include classroom teachers and full-time librarians, counselors, and nurses employed by public school districts and who are entitled to a minimum salary under TEC, §21.402.

(A) A classroom teacher is an educator who teaches an average of at least four hours per day in an academic or career and technology instructional setting pursuant to TEC, §5.001, focusing on the delivery of the Texas essential knowledge and skills and holds the relevant certificate issued by the State Board for Educator Certification (SBEC) under the provisions of TEC, Chapter 21, Subchapter B. Although non-instructional duties do not qualify as teaching, necessary functions related to the educator's instructional assignment such as instructional planning and transition between instructional periods should be applied to creditable classroom time.

(B) A school librarian is an educator who provides full-time library services and holds the relevant certificate issued by the SBEC under the provisions of TEC, Chapter 21, Subchapter B.

(C) A school counselor is an educator who provides full-time counseling and guidance services under the provisions of TEC, Chapter 33, Subchapter A, and holds the relevant certificate issued by the SBEC pursuant to the provisions of TEC, Chapter 21, Subchapter B.

(D) A school nurse is an educator employed to provide full-time nursing and health care services and who meets all the requirements to practice as a registered nurse (RN) pursuant to the Nursing Practice Act and the rules and regulations relating to professional nurse education, licensure, and practice and has been issued a license to practice professional nursing in Texas.

(2) An eligible educator who is employed by more than one district in a shared service arrangement or by a single district in more than one capacity among any of the eligible positions qualifies for the salary increase as long as the combined functions constitute full-time employment.

(3) Full-time means contracted employment for at least ten months (187 days) for 100% of the school day in accordance with definitions of school day in TEC, §25.082, employment contract in TEC, §21.002, and school year in TEC, §25.081.

(4) A local supplement is any amount of pay above the minimum salary schedule for duties that are part of a teacher's classroom instructional assignment.

(5) Current placement on the salary schedule means a placement based on years of service recognized for salary increment purposes up to the current year.

(b) Base pay for the 1999-2001 biennium. As long as employment is in the same position, eligible educators may not receive a minimum salary for each year of the biennium that is less than the salary that they would have received in 1998-1999 at their current placement on the employing district's 1998-1999 salary schedule.

(1) An educator eligible for the salary increase is entitled to a minimum salary in 1999-2000 and 2000-2001 equal to the greater of the salary corresponding to their current placement on the state salary schedule pursuant to TEC, §21.402(a), or the salary corresponding to their current placement on the employing district's 1998-1999 salary schedule, plus $300 per month. If employed by the same district, the minimum must include any local and career ladder supplements the employee would have received in 1998-1999. In addition to classroom teachers, this provision applies to eligible counselors, nurses, and librarians whose salary was based on placement on a salary schedule in 1998-1999.

(2) Eligible counselors, nurses, and librarians who were not on a salary schedule in 1998-1999 are entitled in 1999-2000 to the greater of the salary earned in 1998-1999 plus $300 per month or to the salary corresponding to their current placement on the salary schedule. These educators are placed on the state schedule according to the same criteria that applies to teachers and librarians pursuant to §153.1021 of this title (relating to Recognition of Creditable Years of Service). In 2000-2001, they are entitled to maintain the salary earned in 1999-2000 or to meet the minimum corresponding to their current placement on the salary schedule, whichever is greater.

(3) A beginning teacher who has not previously been on the state salary schedule is entitled to any local supplement that would have been offered to a beginning teacher on the employing district's 1998-1999 salary schedule.

(4) Educators who are eligible for the salary increase and who are employed for more than ten months are entitled to an additional $300 in increased pay for each full month of additional service.

(5) Teachers who are eligible for the salary increase but who are not employed full-time (work either less than 100% of the day or for a portion of the year) are entitled to a proportionate pay increase. For teachers working less than 100% of the day, the increase is proportionate to the percent of the day employed. For teachers employed less than a full year, the increase is valid only for the months employed.

(6) Eligible nurses, librarians, and counselors who are employed for less than a full school year are entitled to a pay increase in proportion to the months employed.

This 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 13, 1999.

TRD-9905886
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-9701

♦ ♦ ♦

TITLE 22. EXAMINING

Part 5. STATE BOARD OF DENTAL EXAMINERS

Chapter 101. DENTAL LICENSURE

22 TAC §101.2

The State Board of Dental Examiners proposes amendments to §101.2, Staggered Dental Registrations.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that increased costs for administering regulatory programs will be met through increased revenue obtained from licensees. Raising the fee for annual license registrations accomplishes this purpose. The annual dental license registration fee is raised $1.00 and the annual fiscal impact on the agency's revenues within the first five years will be an increase of $10,000.

There will be minimal fiscal implications for small and large businesses. The costs to persons who are required to comply with the rule as proposed will be increased by $1.00 per year.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 463-6400. To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §§2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules to perform its duties and ensure compliance with laws relating to the practice of dentistry; Chapter 257, §257.001, and Chapter 254, §254.004, which provides that the Board may adopt a staggered registration system.

The proposed amended rule does not affect other statutes, articles, or codes.

§101.2. Staggered Dental Registrations.

The State Board of Dental Examiners, pursuant to the Occupations Code, Chapter 257, §257.001, Texas Civil Statutes [~~Article 4550b, V.T.C.S~~]., has established a staggered license registration system comprised of initial dental license registration periods followed by annual registrations (i.e., renewals).

(1) The initial, staggered dental license registration periods will range from 6 months to 17 months. Each dentist for whom an initial dental license registration is issued will be assigned a computer-generated check digit. The length of the initial license registration period will be according to the assigned check digit as follows:

(A) a dentist assigned to check digit 1 will be registered for 6 months;

(B) a dentist assigned to check digit 2 will be registered for 7 months;

(C) a dentist assigned to check digit 3 will be registered for 8 months;

(D) a dentist assigned to check digit 4 will be registered for 9 months;

(E) a dentist assigned to check digit 5 will be registered for 11 months;

(F) a dentist assigned to check digit 6 will be registered for 12 months;

(G) a dentist assigned to check digit 7 will be registered for 13 months;

(H) a dentist assigned to check digit 8 will be registered for 14 months;

(I) a dentist assigned to check digit 9 will be registered for 15 months; and

(J) a dentist assigned to check digit 10 will be registered for 17 months.

(2) For individuals who qualify for dental licensure by examination, the initial dental license registration fees will be as follows:

(A) an annual license registration fee of $71.00 [~~$70.00~~] prorated according to the number of months in the initial registration period;

(B) $9.00 for peer assistance.

(3) For individuals who qualify for dental licensure by credentials, the initial dental license registration fees will be as follows:

(A) an annual license registration fee of $71.00 [~~$70.00~~] prorated according to the number of months in the initial registration period;

(B) $9.00 for peer assistance;

(C) a $200.00 annual assessment by the Texas Legislature for deposit to the General Revenue Fund.

(4) Subsequent to the initial registration period, a licensee's annual registration (renewal) will occur on the first day of the month that follows the last month of his/her initial dental license registration period. Pursuant to §102.1(a) of this title (relating to Fee Schedule), the licensee will pay the following fee for each annual registration (i.e., renewal):

(A) a license registration fee of $71.00 [~~$70.00~~];

(B) $200.00 annual assessment by the Texas Legislature for deposit to the General Revenue Fund;

(C) $9.00 for peer assistance.

(5) Approximately 60 days prior to the expiration date of the initial dental license registration period, a license renewal notice will be mailed to all dental licensees who have that expiration date.

(6) A license registration expired for more than one year may not be renewed.

This 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 9, 1999.

TRD-9905808
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

Chapter 103. DENTAL HYGIENE LICENSURE

22 TAC §103.4

The State Board of Dental Examiners proposes amendments to §103.4, Staggered Dental Hygiene Registrations.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that increased costs for administering regulatory programs will be met through increased revenue obtained from licensees. Raising the fee for annual license registrations accomplishes this purpose. The annual dental hygiene license registration fee is raised $1.00 and the annual fiscal impact on the agency's revenues within the first five years will be an increase of $10,000.

There will be minimal fiscal implications for small and large businesses. The costs to persons who are required to comply with the rule as proposed will be increased by $1.00 per year.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 463-6400. To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules to perform its duties and ensure compliance with laws relating to the practice of dentistry; Chapter 257, §257.001, and Chapter 254, §254.004, which provides that the Board may adopt a staggered registration system.

The proposed amended rule does not affect other statutes, articles, or codes.

§103.4. Staggered Dental Hygiene Registrations.

The State Board of Dental Examiners, pursuant to the Occupations Code, Chapter 257, §257.001, Texas Civil Statutes [~~Article 4550b, V.T.C.S.~~], has established a staggered license registration system comprised of initial dental hygiene license registration periods followed by annual registrations (i.e., renewals).

(1) The initial dental hygiene license registration periods will range from 6 months to 17 months. Each dental hygienist for whom an initial dental hygiene license registration is issued will be assigned a computer generated check digit. The length of the initial license registration period will be determined on the basis of the assigned check digit as follows:

(A) a dental hygienist assigned to check digit 1 will be registered for 6 months;

(B) a dental hygienist assigned to check digit 2 will be registered for 7 months;

(C) a dental hygienist assigned to check digit 3 will be registered for 8 months;

(D) a dental hygienist assigned to check digit 4 will be registered for 9 months;

(E) a dental hygienist assigned to check digit 5 will be registered for 11 months;

(F) a dental hygienist assigned to check digit 6 will be registered for 12 months;

(G) a dental hygienist assigned to check digit 7 will be registered for 13 months;

(H) a dental hygienist assigned to check digit 8 will be registered for 14 months;

(I) a dental hygienist assigned to check digit 9 will be registered for 15 months; and

(J) a dental hygienist assigned to check digit 10 will be registered for 17 months.

(2) For individuals who qualify for dental hygiene licensure by examination, the initial dental hygiene license registration fees will be as follows:

(A) an annual license registration fee of $42.00 [~~$41.00~~] prorated according to the number of months in the initial registration period; and

(B) $2.00 for peer assistance.

(3) For individuals who qualify for dental hygiene licensure by credentials, the initial dental hygiene license registration fees will be as follows:

(A) an annual license registration fee of $42.00 [~~$41.00~~] prorated according to the number of months in the initial registration period;

(B) $2.00 for peer assistance.

(4) Subsequent to the initial registration period, a licensee's annual registration (renewal) will occur on the first day of the month that follows the last month of his/her initial dental hygiene license registration period. Pursuant to §102.1(b) of this title (relating to Fee Schedule) the licensee will pay the following fee for each annual registration (i.e., renewal):

(A) a license registration fee of $42.00 [~~$41.00~~]

(B) $2.00 for peer assistance.

(5) Approximately 60 days prior to the expiration date of the initial dental hygiene license registration period, a license renewal notice will be mailed to all dental hygiene licensees who have that expiration date.

(6) A license registration expired for more than one year may not be renewed.

This 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 9, 1999.

TRD-9905809
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

Chapter 104. CONTINUING EDUCATION

22 TAC §104.1

The State Board of Dental Examiners proposes amendments to §104.1, Requirement.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that responsibility for compliance is properly placed on the practitioner, as a prerequisite for renewal of a license. Enforcement of educational requirements will be simplified, reducing the need for enforcement through the compliant process.

There will be no effect on small or large 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 Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 463-6400. To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §§2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001, which provides the State Board of Dental Examiners with the authority to adopt and enforce rules to perform its duties and to ensure compliance with laws relating to the practice of dentistry and Chapter 257, §257.005 which requires the board to implement rules concerning continuing education.

The proposed amended rule does not affect statutes, articles, or codes other than Texas Revised Civil Statutes Annotated, article 4545a as amended by Senate Bill 964, providing that 12 hours per year of continuing education is required as a prerequisite for renewal of a license.

§104.1. Requirement.

For renewals beginning in 2001 as a prerequisite to the annual renewal of a dental or dental hygiene license, 12 [~~To maintain a dental or dental hygiene license, 36~~] hours of acceptable continuing education are required to be completed [~~by the licensee~~] within the year immediately preceding renewal. [~~a three-year period as defined in paragraphs (1)-(9) of this section:~~]

(1) A licensee may carry forward continuing education hours earned during the year immediately preceding renewal which are in excess of the 12-hour annual requirement and such excess hours may be applied to the following years' requirements. Excess hours to be carried forward must have been earned in a classroom setting. A maximum of 24 total excess credit hours may be carried forward. [~~Hours from a previous period shall not count nor shall extra credits be accumulated for use in a subsequent period; i.e., "banking" of hours is not permitted.~~]

(2) All dentists and dental hygienists will begin a one year continuing education period on their renewal dates in the year 2000. For licensees whose three year period ends in 2000, or would have ended in 2001 or 2002, the amount of CE due for that three year period, or portion of a three year period, shall be calculated on the basis of one hour of CE for each month of the period that has passed on the 2000 renewal date. No more than 36 hours of CE will be due for any three year period described herein. In the event that a licensee has CE hours in excess of the amounts required hereby, the excess may be carried forward pursuant to paragraph (1) of this section. [~~The three-year period will be determined as follows:~~]

[~~(A) For a dentist or dental hygienist licensed on or before December 31, 1995, the period begins on the 1996 renewal date and the first three-year period ends on the licensee's renewal date in 1999.~~]

[~~(B) For a dentist or dental hygienist licensed after December 31, 1995, the period begins on the date the license issues and the first three-year period ends on the date of the dentist's or dental hygienist's third renewal date.~~]

[~~(C) Thereafter, each licensee will begin a new three-year period each third renewal date.~~]

(3) Each licensee shall select and participate in the continuing education courses endorsed by the providers identified in §104.2 of this title (relating to Continuing Education Providers). [~~Alternatively a~~] A licensee who is unable to meet education course requirements [~~as cited in paragraph (5) of this section~~] may request that alternative courses or procedures be approved by the Continuing Education Committee.

(A) Such requests must be in writing and submitted to and approved by the Continuing Education Committee prior to the expiration of the annual [~~three-year~~] period for which the alternative is being requested.

(B) A licensee must provide supporting documentation detailing the reason why the continuing education requirements set forth in paragraph (5) of this section cannot be met and must submit a proposal for alternative education procedures.

(C) Acceptable causes may include residence outside the United States, unanticipated financial or medical hardships, or other extraordinary circumstances that are documented.

(D) Should the request be denied, the licensee must complete requirements as cited in paragraph (5) of this section.

(4) Examiners for the Western Regional Examining Board (WREB) will be allowed credit for no more than 6 hours annually, obtained from WREB's calibration and standardization exercise. This provision shall not apply to active board members. [~~Hours taken on or after February 6, 1995, may count toward the accumulation of hours for the first three-year period if they meet the criteria for acceptable continuing education hours identified in §104.2 of this title.~~]

(5) All 12 [~~36~~] hours must be either technical or scientific as related to clinical care. The terms "technical" and "scientific" [~~term "technical or scientific"~~] as applied to continuing education shall mean that courses have significant intellectual or practical content and are designed to directly enhance the practitioner's knowledge and skill in providing clinical care to the individual patient.

(6) Hours in the standards of the Occupational Safety and Health Administration (OSHA) or in cardiopulmonary resuscitation (CPR) may not [~~are existing requirements and are not to~~] be considered in the 12 [~~36~~] hour requirement.

(7) No more than 4 [~~12~~]-hours in any 12 [~~36~~]-hour accumulation may be in self-study. These self-study hours must be provided by those entities cited in §104.2. Examples of self-study courses include [~~,but are not limited to,~~] correspondence courses, video courses, audio courses, and reading courses.

(8) Any individual or entity may petition one of the providers listed in §104.2 of this title (relating to Providers) to offer continuing education.

(9) [~~Individual courses and/or instructors will be approved by providers cited in §104.2 of this title.~~] No more than 4 [~~12~~] hours in any 12 [~~a 36~~]-hour accumulation may be interactive computerized courses. These interactive computerized courses [~~hours~~] must be provided by those entities cited in §104.2 of this title. Examples of interactive computerized [~~computer~~] courses include those that involve interactive dialogue [~~dialog~~] through electronic linkage with an instructor in which manipulation of text or data by the licensee occurs.

(10) Providers cited in §104.2 of this title (relating to Providers) will approve individual courses and/or instructors.

This 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 9, 1999.

TRD-9905810
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

Chapter 107. DENTAL BOARD PROCEDURES

22 TAC §107.1

The State Board of Dental Examiners proposes new §107.1, Application, pursuant to its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature, 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will understand the application of the revised Chapter 107 to the practices and procedures of the State Board of Dental Examiners in contested cases.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The new rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed new rule does not affect other statutes, articles, or codes.

§107.1. Application.

These rules apply to all contested cases within the Board's jurisdiction and shall control practice and procedure before the Board and the State Office of Administrative Hearings (SOAH) unless preempted by rules promulgated by SOAH or the Administrative Procedures Act.

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

Filed with the Office of the Secretary of State, on September 9, 1999.

TRD-9905812
Jeffery R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

Subchapter A. PROCEDURES GOVERNING GRIEVANCES, HEARINGS, AND APPEALS

22 TAC §§107.3, 107.19, 107.23, 107.24, 107.27, 107.28, 107.30, 107.32-107.47

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

The State Board of Dental Examiners proposes the repeal of §107.3, 107.19, 107.23, 107.24, 107.27,107.28, 107.30, 107.32, 107.33, 107.34, 107.35, 107.36, 107.37, 107.38, 107.39, 107.40, 107.41, 107.42, 107.43, 107.44, 107.45, 107.46, and 107.47 of Chapter 107, Dental Board Procedures, in conjunction with its review of Chapter 107, in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature Regular Session, 1999, §167. Such review shall include at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist.

As part of the reorganization of agency rules, the State Board of Dental Examiners is complying with §167 requirements, repealing rules that are redundant with other statutes or rules, updating existing rules to ensure that they are consistent with current agency application.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule are repealed there will be no fiscal implications for local or state government as a result of enforcing or administering the repeal.

Mr. Hill also has determined that for each year of the first five year period the amendments are in effect, the public benefit anticipated as a result of enforcing the repeal is the deletion of obsolete and cumbersome language. Further, all rules proposed for repeal have been supplanted by rules of procedure for hearing contested cases in the State Office of Administrative Hearing.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rules as repealed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The repeal is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.3. Hearings.

§107.19. Classification of Parties.

§107.23. Form and Content of Pleadings.

§107.24. Examination by the Board Through its Executive Director or Hearing Officer.

§107.27. Incorporation by Reference of Agency Record.

§107.28. Docketing and Numbering of Causes.

§107.30. Contested Proceedings.

§107.32. Pre-hearing Conference.

§107.33. Motions for Postponement, Continuance, Withdrawal or Dismissal of Applications or Other Matters before the Agency.

§107.34. Joint Hearings.

§107.35. Place and Nature of Hearings.

§107.36. Presiding Officer.

§107.37. Order of Procedure.

§107.38. Reporters and Transcript.

§107.39. Formal Exceptions.

§107.40. Dismissal Without Hearing.

§107.41. Rules of Evidence.

§107.42. Documentary Evidence and Official Notice.

§107.43. Prepared Testimony.

§107.44. Limitations on Number of Witnesses.

§107.45. Exhibits.

§107.46. Offer of Proof.

§107.47. Depositions.

This 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 9, 1999.

TRD-9905838
Jeffery R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.11

The State Board of Dental Examiners proposes amendments to §107.11, Definitions, pursuant to its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will have a clearer understanding of the meanings of the rules of procedure that apply to contested cases.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.11. Definitions.

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

(1) Agency - The Texas State Board of Dental Examiners also known as the State Board of Dental Examiners and for brevity the dental board or the board.

(2) Applicant or petitioner - A party seeking a license or certificate or a rule or interpretation from the agency.

(3) Board member - One of the appointed members of the decision making body defined as the agency.

(4) Certificate - Any annual renewal authority or permit.

(5) 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 agency after an opportunity for adjudicative hearing.

(6) Executive director - the executive director of the Texas State Board of Dental Examiners.

[~~(7) Examiner - A board member.~~]

[~~(8) Hearing officer - A person(s) appointed by the board as a fact finder on matters pending.~~]

(7) [~~(9)~~] License - Includes the whole or part of any agency permit, certificate, approval, registration, or similar form of permission required by law [~~and specifically it means a dental license~~].

(8) [~~(10)~~] Licensing - Includes the agency process relating to [~~respecting~~] the granting, denial, renewal, revocation, cancellation, suspension, annulment, withdrawal, limitation, or amendment of a license.

(9) [~~(11)~~] Officer - Any board member elected to an office of the Texas State Board of Dental Examiners.

(10) [~~(12)~~] Party - Each person named or admitted as a party.

(11) [~~(13)~~] Person - Any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character.

[~~(14) Pleading - written allegations filed by parties concerning their respective claims.~~]

(12) [~~(15)~~] Register - The Texas Register.

(13) [~~(16)~~] Registration - The required annual renewal of any previously issued permit or authority.

(14) [~~(17)~~] Rule - Any agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of the [~~an~~] agency. 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 [~~any~~] agency and not affecting private rights or procedures. This definition includes substantive regulations.

(15) Administrative Law Judge (ALJ) - a person who presides at an administrative hearing held before the State Office of Administrative Hearings (SOAH).

(16) Petitioner - a party, including the board who brings a request or action and assumes the burden of going forward with an administrative proceeding; e.g., the board in an action to discipline a licensee; the person who seeks reinstatement of a license; the person who seeks a determination of eligibility for licensure.

(17) Respondent - a party, including the board, to whom a request is made or against whom an action is brought, e.g., the licensee in a disciplinary action by the board; the board in a reinstatement action; the board in an action to determine eligibility for licensure.

This 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 9, 1999.

TRD-9905815
Jeffery R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.102

The State Board of Dental Examiners proposes amendments to §107.12, Object of Rules, pursuant to its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will have a clearer understanding of the purpose of the rules found in Chapter 107, Dental Board Procedures, particularly the public's right to participate and receive notice in agency actions.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.12. Object of Rules.

(a) The purpose of these rules is to provide for a simple and efficient system of procedure before the agency, to insure uniform standards of practice and procedure, public participation in and notice of agency actions, and a fair and expeditious determination of causes. These rules shall be liberally construed, with a view towards the purpose for which they were adopted.

(b) A revocation, suspension, annulment, or withdrawal of a license is not effective unless, before institution of agency proceedings:

(1) the agency gives notice by personal service or by registered or certified mail to license holder of facts or conduct alleged to warrant the intended action; and

(2) the license holder is given an opportunity to show compliance with all requirements of law for the retention of the license.

This 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 9, 1999.

TRD-9905816
Jeffery R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.15

The State Board of Dental Examiners proposes amendments to §107.15, Computation of Time, pursuant to its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will be assured that the computation of time within which to take action will be determined in accordance with the Administrative Procedure Act and the rules of procedure for the State Office of Administrative Hearings.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.15. Computation of Time.

[~~(a)~~] [~~Computing time:~~] In computing time periods [~~any period of time~~] prescribed [~~or allowed~~] by these rules, or by order of the agency, [~~or by any applicable statute, the period shall begin on~~] the day of [~~after~~] 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, [~~in controversy and conclude on the last day of such computed period,~~] unless it is [~~be~~] a Saturday, Sunday or legal holiday, in which case [~~event~~] the time period will [~~runs until the~~] end on [~~of~~] the next day that the agency is open. [~~which is neither a Saturday, Sunday nor a legal holiday.~~]

[~~(b) Extensions: Unless otherwise provided by statute, the time for filing any pleading may be extended by order of the Executive Director or other designated person, upon written motion duly filed with him prior to the expiration of the applicable period of time for the filing of the same, showing that there is good cause for such extension of time and that the need therefor is not caused by the neglect, indifference or lack of diligence of the movant. A copy of any such motion shall be served by the party filing same upon all other parties of record to the proceeding contemporaneously with the filing thereof.~~]

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

Filed with the Office of the Secretary of State, on September 9, 1999.

TRD-9905817
Jeffery R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.16

The State Board of Dental Examiners proposes amendments to §107.16, Agreement to be in Writing, pursuant to its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will have a clearer understanding that any agreement in a proceeding with the Board must be reduced to writing to be enforceable.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.16. Agreement to be in Writing.

No stipulation or agreement between the parties, their attorneys or representatives, with regard to any matter involved in any proceeding before the agency shall be enforced unless it shall have been reduced to writing and signed by the parties or their authorized representatives, [~~or unless it shall have been dictated into the record by them during the course of a hearing,~~] or incorporated in an order bearing their written approval. This section does not limit a party's ability to waive, modify or stipulate any right or privilege afforded by these rules, unless precluded by law.

This 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 9, 1999.

TRD-9905818

Jeffery R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.17

The State Board of Dental Examiners proposes amendments to §107.17, Service in Non-rulemaking Proceedings, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will have a clearer understanding of the procedures to secure personal service upon a party or, where appropriate, upon a party's attorney or representative.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas, 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.17. Service in Non-rulemaking Proceedings.

Where service of notice by the agency is required, all parties shall be notified either personally or by first class mail, to the last known address, of any decision or order. If any party has appeared by attorney or other representative, service shall be made upon such attorney or representative.

[(a) Personal service. Where personal service of notice by the agency is required, the agency shall mail the same, certified or registered mail, to the last known place of address of the person entitled to receive such notice or an employee of the agency may personally deliver a copy of such notice to such person.]

[(b) Service of pleadings. A copy of any protest, reply, answer, motion, or other pleading filed by any party in any proceeding subsequent to the institution thereof shall be mailed or otherwise delivered by the party filing the same to every other party of record. If any party has appeared in the proceeding by attorney or other representative authorized under these rules to make appearances, service shall be make upon such attorney or other representative. The willful failure of any party to make such service shall be sufficient grounds for the entry of an order by the board, the executive director, the hearing officer or the designated officer (whoever hears the matter), striking the protest, reply, answer, motion, or other pleading from the record.]

[(c) Certificate of service. A certificate by the party, attorney, or representative who files a pleading, stating that it has been served on the other parties, shall be prima facie evidence of such service. The following form of certificate will be sufficient in this connection: I hereby certify that I have this _____ day of _____, 19__, served copies of the foregoing (pleading, etc.) upon all other parties to this proceeding, by (here state the manner of service). Signature.]

This 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 9, 1999.

TRD-9905819
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.18

The State Board of Dental Examiners proposes amendments to §107.18, Conduct and Decorum, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will be assured that all proceedings before the Board are conducted in a courteous and dignified manner.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas, 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.18. Conduct and Decorum.

Parties, representatives and other participants shall conduct themselves with dignity and shall show courtesy and respect for one another and the agency, including members of the board and staff. Attorneys shall adhere to the standards of conduct in the Texas Lawyer's Creed promulgated by the Texas Supreme Court.

~~[(a) Every party, witness, attorney, or other representative shall comport himself in all proceedings with proper dignity, courtesy, and respect for the agency, the board member(s), the executive director, the hearing officer, or the designated officer, and all other parties. Disorderly conduct will not be tolerated. Attorneys and other representatives of parties shall observe and practice the standards of ethical behavior prescribed for attorneys at law by the Texas State Bar.]~~

~~[(b) The dental board may hear any case or matter or it may appoint the executive director of the agency, a hearing officer, or it may designate an officer of the board to hear and act as fact-finder. When the board has appointed and assigned the executive director, a hearing officer, or an officer to hear a matter, such person so assigned shall be designated the "hearing officer" and such designation and term is used hereinafter whether the person be actually the agency executive director or an officer of the board or a different person.]~~

This 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 9, 1999.

TRD-9905820
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.20

The State Board of Dental Examiners proposes amendments to §107.20, Parties in Interest, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will know that any person may appear in a proceeding before the Board, provided that a proper reason exists for such an appearance.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas, 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.20. Persons Interested in Proceedings ~~[Parties in Interest]~~.

Any person ~~[party in interest]~~ may appear in any proceeding before the agency. Appearances may be disallowed upon a showing that the person has no justiciable or administratively cognizable interest in the proceeding. The board shall have the right in any proceeding to limit the number of witnesses whose testimony is merely cumulative. ~~[All appearances shall be subject to a motion to strike upon a showing that the party has no justifiable or administratively cognizable interest in the proceeding.]~~

This 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 9, 1999.

TRD-9905821
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.21

The State Board of Dental Examiners proposes amendments to §107.21, Appearances Personally or by Representative, pursuatnt to its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that persons appearing before the board will know that they have the right to be represented at the appearance.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to

perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.21. Appearances Personally or by Representative.

Any person [~~party~~] may appear and be represented by an attorney at law authorized to practice law before the highest court of the State of Texas [~~any state~~]. This right may be expressly waived. Any person may appear on his own behalf, or by a bona fide full-time employee. A corporation, partnership or association may appear and be represented by any bona fide officer, partner or full-time employee.

This 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 9, 1999.

TRD-9905822
Jeffery R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.29

The State Board of Dental Examiners proposes amendments to §107.29, Licenses, pursuant to its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will have a clearer understanding of the status of an existing license during a period of review by the board.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.29. Licenses.

If a license holder makes [~~When a licensee has made~~] timely and sufficient application for the renewal of a license or for a new license for any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency . If the application is denied or the terms of the new license are limited, the existing license does not expire [~~, or unless it has been terminated according to statute and rule, and in case the application is denied or the license is in some manner limited,~~] until the last day for seeking review of the agency order or a later date when fixed by order of the reviewing court.

This 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 9, 1999.

TRD-9905823
Jeffery R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.31

The State Board of Dental Examiners proposes amendments to §107.31, Personal Services, pursuant to its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will have a clearer understanding of the availability of and requirements for, personal service and enforcement of an investigative subpoena. Service of subpoena in a contested case is addressed in the Administrative Procedure Act, but the Act does not provide a method to obtain necessary documents during the pendency of an investigation into the circumstances of a complaint filed with the State Board of Dental Examiners. Resolution of complaints oftentimes requires review of records, especially in fraud and standard of care cases. This rule permits the board to obtain those records expeditiously. Senate Bill 964, 76th Legislature, 1999, impacts this rule by providing that suits by the attorney general to enforce subpoenas shall only be heard in District Court in Travis County, Texas.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.31. Personal Service.

The board may command the sheriff or any constable in the State of Texas or any agent or investigator of the board to serve a subpoena to compel the attendance of witnesses for examination under oath and the production for inspection and copying of books, accounts, records, papers, correspondence, documents and other evidence relevant to the investigation of alleged violations of statutes relating to the practice of dentistry. If a person fails to comply with an investigative subpoena the board, acting through the attorney general, may file suit to enforce the subpoena in a district court in Travis County. [~~All notices of which personal service is required by law shall be addressed to the person entitled thereto, and shall set forth the names of all other parties, the nature and subject matter of the proceeding, the time and place of hearing, and any other matter required by law.~~]

This 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 9, 1999.

TRD-9905824
Jeffery R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.48

The State Board of Dental Examiners proposes amendments to §107.48, Subpoenas, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the rule as amended complies with the provisions of the Administrative Procedure Act. Persons compelled to attend a hearing or give a deposition will be given advance notice of their requirement to attend or give a deposition.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.48. Subpoenas.

(a) 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 testify or give a deposition or to produce books, records, papers, or other objects that may be necessary and proper for the purpose of a proceeding at the State Office of Administrative Hearing (SOAH) is entitled to receive: [~~Following written request by a party or on its own motion:~~]

(1) $.18 for each mile, or a greater amount prescribed by state agency rules, for going to and returning from the place of the hearing or deposition if the place is more than 25 miles from the person's place of residence and the person uses the person's personally owned or leased motor vehicle for the travel; [~~Subpoenas for the attendance of a witness from any place in the State of Texas at a hearing in a pending proceeding, may be issued at any time by the agency through the executive director, or, by a hearing officer.~~]

(2) Reimbursement of the transportation expenses of the witness or deponent for going to and returning from the place where the hearing is held or the deposition is taken, if the place is more than 25 miles from the person's place of residence and the person does not use the person's personally owned or leased motor vehicle for the travel; [~~Motions for subpoenas to compel the production of books, papers, accounts, documents, or other tangible items shall be addressed to the Agency, and shall specify as nearly as may be the books, papers, accounts, documents, or other tangible items desired. If the matter sought is relevant material and necessary and will not result in harassment, imposition, or undue inconvenience or expense to the party to be required to produce the same, the agency, through the executive director, or a hearing officer may issue a subpoena, compelling production of books, papers, accounts, documents, or other tangible items as deemed necessary.~~]

(3) Reimbursement of the meal and lodging expenses of the witness or deponent while going to and returning from the place where the hearing is held or deposition taken, if the place is more than 25 miles from the person's place of residence; [~~Such subpoenas shall be issued only after a showing of good cause and deposit of sums with the agency sufficient to insure payment of expenses incident to the subpoenas, the attendance of witnesses or deponents or both.~~]

(4) $25, or a greater amount prescribed by state agency rule, for each day or part of a day that the person is necessarily present. [~~A witness or deponent who is not a party and who is subpoenaed compelled or requested to attend any hearing or proceeding to testify or to give a deposition or to produce books, records, papers, or other objects that may be necessary and proper for the purposes of the proceeding under the authority of this section is entitled to receive:~~]

[~~(A) Mileage of 18 cents a mile if by private car, actual train or bus fare, or economy air fare, for going to, and returning from the place of the hearing or the place where the deposition is taken if~~

~~the place is outside the city, town, village, or area of such person's residence.]~~

~~[(B) A fee of $25 a day for each day or part of a day the person is necessarily present as a witness or deponent; meal expense not to exceed $15 per day; further, such person is entitled to be paid an additional fee of not to exceed $50 for required overnight lodging.]~~

~~[(C) Fees to which a witness or deponent is entitled under this section shall be paid by the agency from the funds deposited by the party or agency 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.]~~

(b) A subpoena or commission requiring deposition shall be issued only after deposit with the agency of an amount sufficient to ensure payment of the expenses incident to the subpoena, the attendance of witnesses or deponents, or both.

(c) Requests for issuance of subpoenas or commissions requiring deposition shall be directed to the agency not later than the tenth day before the date the witness or deponent is required to appear. The parties may agree to modify the time period prescribed by this section.

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

Filed with the Office of the Secretary of State on September 9, 1999.

TRD-9905825
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.49

The State Board of Dental Examiners proposes amendments to §107.49, Proposals for Decision, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the procedures for filing exceptions to a Proposal for Decision prepared by an administrative law judge are more clear and no longer conflict with rules of the State Office of Administrative Hearing.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.49. Proposals for Decision.

(a) If in a contested case a majority of the members of the Board who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, may not be made until a proposal for decision is served on the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs to the members of the board who are to render the decision. The proposal for decision must contain a statement of the reasons for the proposed decision and of each finding of fact and conclusion of law necessary to the proposed decision prepared by the person who conducted the hearing or by one who has read the record. The parties by written stipulation may waive compliance with this section.

(b) [~~When a proposal for decision is prepared, a copy of the proposal shall be served forthwith by the executive director on each party and his attorney of record.~~] Upon the expiration of the twentieth day following the time provided for the filing of exceptions and briefs in §107.50 of this title (relating to Filing of Exceptions, Briefs, and Replies), the proposal for decision may be adopted by written order of the agency, unless exceptions and briefs shall have been filed in the manner required in §107.50 of this title (relating to Filing of Exceptions, Briefs, and Replies). [~~If deemed warranted by the executive director, the hearing officer may direct a party to draft and submit a proposal for decision which shall include proposed findings of fact and a concise and explicit statement of the underlying facts supporting such proposed findings developed from the record.~~]

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

Filed with the Office of the Secretary of State on September 9, 1999.

TRD-9905826
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.51

The State Board of Dental Examiners proposes new §107.51, Findings of Fact and Conclusions of Law, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will know those instances when the Board can change the Findings of Fact and Conclusions of Law prepared by an Administrative Law Judge in a contested case.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The new rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed new rule does not affect other statutes, articles, or codes.

§107.51. Findings of Fact and Conclusions of Law.

(a) The agency may change a finding of fact or conclusion of law made by the administrative law judge if the agency determines:

(1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions;

(2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or

(3) that a technical error in a finding of fact should be changed.

(b) the agency shall state in writing the specific reason and legal basis for a change made under this section.

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

Filed with the Office of the Secretary of State on September 9, 1999.

TRD-9905813
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.53

The State Board of Dental Examiners proposes amendments to §107.53, Final Decisions and Orders, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that provisions for notifying parties of any board decision or order are clearly spelled out and comply with the Administrative Procedure Act.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.53. Final Decisions and Orders.

(a) All final decisions and orders of the agency shall be in writing and shall be signed by the president or other presiding member and secretary of the board. [~~Parties shall be notified either personally or by mail of any decision or order. On written request, a copy of the decision or order shall be delivered or mailed to any party and to the attorney of record.~~]

(b) All parties shall be notified either personally or by first class mail of any decision or order.

(c) On issuance of a decision or order or an order ruling on a motion for rehearing, the agency shall send a copy of the decision or order by first class mail to the attorneys of record or, if a party is not represented by an attorney, to the party, and shall keep an appropriate record of the mailing. A party or attorney of record notified by mail is presumed to have been notified on the third day after the date on which the notice is mailed.

This 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 9, 1999.

TRD-9905827
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.54

The State Board of Dental Examiners proposes amendments to §107.54, Administrative Finality, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance

with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the determination of the conditions under which a decision becomes final complies with the Administrative Procedure Act.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.54. Administrative Finality.

(a) A decision is final: [~~, in the absence of a timely motion for rehearing, and is final and appealable 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 agency board includes a member who receives no salary except per diem for his work as a board member and who resides outside Travis County, the Board may rule on a motion for rehearing at a meeting or by mail, telephone, telegraph, or other suitable means of communication. If the agency 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 on the date rendered and no motion for rehearing is required as a prerequisite for appeal.~~]

(1) if a motion for rehearing is not filed on time, on the expiration of the period for filing a motion for rehearing;

(2) if a motion for rehearing is filed on time, on the date:

(A) the order overruling the motion for rehearing is rendered; or

(B) the motion is overruled by operation of law.

(3) if the agency finds that an imminent peril to the public health, safety, or welfare requires immediate effect of a decision or order, on the date the decision is rendered, or;

(4) on the date specified in the order for a case in which all parties agree to the specified date in writing or on the record, if the specified date is not before the date the order is signed or later than the 20th day after the date the order was rendered.

(b) If a decision or order is final under subsection (a)(4) of this section, the agency must recite in the decision or order the finding made under subsection (a)(4) of this section and the fact that the decision is final and effective on the date rendered.

This 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 9, 1999.

TRD-9905828
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.55

The State Board of Dental Examiners proposes amendments to §107.55 Motions for Rehearing, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the prerequisites for appeal of a decision comply with the Administrative Procedure Act.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.55. Motions for Rehearing.

(a) A timely motion for rehearing is a prerequisite to an appeal, except that a motion for rehearing of a decision that is final under §107.54 (a)(3) of this title (relating to Administrative Finality), is not a prerequisite to an appeal. [~~A motion for rehearing must be filed within 20 days after the date the party or his attorney of record is notified of the final decision or order. Replies to a motion for rehearing must be filed with the agency within 30 days after the date the party or his attorney of record is notified of the final decision or order, and agency action on the motion must be taken within 45 days~~

~~after the date the party or his attorney of record is notified of the final decision or order. If agency action is not taken within the 45-day period, the motion for rehearing is overruled by the operation of law 45 days after the date of rendition of the final decision or order. The agency may by written order extend the period of time for the filing the motions and replies and taking agency action, except that an extension may not extend the period for the agency action beyond 90 days after the date of rendition of the final decision or order. 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. The parties may by agreement with the approval of the agency provide for a modification of the times provided in this section.~~]

(b) A decision that is final under §107.54(a)(2)(3)(4) of this title (relating to Administrative Finality) is appealable.

This 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 9, 1999.

TRD-9905829
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.56

The State Board of Dental Examiners proposes new §107.56, Motions for Rehearing: Procedures, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will be assured that the board's procedures for considering a motion for rehearing in a contested case are in compliance with the Administrative Procedure Act.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 463-6400. To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The new rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed new rule does not affect other statutes, articles, or codes.

§107.56. Motions for Rehearing: Procedures.

(a) A motion for rehearing in a contested case must be filed with the Board not later than the 20th day after the date on which the party or the party's attorney of record is notified as required by §107.53 of this title (relating to Final Decisions and Orders), of a decision or order that may become final.

(b) A reply to a motion for rehearing must be filed with the agency not later than the 30th day after the date on which the party or the party's attorney of record is notified as required by §107.53 of this title (relating to Final Decisions and Orders) of the decision or order that may become final.

(c) The agency shall act on a motion for rehearing not later than the 45th day after the date on which the party or the party's attorney of record is notified as required by §107.53 of this title (relating to Final Decisions and Orders) of the decision or order that may become final or the motion for rehearing is overruled by operation of law. If the board includes a member who receives no salary except for per diem for his work as a board member and who resides outside Travis county, the board may rule on a motion for rehearing at a meeting or by mail, telephone, telegraph, or other suitable means of communication.

(d) The agency may by written order extend the time for filing a motion or reply or taking action, except that an extension may not extend the period for agency action beyond the 90th day after the date on which the party or the party's attorney of record is notified as required by §107.53 of this title (relating to Final Decisions and Orders) of the decision or order that may become final.

(e) In the event of an extension, a 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 on which the party or the party's attorney of record is notified as required by §107.53 of this title (relating to Final Decisions and Orders) of the decision or order that may become final.

This 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 9, 1999.

TRD-9905814
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.57

The State Board of Dental Examiners proposes amendments to §107.57, The Record, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature, 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in

effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the requirements for the contents of the record in a contested case comply with the Administrative Procedure Act.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §§2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.57. The Record.

[~~(a)~~] The record in a contested case includes [~~shall include where applicable~~]:

(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 on them;

(5) proposed findings and exceptions;

(6) any decision, opinion, or report by the administrative law judge [~~hearing officer or the member of the board presiding at the hearing~~]; and

(7) all staff memoranda or data submitted to or considered by the administrative law judge [~~hearing officer~~] or members of the agency who are involved in making the decision.

~~[(b) Findings of fact shall be based exclusively on the evidence presented and matters officially noticed.]~~

This 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 9, 1999.

TRD-9905830
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.58

The State Board of Dental Examiners proposes amendments to §107.58, Show Cause Orders and Complaints, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will have a clearer understanding of the provisions for assessing costs for preparation of the record in appeal of a final decision or order. Further, costs may be assessed as court costs.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 463-6400. To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §§2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.58. Cost of Appeal [~~Show Cause Orders and Complaints~~].

(a) The agency may assess the cost of any transcript to the requesting party. This does not preclude the parties from agreeing to share the costs associated with the preparation of a transcript. [~~, either on its own motion or upon receipt of sufficient written complaint, may in its sound discretion, at any time after notice to all interested parties, including personal service upon the license holder, cite any person operating under its jurisdiction to appear before it in a public hearing and require him or it to show cause why his or its license or certificate or other authority should not be revoked, canceled, suspended, limited, amended, or that such person has been reprimanded or censored, or other action available to the agency be taken, for the failure to comply with any applicable statute, or the rules, regulations or orders of the agency, or for failure to abide by the terms and provisions of the license itself. All hearings in such proceedings shall be conducted in accordance with the provisions of these rules.~~]

(b) A party who appeals a final decision in a contested case will be required to pay all or a part of the cost of preparation of the original or a certified copy of the record of the proceeding that is required to be sent to the reviewing court. [~~No revocation, cancellation, suspension, limitation, or withdrawal of any license or certificate or other authority is effective unless, prior to the institution of agency proceedings, the agency gives notice by personal service or by registered or certified mail to the licensee of facts or conduct alleged to warrant the intended action, and the licensee or certificate holder is given an opportunity to show compliance with all requirements of law for the retention of the license.~~]

(c) A charge imposed under this section is a court cost and may be assessed by the court in accordance with the Texas Rules of Civil Procedure.

This 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 9, 1999.

TRD-9905831
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.60

The State Board of Dental Examiners proposes amendments to §107.60, Amendments to Rules Subsequent to January 1, 1976, pursuant to its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the procedure for adopting, repealing or amending rules will comply with the requirements of the Administrative Procedure Act.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.60. Adopting, Repealing, or Amending Rules [~~Amendments to Rules Subsequent to January 1, 1976~~]

(a) All rules shall be adopted, repealed, or amended in accordance with the Administrative Procedure Act. Prior to adopting, repealing, or amending any rule, [~~the adoption of any rule,~~] the agency 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 of the House of Representatives. [~~and published by the secretary of state in the Texas Register.~~] No rule or regulation proposed for adoption may be adopted until such proposed rule or regulation has been published in the *Texas Register* as provided by law. 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 the Government Code, Chapter 2002, §2002.014. [~~A statement of the statutory or other authority under which the rule is proposed to be promulgated;~~]

(3) A statement of the statutory or other authority under which the rule is proposed to be adopted. [~~A request for comments on the proposed rule from any interested person; and~~]

(4) A fiscal note showing the name and title of the officer preparing it. [~~Any other statement required by law;~~]

(5) A note about public benefits and costs showing the name and title of the officer responsible for preparing it. [~~No rule or regulation proposed for adoption may be adopted until such proposed rule or regulation has been published in the Texas Register as provided by law.~~]

(6) A local employment impact statement prepared under the Government Code, Chapter 2001, §2001.022, if required.

(7) A request for comments on the proposed rule from any interested person.

(8) Any other statement required by law.

(b) Each notice of a proposed rule becomes effective as notice when published in the Register. The notice shall be mailed to all persons who have made timely written requests of the agency for advance notice of its rule-making proceedings. However, failure to mail the notice does not invalidate any actions taken or rules adopted.

(c) Prior to the adoption of any rule, the agency shall give[~~afford~~] all interested persons [~~who have made timely requests~~] a reasonable opportunity to submit data, views, or arguments, orally or in writing.

(d) The agency may adopt an emergency rule without prior notice or hearing, or with an abbreviated notice and hearing that it finds practicable, if the agency: [~~If the agency finds that an imminent peril to the public health, safety, or welfare require adoption of a rule on fewer than 30 days notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing that it finds practicable to adopt an emergency rule. Such an emergency rule or regulation or amendment(s) to any of the board's rules or regulations may be instigated by one of the officers of the board, and such officer may conduct a poll by mail or telephone and arrive at a decision when the majority of the board finds that such an emergency rule, regulation, or amendment(s) needs to be adopted. This section 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 under subsections (a) and (c) of this section is not precluded. An emergency rule adopted under the provisions for this subsection, and the agency's written reasons for the adoption, shall be filed in the office of the secretary of state for publication in the *Texas Register*.~~]

(1) finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice; and

(2) states in writing the reasons for its finding.

(3) A rule adopted under this section may be effective for not longer than 120 days and may be renewed once for not longer than 60 days.

(4) The agency shall file an emergency rule adopted under this section and the agency's written reasons for adoption with the secretary of state for publication in the Texas Register.

(e) The agency may use informal conferences and consultations to obtain opinions [~~as means of obtaining the viewpoints~~] and advice of interested persons about [~~concerning~~] contemplated rule-making. The agency also may appoint committees of experts or interested persons or representatives of the [~~general~~] public to advise it about [~~with respect to~~] any contemplated rule-making. The powers of these committees are advisory only.

(f) Any interested person may petition the agency requesting the adoption of a rule. The [~~Any such~~] petition must be presented in substantially the form found in §107.62 of this title (relating to Appendix) [~~set forth in §107.62 of this title (relating to Petition for Adoption of a Rule)~~]. Not later than the 60th day after the date of [~~At the board's next meeting after~~] submission of a petition the agency shall: [~~either shall deny the petition in writing, stating its reasons for the denial, or shall initiate rule-making proceedings in accordance with the provisions of this section or may schedule hearings to determine the necessity of such requested rule.~~]

(1) deny the petition in writing, stating the reasons for its denial; or

(2) initiate a rulemaking proceeding.

This 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 9, 1999.

TRD-9905832
Jeffery R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.63

The State Board of Dental Examiners proposes amendments to §107.63, Informal Disposition, pursuant to its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will have a clearer understanding of the procedures and requirements for informal resolution of complaints at a settlement conference. This procedure can result in a savings of the time, expense and effort required to file a contested case at the State Office of Administrative Hearing.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.63. Informal Disposition.

Pursuant to the Government Code, Chapter 2001 et seq., [~~Administrative Procedure and Texas Register Act, §13(e),~~] ultimate disposition of any complaint or matter pending before the Board may be made by stipulation, agreed settlement, or consent order. Such informal dispositions will facilitate the expeditious change or correction of dental practice patterns which constitute violations of the Dental Practice Act or the rules of the Board.

(1) Approval. The secretary or executive director shall determine if the public interest would be served by offering to resolve a complaint or other matter pending before the Board by stipulation, settlement agreement, or consent order in lieu of a formal disciplinary proceeding described in Texas Civil Statutes, Occupations Code, Chapter 263. §263.003 [~~Article 4548h, relating to hearing)~~]. If the secretary or executive director approves the matter for possible resolution by stipulation, agreed settlement, or consent order, the licensee and other persons shall be notified as provided in this section.

(2) Procedure. Upon referral by the secretary or executive director of a complaint or other matter for possible resolution by stipulation, agreed settlement, or consent order, the following procedure shall be followed.

(A) One or more members of the board shall represent the full board at the settlement conference.

(B) The board will provide the licensee notice in writing of the time, date, and place of the settlement conference. Such notification shall inform the licensee of the nature of the alleged violation, that he or she may be represented by legal counsel, that the licensee may offer the testimony of such witnesses as he or she may desire, that the board will be represented by one or more of its members and by legal counsel, and that he or she may request that the matter be considered by the board according to procedures described in Texas Civil Statutes, Occupations Code, Chapter 263, §263.007 [~~Article 4548h, (relating to hearing)~~]. A copy of the board's rules relating to the informal disposition of cases shall be enclosed with the notice of the settlement conference. Notice of the settlement conference, with enclosures, shall be sent by certified mail, return receipt requested, to the current address of the licensee on file with the Board.

(C) The settlement conference shall be informal and will not follow the procedure established in State Office of Administrative Hearing (SOAH) rules [~~this chapter~~] for contested cases. The licensee, his or her attorney, and representative(s) of the board and board staff may question witnesses, make relevant statements, present affidavits or statements of persons not in attendance, and may present such other evidence as may be appropriate. Any documentary evidence received by the board less than ten days before the sched-

uled dates of the settlement conference will not be considered by the panel.

(D) The settlement conference will be conducted by a representative(s) of the board. The board's representative may call upon the board's attorney at any time for assistance in conducting the settlement conference. The board's representative(s) may question any witness, and shall afford each participant in the settlement conference the opportunity to make such statements as are material and relevant.

(E) The board's representative(s) may prohibit or limit access to the Board's investigative file by the licensee, his or her attorney, and the complainant and his or her representative.

(F) The board's representative(s) shall exclude from the settlement conference all persons except witnesses during their testimony, the licensee, his or her attorney, the complainant, board members, and board staff.

(G) At the conclusion of the settlement conference, the board's representative(s) shall make recommendations to the licensee for resolution or correction of any alleged violations of the Dental Practice Act or of the Board rules. Such recommendations may include any disciplinary actions authorized by the Occupations Code, Chapter 263, §263.002, [~~Dental Practice Act,~~] Texas Civil Statutes[~~, Article 4549, §3~~]. The board's representative(s) may, on the basis that a violation of the Dental Practice Act or the Board's rules has not been established recommend that the case be closed, or the case may be referred to the Board Secretary for further investigation.

(H) The licensee shall either accept or reject the settlement recommendations proposed by the board representative(s) [~~within 30 days of the last day of the conference~~]. To accept the settlement recommendation [~~agreement~~], the licensee must sign the proposed settlement agreement [~~and cause the signed agreement to be returned to and filed with the board~~] within 30 days from receipt. [~~the 30-day period.~~] Inaction by the licensee shall constitute rejection. If the licensee rejects the proposed agreement, the matter shall be referred to the secretary and executive director for other appropriate disposition.

(I) Following acceptance and execution of the agreement by the licensee [~~of the settlement agreement~~], said agreement shall be submitted to the board's legal counsel, and/or executive director for review.

(J) The settlement proposal will then be submitted to the entire board for approval.

(K) A recommendation to close a case requires no action by the Respondent prior to its presentation to the Board.

(3) Consideration by the Board.

(A) The name and license number of the licensee will not be made available to the board until after the board has reviewed and made a decision on the recommended settlement agreement [~~conference~~].

(B) Upon an affirmative majority vote, the Board shall either enter an order approving the proposed settlement agreements, or without entry of an order, approve the recommendation to close. Said order shall bear the signature of the president and secretary of the Board, or of the officer presiding at such meeting and shall be included in the minutes of the Board.

(C) If the board does not approve a proposed settlement agreement, the licensee shall be so informed. The matter shall be referred by the board to the secretary and executive director for consideration of appropriate action.

This 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 9, 1999.

TRD-9905833
Jeffery R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

Subchapter B. PROCEDURES FOR INVESTIGATING COMPLAINTS

22 TAC §107.100

The State Board of Dental Examiners proposes amendments to §107.100, Receipt, Processing and Coordination of Complaints, pursuant to its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will have a clearer understanding of the statutory provisions for receipt, processing, and coordination of complaints.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.100. Receipt, Processing, and Coordination of Complaints.

(a) The Enforcement Division of the State Board of Dental Examiners, under supervision of the Director of Enforcement, shall have primary responsibility for the receipt, processing, and assignment of complaints filed by patients and/or other members of the general public or dental profession against Texas dentists and dental hygienists and/ or dental laboratory registrants. All complaints shall be processed, coordinated, and investigated with the coordina-

tion of the Board Secretary or his/her designee. All complaints and investigations shall follow the prescribed and mandated procedures as detailed in the Occupations Code, Chapter 255 [~~Section 1, Article 4548h - Complaints: Refusing, Revoking, Canceling and Suspending Licenses, of the Dental Practice Act~~].

(b) In order to insure that all complaints received are accounted for and follow the prescribed protocols, a complaint/investigative procedure shall be established and utilized.

This 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 9, 1999.

TRD-9905834
Jeffery R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.101

The State Board of Dental Examiners proposes amendments to §107.101, Guidelines for the Conduct of Investigations, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will have a clearer understanding of the statutory provisions for the guidelines for categorizing complaints, assigning priorities, and evaluating the need for temporary suspension of a license.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas, 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.101. Guidelines for the Conduct of Investigation.

(a) (No change.)

(b) Every complaint shall be assigned a priority classification. Priority 1 represents more serious allegations of violations, including [~~but not limited to,~~] Patient Mortality, Patient Morbidity, Practicing Without a License, and Sanitation. Priority 2 represents less serious threats to the public welfare, including [~~but not limited to~~] records-keeping violations and advertising.

(c) Upon receipt, every complaint shall be evaluated by the Director of Enforcement to determine whether temporary suspension, in compliance with the Occupations Code, Chapter 263, §263.004 [~~Article 4548h, Section 2(d)~~], should be considered.

This 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 9, 1999.

TRD-9905835
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

22 TAC §107.12

The State Board of Dental Examiners proposes amendments to §107.102, Procedures in Conduct of Investigations, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will have a clearer understanding of the statutory provisions for procedures governing the conduct of investigations.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas, 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.102. Procedures in Conduct of Investigations.

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

(c) If, upon initial review, the complaint reveals a possible threat to a person's welfare, the complaint shall be referred to the Board or an executive committee of the Board, for consideration of temporary suspension, pursuant to the Occupations Code, Chapter 263, §263.004 [~~Article 4548h, Section 2(d)~~].

(d)-(g) (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 9, 1999.

TRD-9905836
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

Subchapter C. ADMINISTRATIVE PENALTIES

22 TAC §107.200

The State Board of Dental Examiners proposes amendments to §107.200, Administrative Penalty, in conjunction with its review of Chapter 107, Dental Board Procedures, and in accordance with the General Appropriations Act of 1997, Article IX, Acts of the 75th Legislature 1997, §167.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the rule.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will have a clearer understanding of the statutory provisions for the procedures governing the assessment of administrative penalties for violations of the Dental Practice Act and/or the rules of the Board.

There will be no fiscal implications for small and large businesses. There will be no economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas, 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.200. Administrative Penalty.

(a) Procedures and amounts for administrative penalties portrayed in this rule apply generally to violations of the Dental Practice Act and/or Board rules except for violations of the continuing education requirements prescribed in the Occupations Code, Chapter 257, §257.005, [~~Dental Practice Act in Article 4544, §5,~~] Texas Civil Statutes; [~~Article 4551e, §5A, Texas Civil Statutes,~~] Senate Bill 964, 76th Legislature, 1999, and in Chapter 104 of this title (relating to Continuing Education). Procedures and amounts for administrative penalties for failure to comply with continuing education requirements are set forth in §107.201 of this title (relating to Administrative Penalties for Continuing Education Violations).

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

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

Filed with the Office of the Secretary of State, on September 9, 1999.

TRD-9905837
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

Chapter 115. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL DENTAL HYGIENE

22 TAC §115.10

The State Board of Dental Examiners proposes amendments to §115.10, Radiologic Procedures.

Jeffry R. Hill, Executive Director, State Board of Dental Examiners, has determined for the first five-year period the rule is in effect there will be fiscal implications for local or state government as a result of enforcing or administering the rule. Annual revenue to the agency will increase by $7.00 per package, or $20,000. The increase is proposed to recover increased costs to the board for providing test packets to applicants.

Mr. Hill also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that costs incurred by the agency in performing a service, i.e., radiologic study packets and examinations will be offset by an equal amount of revenue. It is made clear that the examination shall be administered by a Texas licensed dentist. Revisions to the rule help ensure the safety of the citizens of Texas.

There will be no fiscal implications for small and large businesses. Other than the economic costs to persons who are required to comply with the rule as proposed which is contingent upon the number of radiology examinations purchased by a licensed Texas dentist as the fee is increased from $30 to $37 to cover the cost of additional study material that is now included in the examination packet.

Comments on the proposal may be submitted to Mei Ling Clendennen, Assistant Executive Director, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas, 78701, (512-463-6400). To be considered, all comments must be received by the State Board of Dental Examiners on or before October 24, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the State Board of Dental Examiners with the authority to adopt and enforce rules necessary for it to perform its duties, and to ensure compliance with laws relating to the practice of dentistry.

The proposed amended rule does not affect other statutes, articles, or codes.

§115.10. Radiologic Procedures.

(a) Any person performing radiologic procedures under the supervision of a Texas licensed dentist must register with the Texas State Board of Dental Examiners (TSBDE). A[~~This~~] registrant may perform, by the direct oral or written order(s) of the supervising [~~licensed~~] dentist, any radiologic procedures [~~radiographs~~] required for the diagnosis of the maxillofacial complex.

(b) This section does not apply to registered nurses or persons certified under the Medical Radiologic Technologist Certification Act.

(c) A dental hygienist who is licensed and currently registered in this state, shall be deemed to be registered for the purpose of performing radiologic procedures .

(d) [~~There will be no additional fee for the registration of qualified people defined under this section. The current registration fee paid by the employing licensee will adequately cover costs.~~] An examination materials charge, not to exceed $37 [~~$30~~], payable to Texas State Board of Dental Examiners, will be assessed to those requiring examination under the provisions of this Act.

[~~(e) Dental assistants who meet the minimum standards established by these rules shall be listed on the annual registration notice of their present employing dentist (Texas Civil Statutes, Article 4551e-1(3)). This notice will be available for inspection in the office of the licensee.~~]

(e) [~~(f)~~] A [~~registered dentist may certify that a~~] dental assistant is qualified to perform radiographic procedures if any one of the following criteria is met:

(1) current certification as a [~~be a currently~~] certified dental assistant by [~~meeting criteria established by~~] the Dental Assisting National Board, Inc.;

(2) successful completion of [~~have taken and passed~~] the dental radiation health and safety examination administered by the Dental Assisting National Board, Inc.; or

(3) successful completion of [~~has taken and passed~~] an examination specified by the TSBDE and administered by a licensed Texas dentist. [~~This test shall be constructed by a radiologic advisory committee appointed by the board. Essential areas of testing shall include, but not be limited to, the following areas:~~]

[~~(A) radiation protection for the patient and others;~~]

[~~(B) radiographic equipment including safety standards, operations, and maintenance;~~]

[~~(C) image production and evaluation;~~]

[~~(D) applied human dental anatomy;~~]

[~~(E) radiographic techniques.~~]

(f) [~~(g)~~] Dental assistants who are not qualified under the provisions of this section, may [~~shall~~] be allowed to perform necessary diagnostic radiographs under the direct supervision of the dentist for a period of six months as a part of their training and as a part of their examination , provided the dental assistant is personally supervised by a person authorized to perform radiologic procedures.

[~~(h) Any new dental assistants, with no previous experience in dentistry, will have up to six months to come into compliance with the provisions of these regulations if they are to perform radiographic procedures.~~]

[~~(i) Any dental assistant (who qualifies under this rule) hired by the licensee after he or she has submitted his or her annual registration notice, shall be deemed registered if the licensee lists the assistant's name and date of employment on the back of the registration notice.~~]

(g) [~~(j)~~] All dental radiologic procedures can be performed by any person qualified and certified under this section.

(h) [~~(k)~~] Registration may be [~~suspended,~~] revoked, [~~or not renewed~~] for the following reasons:

(1) violation of the rules of the Texas State Board of Dental Examiners;

(2) violation of the Texas Dental Practice Act; and[~~Medical Radiologic Technologist Certification Act or rules promulgated thereunder; or~~]

(3) violation of all other applicable rules and statutes affecting radiologic procedures in Texas. [~~violation of the Texas Dental Practice Act.~~]

(i) [~~(l)~~] All registrants must comply with the rules and regulations of the Texas Department of Health for control of radiation.

[~~(m) These rules are effective January 1, 1989.~~]

This 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 9, 1999.

TRD-9905811
Jeffry R. Hill
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6400

♦ ♦ ♦

Part 11. BOARD OF NURSE EXAMINERS

Chapter 220. NURSE LICENSURE COMPACT

22 TAC §§220.1-220.4

The Board of Nurse Examiners proposes new §§220.1-220.4 pursuant to new provisions of the Nursing Practice Act, Texas Revised Civil Statutes Annotated Art. 4528b, Sections 1 through 10, (Nurse Licensure Compact). The new rules concern Definitions; Issuance of a License a Compact Party State; Limitations on Multistate Licensure Privilege; and Information System created by Art. 4528b.

The new rules are being proposed pursuant to the new Nursing Licensure Compact which will become effective January 1, 2000. To date, the compact legislation has been adopted by five states including Texas, Arkansas, Maryland, North Carolina,

and Utah. States that have enacted the compact legislation are referred to as party states. The compact allows for the mutual recognition by party states of a single nurse license rather than the cumbersome practice of obtaining duplicative licenses for each state a nurse practices. Mutual recognition of a license increases nurse mobility and facilitates delivery of health care by innovative communication practices such as telenursing. Additionally, the compact will promote the public health and safety by encouraging cooperative effort among party states in nurse licensing and regulation. The compact creates a shared information system which allows the party states to exchange and tract information on nurse regulation, ongoing investigations and disciplinary actions. The proposed new rules were developed through a cooperative effort between the compact party state administrators in order that a uniform rules packet could be proposed in each party state consistent with the uniform compact language.

New §220.1 contains definitions for terms used in Article 4228b and specifies what will be considered a nurse's "primary state of residence" for purposes of the compact.

New §220.2 specifies how a nurse practicing pursuant to the compact shall apply for a home state license and how the compact effects a nurse changing his or her state of primary residency.

New §220.3 provides that a licensee subject to a disciplinary order which requires monitoring or restricted practice must meet the terms of such order within the issuing home state unless the nurse obtains written permission to practice in a new party state from both the home state board and new party state board.

New §220.4 describes the new shared licensure and disciplinary information system which is created by the compact. The rule defines the levels of access to such information collected pursuant to the compact for both party states and non-party states and the reporting requirements of party states.

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.

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

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

The amendments are proposed under the Nursing Practice Act, Texas Occupations Code, Section 301.151, 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 4528b, Section 6(a)(4) which provides the Board authority to adopt uniform rules concerning the compact.

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

§220.1. Definitions.

For the purpose of the Compact, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Board–party state's regulatory body responsible for issuing nurse licenses.

(2) Information system–the coordinated licensure information system.

(3) Primary state of residence–the state of a person's declared fixed permanent and principal home for legal purposes; domicile.

(4) Public–any individual or entity other than designated staff or representatives of party state Boards or the National Council of State Boards of Nursing, Inc.

§220.2. Issuance of a License by a Compact Party State.

(a) A nurse applying for a license in a home party state shall produce evidence of the nurses' primary state of residence. Such evidence shall include a declaration signed by the licensee. Further evidence that may be requested may include but are not limited to:

(1) a driver's license with a home address;

(2) voter registration card displaying a home address; or

(3) federal income tax return declaring the primary state of residence.

(b) A nurse changing primary state of residence, from one party state to another party state, may continue to practice under the former home state license and multistate licensure privilege during the processing of the nurse's licensure application in the new home state for a period not to exceed thirty days.

(c) The licensure application in the new home state of a nurse under pending investigation by the former home state shall be held in abeyance and the thirty day period stated in subsection (b) of this section shall be stayed until resolution of the pending investigation.

(d) The former home state license shall no longer be valid upon the issuance of a new home state license.

(e) If a decision is made by the new home state denying licensure, the new home state shall notify the former home state within ten business days and the former home state shall take action in accordance with that state's laws and rules. The applicant shall cease practicing on the multi-state privilege in the state in which licensure was denied.

§220.3. Limitations on Multistate Licensure Privilege.

All home state Board disciplinary orders, agreed or otherwise, which limit the scope of licensee's practice or require monitoring of the licensee as a condition of the order shall include the requirement that the licensee will limit his or her practice to the home state during the pendency of the order. This requirement may allow the licensee to practice in other party states with prior written authorization from both the home state and party state Boards.

§220.4. Information System.

(a) Levels of access.

(1) The public shall have access to nurse licensure information limited to:

(A) the nurse's name,

(B) jurisdiction(s) of licensure,

(C) license expiration date(s),

(D) licensure classification(s) and status(es),

(E) public emergency and final disciplinary actions, as defined by contributing state authority, and

(F) the status of multistate licensure privileges.

(2) Non-party state Boards shall have access to all Information System data except current significant investigative information and other information as limited by contributing party state authority.

(3) Party State Boards shall have access to all Information System data contributed by the party states and other information as limited by contributing non-party state authority.

(b) The licensee may request in writing to the home state Board to review the data relating to the licensee in the Information System. In the event a licensee asserts that any data relating to him or her is inaccurate, the burden of proof shall be upon the licensee to provide evidence that substantiates such claim. The Board shall verify and within ten business days correct inaccurate data to the Information System.

(c) The Board shall report to the Information System within 10 business days, a disciplinary action, agreement or order requiring participation in alternative programs or which limit practice or require monitoring (except agreements and orders relating to participation in alternative programs required to remain nonpublic by contributing state authority), dismissal of complaint, and changes in status of disciplinary action, or licensure encumbrance.

(d) Current significant investigative information shall be deleted from the Information System within ten business days upon report of disciplinary action, agreement or order requiring participation in alternative programs or agreements which limit practice or require monitoring or dismissal of a complaint.

(e) Changes to licensure information in the Information System shall be completed within ten business days upon notification by a 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 13, 1999.

TRD-9905887
Katherine A. Thomas, MN, RN
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 305-6816

♦ ♦ ♦

Part 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

Chapter 462. COMPLAINTS AND ENFORCEMENT

22 TAC §§462.1-462.14

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

The Texas State Board of Examiners of Psychologists proposes the repeal of §§462.1 - 462.14, concerning Complaints and Enforcement. The repeals are being proposed in order to reorganize the rules of the Board.

Sherry L. Lee, Executive Director, 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 as a result of enforcing or administering the repeals.

Ms. Lee also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be to make the rules easier for licensees and the general public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Comments on the proposals may be submitted to Janice C. Alvarez, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700.

The repeals are proposed under Texas Civil Statutes, Article 4512c, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed repeals do not affect other statutes, articles, or codes.

§462.1. Timeliness of Complaints.

§462.2. Complaint Procedure Notification.

§462.3. Standardized Complaint Form.

§462.4. Complaint Investigation.

§462.5. Complaint Disposition.

§462.6. Temporary Suspension of a License.

§462.7. Persons with Criminal Backgrounds.

§462.8. Rehabilitation Guidelines.

§462.9. Complaints Alleging Violations of Court Orders.

§462.10. Rules of Evidence in Contested Cases.

§462.11. Legal Actions Reported.

§462.12. Suspension of License for Failure to Pay Child Support.

§462.13. Non-compliance with Continuing Education Requirements.

§462.14. Monitoring of Licenses.

This 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 13, 1999.

TRD-9905893
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

Chapter 463. APPLICATIONS AND EXAMINATIONS

22 TAC §463.26

The Texas State Board of Examiners of Psychologists proposes new §463.26, concerning Health Service Provider in Psychology Specialty Certification. The new rule is being proposed in order to reorganize and clarify the rules of the Board.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Lee also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to make the rules easier for licensees and the general public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposals may be submitted to Janice C. Alvarez, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700.

The new rules are proposed under Texas Civil Statutes, Article 4512c, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed new rules do not affect other statutes, articles, or codes.

§463.26. Health Service Provider in Psychology Specialty Certification.

(a) Health Service Provider in Psychology is a specialty certification from the Board available to Texas licensed psychologists who are listed in the National Register of Health Service Providers. The National Register defines a health service provider as one who is trained and experienced in the delivery of direct, preventive, assessment, and therapeutic intervention services to individuals whose growth, adjustment, or functioning is impaired, or to individuals who otherwise seek services. This credential does not constitute a license to practice psychology under the Act. The Board will continue to recognize all individuals who were certified as health service providers by the Board prior to January 1, 1998, and who remain in good standing.

(b) Requirements for this credential as of January 1, 1998, are:

(1) Current, active licensure by the Board as a psychologist; and

(2) Documentation submitted directly to the Board from the National Register of Health Service Providers in Psychology that the applicant is currently designated as a Health Service Provider with the National Register.

(c) Active status as a health service provider in psychology requires annual renewal and payment of an annual renewal fee. After one year, if the licensee fails to renew this specialty certification, it is void. To obtain specialty certification again, reapplication is required.

This 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 13, 1999.

TRD-9905894
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

Chapter 465. RULES OF PRACTICE

22 TAC §465.1

The Texas State Board of Examiners of Psychologists proposes an amendment to §465.1 concerning Definitions. The amendment is being proposed in order to stipulate that the informed consent obtained from a patient/client must be documented and that the informed consent is part of the patient/client records.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to protect the public, including assisting in the continuity of care. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Janice C. Alvarez, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700.

The amendment is proposed under Texas Civil Statutes, Article 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§465.1. Definitions.

The following terms have the following meanings:

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

(4) "Informed Consent" means the documented consent of [~~by~~] the patient, client and other recipients of psychological services only after the patient, client or other recipient has been made aware of the purpose and nature of the services to be provided, including but not limited to: the specific goals of the services; the procedures to be utilized to deliver the services; possible side effects of the services, if applicable; alternate choices to the services, if applicable; the possible duration of the services; the confidentiality of and relevant limits thereto; all financial policies, including the cost and methods of payment; and any provisions for cancellation of and payments for missed appointments; and right of access of the patient, client or other recipient to the records of the services.

(5)-(10) (No change.)

(11) "Records" are any information, regardless of the format in which it is maintained, that can be used to document the delivery, progress or results of any psychological services including,

but not limited to, data identifying a recipient of services, dates of services, types of services, informed consents, fees and fee schedules, assessments, treatment plans, consultations, session notes, test results, reports, release forms obtained from a client or patient or any other individual or entity, and records concerning a patient or client obtained by the licensee from other sources.

(12)-(14) (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 13, 1999.

TRD-9905895
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §465.6

The Texas State Board of Examiners of Psychologists proposes an amendment to §465.6 concerning Listings & Advertisements. The amendment is being proposed in order to reorganize and clarify the rules of the Board.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to make the rules easier for licensees and the general public to follow and understand. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Janice C. Alvarez, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700.

The amendment is proposed under Texas Civil Statutes, Article 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§465.6. Listings, Public Statements and [&] Advertisements, Solicitations, and Specialty Titles.

(a) (No change.)

(b) Public Statements and [&] Advertisements [~~Advertising~~].

(1) Licensees shall not authorize, use or make any public statements and advertisements that are false, deceptive, misleading or fraudulent, either because of what they state, convey or suggest or because of what they omit concerning the practice of psychology or their own training, experience or competence; their academic degrees; their credentials; their institutional or association affiliations; publications or research.

(2) A licensee's authorization of or use in any advertising or listing for the practice of psychology of the term "Board Certified" or "Board Approved" or any similar words or phrases calculated to convey the same meaning shall constitute misleading or deceptive advertising, unless the licensee discloses the complete name of the specialty board which conferred the aforementioned certification. A licensee may not use the term "Board Certified" or "Board Approved" or any similar words or phrase calculated to convey the same meaning if the claimed board certification has expired and has not been renewed at the time the advertising in question was published or broadcast.

(3) [~~(2)~~] Licensees who learn of false or deceptive statements about their practice of psychology or their status as providers of psychological services make reasonable efforts to correct such statements.

(c) Solicitation of Testimonials and/or Patients.

(1) [~~(3)~~] Licensees do not solicit testimonials from current therapy clients or patients or from other persons who are vulnerable to undue influence.

(2) [~~(4)~~] Licensees do not engage, directly or through agents, in uninvited in-person solicitation of business from actual or potential therapy patients or clients.

(d) Specialty Titles. A psychologist may use a specialty title only when one of the following criteria have been met:

(1) Doctorate in the area of specialization;

(2) Diplomate status in that area from the American Board of Professional Psychology;

(3) Retraining under the American Psychological Association retraining guidelines of 1977;

(4) Documentation that the title has been used for five years and documentation of academic coursework and relevant applied experience, if an individual was matriculated in a doctoral program in psychology in 1977 or before;

(5) Certificate of proficiency from the American Psychological Association's College of Professional Psychology.

This 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 13, 1999.

TRD-9905896
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

Chapter 466. PROCEDURE

22 TAC §§466.1-466.42, 466.44

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

The Texas State Board of Examiners of Psychologists proposes the repeal of Chapter 466, Procedure, §§466.1-466.42 and §466.44. The repeals are being proposed in order to reorganize the rules of the Board.

Sherry L. Lee, Executive Director, 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 as a result of enforcing or administering the repeals.

Ms. Lee also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be to make the rules easier for licensees and the general public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Comments on the proposals may be submitted to Janice C. Alvarez, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700.

The repeals are proposed under Texas Civil Statutes, Article 4512c, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed repeals do not affect other statutes, articles, or codes.

§466.1. Objective and Scope.

§466.2. Definitions.

§466.3. Construction.

§466.4. Records of Official Action.

§466.5. Conduct and Decorum.

§466.6. Computation of Time.

§466.7. Agreement To Be in Writing.

§466.8. Pleadings.

§466.9. Docketing.

§466.10. Notice of Adjudicative Hearing.

§466.11. Service in Nonrulemaking Proceedings.

§466.12. Filing Fees.

§466.13. Notice of Rulemaking Proceedings.

§466.14. Informal Settlement Conference.

§466.15. Informal Disposition.

§466.16. Confidentiality of Informal Settlement Conference.

§466.17. Prehearing Conference.

§466.18. Recording of Hearings.

§466.19. Motions.

§466.20. Consolidated Hearings.

§466.21. Place and Nature of Hearing.

§466.22. Presiding Officer.

§466.23. Record.

§466.24. Withdrawing the Application.

§466.25. Discovery.

§466.26. Evidence.

§466.27. Official Notice.

§466.28. Protective Orders.

§466.29. Orders Compelling Discovery Requests.

§466.30. Sanctions.

§466.31. Board Review of Disciplinary Orders.

§466.32. Stipulation.

§466.33. Exhibits.

§466.34. Hearing Procedures.

§466.35. Oral Argument.

§466.36. Proposals for Decisions.

§466.37. Exceptions and Replies.

§466.38. Oral Argument.

§466.39. Final Decisions and Orders.

§466.40. Motions for Rehearing.

§466.41. Costs of Appeal.

§466.42. Disciplinary Review Panel.

§466.44. Disciplinary Guidelines.

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

Filed with the Office of the Secretary of State on September 13, 1999.

TRD-9905897
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

Chapter 467. ANNOUNCEMENTS AND LISTINGS

22 TAC §467.2, §467.3

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

The Texas State Board of Examiners of Psychologists proposes the repeal of §467.2 and §467.3, concerning Announcements and Listings. The rules are being repealed in order to reorganize and clarify the rules of the Board.

Sherry L. Lee, Executive Director, 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 as a result of enforcing or administering the rule.

Ms. Lee also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as

a result of enforcing the repeal will be to make the rules easier for licensees and the general public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Janice C. Alvarez, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700.

The repeals are proposed under Texas Civil Statutes, Article 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed repeal does not affect other statutes, articles, or codes.

§467.2. Use of Specialty Titles.

§467.3. Misleading or Deceptive Advertising.

This 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 13, 1999.

TRD-9905898
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

Chapter 469. SPECIALTY CERTIFICATION

22 TAC §469.1, §469.2

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

The Texas State Board of Examiners of Psychologists proposes the repeal of §469.1 and §469.2, concerning Specialty Certification. The rules are being repealed in order to reorganize and clarify the rules of the Board.

Sherry L. Lee, Executive Director, 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 as a result of enforcing or administering the rule.

Ms. Lee also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeal will be to make the rules easier for licensees and the general public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Janice C. Alvarez, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The repeals are proposed under Texas Civil Statutes, Article 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed repeal does not affect other statutes, articles, or codes.

§469.1. Definition of Health Service Provider in Psychology.

§469.2. Criteria for Health Service Provider in Psychology.

This 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 13, 1999.

TRD-9905899
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

Chapter 469. COMPLAINTS AND ENFORCEMENT

22 TAC §§469.1-469.14

The Texas State Board of Examiners of Psychologists proposes new Chapter 469, Complaints and Enforcement, §§469.1 - 469.14. The new rules are being proposed in order to reorganize and clarify the rules of the Board.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Lee also has determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the sections will be to make the rules easier for licensees and the general public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposals may be submitted to Janice C. Alvarez, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700.

The new rules are proposed under Texas Civil Statutes, Article 4512c, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed new rules do not affect other statutes, articles, or codes.

§469.1. Timeliness of Complaints.

A complaint is timely filed if it is received by the Board, in proper form, within five years of the date of the termination of professional services. A complaint alleging sexual misconduct, as defined by the

Board rules, by a licensee or alleging the infliction of physical harm upon a client or patient by a licensee is timely filed if received within ten years of the occurrence of the allegations.

§469.2. Complaint Procedure Notification.

(a) Methods of Notification. The Board and its licensees shall provide notification to the public that complaints can be filed with the Board by publishing the Board's name, its mailing address, and telephone number by the following method:

(1) Displaying a sign in a prominent location, on a wall in all rooms where psychological services are conducted in a position that is reasonably likely to be viewed by individuals occupying the room, on paper of no less than 8 inches by 11 inches in size, with the Board approved notification statement printed in black. The Board approved notification statement must be printed in both English and Spanish.

(A) The Board approved English notification statement reads as follows: "Be it known that the Texas State Board of Examiners of Psychologists receives questions and complaints regarding the practice of psychology. For assistance please contact: Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700, or 800-821-3205."

(B) The Board approved Spanish notification statement reads as follows: "Se desea informar que la Comisi¢n Estatal Examinadora de Psic¢logos de Texas recibe toda clase de consultas y quejas sobre el ejercicio profesional de la psicolog¡a en el Estado de Texas. Si usted necesita de este servicio, comun¡quese con: Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700 o 800-821-3205."

(2) The Board approved notification statement is provided to licensees at the time of licensure. Additional Board approved notification statements may be obtained directly from the Board's office at any time.

(b) In addition to the Board approved notification sign, licensees may also notify consumers by the following methods:

(1) on each registration form, application, or written contract for services of a licensee; or

(2) in a bill for services provided by a licensee.

§469.3. Standardized Complaint Form.

(a) All complaints filed against a licensee must be submitted to the Board on the Board approved standardized complaint form. The Board approved complaint form can be obtained free of charge from the Board's office or downloaded from the Board's web site.

(b) The Board shall make available to each person who wishes to file a complaint: the Board approved complaint form, release of information forms, Rules and Regulations of the Board.

(c) The complaint form must be physically delivered to the Board office in person or by mail service to be considered filed. Fax transmittal and or E-mail do not constitute physical delivery.

(d) All required release forms must be signed, witnessed and returned to the Board, along with the complaint form, before a complaint can be processed.

§469.4. Complaint Investigation.

(a) The Board has established a priority rating system to distinguish between categories of complaints. The priority rating system is as follows:

(1) cases involving imminent physical harm to the public;

(2) cases involving sexual misconduct on the part of a licensee;

(3) cases involving current applicants for licensure;

(4) cases involving other administrative violations of Board Rules or the Act;

(5) cases involving covert or other undercover investigations in conjunction with any of the above priorities.

(b) The Investigation Division shall dispose of all complaints in a timely manner. A schedule shall be established for conducting each phase of a complaint that is under the control of the Board not later than the 30th day after the date the complaint is received by the Board. The schedule shall be kept in the information file of the complaint, and all parties shall be notified of the projected time requirements for pursuing the complaint. A change in the schedule must be noted in the complaint information file, and all parties to the complaint must be notified in writing not later than the seventh day after the date the change is made.

(c) The Board will dismiss complaints at a regularly scheduled Board Meeting. Any person who files a complaint will be notified by letter of Board action to dismiss the complaint.

(d) The services of a private investigator shall be retained only in the event that staff investigator positions are vacant or inadequate to provide essential investigative services. The services of a private investigative agency shall be obtained in accordance with the procurement procedures of the General Services Commission.

§469.5. Complaint Disposition.

(a) A preliminary investigation shall be conducted to determine if the Board has jurisdiction over the complaint and to determine the nature of the allegations. The complainant will be provided the opportunity to explain the allegations made in the complaint.

(b) A review will be conducted after the preliminary investigation to determine if the complaint states an allegation which, if true, would constitute a violation of the Board's Act and rules.

(c) Complaints that do not state a violation of the Board's Act or rules shall be returned to the complainant. If the complaint alleges a violation of another agency's Act or rules, the complaint shall be referred to the appropriate agency.

(d) Complaints that state a violation of the Board's Act and rules shall be investigated by an investigator assigned by the Manager of the Investigation Division.

(e) Following completion of the investigation, an investigation report shall be drafted. This report shall include a recommendation as to whether the investigation has produced sufficient evidence to establish probable cause that a violation of the Board's Act and rules has occurred.

(f) The Investigation Division Manager and the counsel for the Board shall review the investigation report, evidence and the case file of the complaint to determine if there is sufficient evidence to demonstrate a violation of the Board's Act, rules, or order to recommend probable cause to the Board.

(g) A complaint for which the staff determines probable cause shall be referred to a Disciplinary Review Panel of the Board for an informal conference. Counsel for the Board shall serve the Respondent with a Notice of Violations and Informal Settlement Conference.

(h) A complaint for which the staff determines that probable cause does not exist shall be referred to the Board for dismissal.

§469.6. Temporary Suspension of a License.

(a) An executive committee of the Board, consisting of the Board Chair, Complaints Committee Chair, and a public member, shall temporarily suspend the license of a licensee under the Act if the executive committee determines, based on evidence or information presented to the committee, that the continued practice by the licensee constitutes a continuing or imminent threat to the public welfare.

(b) A temporary suspension under subsection (a) of this section may also be ordered on a majority vote of the Board at a scheduled Board meeting.

(c) The date of suspension will be either the date the executive committee votes to suspend the license, or the date that a majority of the Board votes to suspend the license.

(d) A license temporarily suspended under this rule will be suspended without notice or hearing provided that, at the time of the suspension, a hearing to determine that disciplinary proceedings under this Act should be initiated against the licensee is scheduled to be held not later than the 14th day after the date of suspension. A second hearing on the suspended license shall be held not later than the 60th day after the date the suspension was ordered. If the second hearing is not held in the time required by this rule, the suspended license is automatically reinstated unless the delay was precipitated by the licensee for the purpose of procuring automatic reinstatement of the license.

(e) Hearings for the temporary suspension of a license shall be held at the State Office of Administrative Hearings in accordance with Board Rules and the Act.

§469.7. Persons with Criminal Backgrounds.

(a) The Board may revoke or suspend an existing valid license, disqualify a person from receiving or renewing a license, or deny to a person the opportunity to be examined for a license due to a felony conviction if the offense directly relates to the performance of the activities of a licensee and the conviction directly affects such person's present fitness to perform as a licensee of this Board.

(b) No person currently serving a sentence in prison for a felony is eligible to obtain or renew his/her license.

(c) In determining whether a criminal conviction directly relates to the performance of a licensee, the Board shall consider the factors listed in the Texas Civil Statutes, Article 6252.13c(4)(b).

(d) Those crimes which the Board considers as directly related to the performance of a licensee include but are not limited to:

(1) any felony or misdemeanor of which fraud, dishonesty, or deceit is an essential element;

(2) any criminal violation of the Psychologists' Licensing Act or other statutes regulating or pertaining to the profession of psychology;

(3) any criminal violation of statutes regulating other professions in the healing arts, which includes, but is not limited to medicine and nursing;

(4) any crime involving moral turpitude;

(5) murder;

(6) burglary;

(7) robbery;

(8) rape;

(9) theft;

(10) child molesting;

(11) substance abuse.

(e) In determining whether a criminal conviction directly affects a person's present activity, the Board shall consider the factors listed in Texas Civil Statutes, Article 6252-13c(4)(c)(1)-(6).

(f) It shall be the responsibility of the applicant to secure and provide to the Board the recommendations of the prosecution, law enforcement, and correctional authorities regarding all criminal offenses.

(g) The applicant shall also furnish proof in such form as may be required by the Board that he/she maintained a record of steady employment and has supported his/her dependents and has otherwise maintained a record of good conduct and has paid all outstanding court costs, supervision fees, fines and restitution as may have been ordered in all criminal cases in which he/she has been convicted.

§469.8. Rehabilitation Guidelines.

(a) In the event of revocation or suspension of a license due to non-compliance with the rules of the Board and/or its ethical principles, licensees can expect to receive from the Board a plan of rehabilitation. The plan shall outline the steps the person must follow in order to be considered for relicensure or removal of suspension. Completion of the plan may lead to consideration of submission of an application for relicensure; removal of suspension; removal of supervision requirements. In the event the licensee has not met the Board's criteria for rehabilitation, the plan may be revised, expanded, and/or continued depending upon the progress of the rehabilitation program.

(b) The Board may follow one or more options in devising a rehabilitation program:

(1) The individual may be supervised in all or selected areas of activities related to his/her practice as a licensee by a licensed psychologist approved by the Board for a specified length of time.

(A) The Board will specify the focus of the supervision.

(B) The Board will specify the number of hours per week required in a face-to-face supervisory contract.

(C) The supervisor will provide periodic and timely reports to the Board concerning the progress of the supervisee.

(D) Any fees for supervision time will be the responsibility of the supervisee.

(E) The supervisor is acting as a 'friend' of the Board. Judgements of the supervisor are to be made independently and without reference to Board opinions.

(2) The individual may be expected to successfully complete a variety of appropriate educational programs. Appropriate educational formats may include but are not limited to workshops, seminars, courses in regionally accredited universities, or organized pre- or post-doctoral internship settings. Workshops or seminars which are not held in a setting of academic review (approved continuing education) need prior approval of the Board. Any course of study must be approved by the Board prior to enrollment if it is to meet the criteria of a rehabilitation plan.

(3) The Board may require of the individual:

(A) psychodiagnostic evaluations by a psychologist approved by the Board;

(B) a physical examination including alcohol and drug screening by a physician approved by the Board;

(C) psychotherapy on a regular basis from a psychologist approved by the Board;

(D) any other requirement that seems appropriate to the individual case.

(4) The Board may require the individual to:

(A) take or retake and pass the appropriate professional examination;

(B) take or retake and pass the Jurisprudence Examination;

(C) take or retake and pass the Oral Examination;

(D) complete any other requirement that seems appropriate to the individual case.

§469.9. Complaints Alleging Violations of Court Orders.

No complaint will be processed against a licensee if such complaint is predicated upon a violation of a court order unless such complaint includes certified court documents which show that the court has decided that the licensee did violate the specific court order and the court's response to such violation.

§469.10. Rules of Evidence in Contested Cases.

The rules of evidence described in the Administrative Procedure Act will be followed by the Board and its hearing officers. Considering that the Board commonly relies upon information presented to it in applications, written responses, and related documentation in the routine conduct of its affairs, including official decision-making in the processing of applications for licensure, evidence of a similar type will be considered and may be relied upon by the Board and its hearing officers in the conduct of the Board's affairs involving official decision-making in all matters relating to licensure, including disciplinary matters in contested cases.

§469.11. Legal Actions Reported.

Any legal action, civil or criminal in nature, taken against a licensee or practice of a licensee must be reported to the Board's office by sending a copy of the initial pleadings to the Board within 20 days of the filing of such action with the court. The licensee may, if desired, submit any further documentation and/or a written explanation along with a copy of the pleadings.

§469.12. Suspension of License for Failure to Pay Child Support.

(a) On receipt of a final court or attorney general's order suspending a license due to failure to pay child support, the executive director shall immediately determine if the Board has issued a license to the obligator named on the order, and, if a license has been issued:

(1) enter an order of suspension of the license;

(2) report the suspension as appropriate; and

(3) demand surrender of the suspended license.

(b) The Board shall implement the terms of a final court or attorney general's order suspending a license without additional review or hearing. The Board will provide notice as appropriate to the licensee or to others concerned with the license.

(c) The Board may not modify, remand, reverse, vacate, or stay a court or attorney general's order suspending a license issued under the Texas Family Code, Chapter 232, and may not review, vacate, or reconsider the terms of an order.

(d) A licensee who is the subject of a final court or attorney general's order suspending his or her license is not entitled to a refund for any fee paid to the Board.

(e) If a suspension overlaps a license renewal period, an individual with a license suspended under this section shall comply with the normal renewal procedures in the Act and this chapter; however, the license will not be renewed until subsections (g) and (h)of this section are met.

(f) An individual who continues to engage in the practice of psychology or continues to use the titles "Licensed Psychologist," "Provisionally Licensed Psychologist," "Licensed Psychological Associate," "Licensed Specialist in School Psychology" or the initials "L.P.," "P.L.P.," "L.P.A.," or L.S.S.P." after the issuance of a court or attorney general's order suspending the license is liable for the same civil and criminal penalties provided for engaging in the prohibited activity without a license or while a license is suspended as any other license holder of the Board.

(g) On receipt of a court or attorney general's order vacating or staying an order suspending a license, the executive director shall promptly issue the affected license to the individual if the individual is otherwise qualified for the license.

(h) The individual must pay a reinstatement fee in an amount equal to the annual renewal fee set out in §473.3 of this title (relating to Annual Renewal Fees) prior to issuance of the license under subsection (g) of this section.

§469.13. Non-compliance with Continuing Education Requirements.

(a) An individual who fails to comply with the Board's mandatory continuing education requirements shall be subject to a complaint for non-compliance with the Board's rules. If a complaint is filed against a licensee for non-compliance and the licensee resigns in lieu of adjudication of the complaint or the license is voided as delinquent and the licensee later applies for licensure, the complaint shall be reinstated; and the application shall be held in abeyance until the complaint is resolved.

(b) Any licensee who has failed to submit proof of full compliance with §461.11 of this title (relating to Continuing Education) shall be referred to the investigation division pursuant to a complaint for non-compliance with §461.15 of this title (relating to Compliance with Act, Rules, Board Directives and Orders) on the forty-fifth day after the original renewal date for the license. The filing of a complaint under this provision shall be in addition to any penalties or requirements assessed by the licensing division for renewal.

§469.14. Monitoring of Licensees.

(a) The Compliance Division is responsible for monitoring licensees who are ordered by the Board to perform certain acts. The Compliance Division ascertains that the licensee performs the required acts within the designated time period.

(b) The Compliance Division is responsible for implementing the preventive approach of the Board to enforcement of the Act and the Rules of the Board by identifying and monitoring licensees who represent a risk to the public.

This 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 13, 1999.

TRD-9905900
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

Chapter 470. ADMINISTRATIVE PROCEDURE

22 TAC §§470.1-470.6, §470.8, §470.10, §470.12, §§470.15-470.17, §470.19, §470.21, §470.24

The Texas State Board of Examiners of Psychologists proposes new Chapter 470, Administrative Procedure, §§470.1-470.6, §470.8, §470.10, §470.12, §§470.15-470.17, §470.19, §470.21, and §470.24. The new rules are being proposed in order to reorganize and clarify the rules of the Board.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the new sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Lee also has determined that for each year of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the sections will be to make the rules easier for licensees and the general public to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposals may be submitted to Janice C. Alvarez, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700.

The new rules are proposed under Texas Civil Statutes, Article 4512c, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed new rules do not affect other statutes, articles, or codes.

§470.1. 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.

§470.2. 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 Psychologists' Licensing Act, Texas Civil Statutes, Article 4512c, as amended.

(2) Administrative Law Judge (ALJ)- 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) Agency - The Board and all divisions, departments and employees thereof.

(4) Administrative Procedure Act (APA)–Government Code, Chapter 2001, as amended.

(5) Applicant - A party seeking a license from the Board.

(6) Applications Dispute Committee- Committee appointed by the Chair to conduct informal settlement conferences concerning application and licensing disputes and to make recommendations to the Board for its review.

(7) 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.

(8) Board - The nine-member Texas State Board of Examiners of Psychologists.

(9) Board member - one of the members of the Board, appointed pursuant to the Act, §4, and qualified under the Act, §5.

(10) Chair - The chairperson of the Board.

(11) Complainant - A party bringing a complaint under the Act.

(12) Complaint - An action over which the Board has jurisdiction filed against any individual who violates the Act and/or Rules of the Board.

(13) Contested case - A proceeding, including, but not restricted to licensing and disciplinary action in which the legal rights, duties, or privileges of a party are to be determined by the Board after an opportunity for an adjudicative hearing.

(14) Disciplinary Review Panel- Committee appointed by the Chair to conduct informal settlement conferences concerning disciplinary actions and to make recommendations to the Board the Boar's review.

(15) Executive Director - The executive director of the Board designated in accordance with the Act, ˜7(b).

(16) License - The whole or part of any agency permit, approval, registration, or similar form of permission required by law.

(17) Licensee - Any individual or person to whom the agency has issued any permit, certificate, approved registration, or similar form of permission authorized by law.

(18) Licensing - The agency process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(19) Official act - Any act performed by the Board pursuant to a duty, right or responsibility imposed or granted by law.

(20) Party - Each person or agency named or admitted to participate as a party before the Board or the State Office of Administrative Hearings.

(21) Person - Any individual, representative, corporation, or other entity, including any public or non-profit corporation, or any agency or instrumentality of federal, state, or local government.

(22) Pleading - A written document submitted by a party, 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.

(23) Presiding officer - The chair, the acting chair of the Board, or a duly authorized administrative law judge while acting with respect to a hearing.

(24) Respondent - An individual over whom the Board has jurisdiction and against whom a complaint is filed.

(25) 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.

(26) State Office of Administrative Hearings (SOAH) - The agency to which contested cases are referred by the Texas State Board of Examiners of Psychologists.

(27) Texas Open Records Act Texas Government Code, Chapter 552.

§470.3. Construction.

(a) A provision of a section referring to the Board is construed to apply to the Board or the chair if the matter is within the jurisdiction of the Board.

(b) Unless otherwise provided by law, any duty imposed on the Board or chair may be delegated to a duly authorized representative. In such case, the provisions of any section referring to the Board or the chair shall be construed to also apply to the duly authorized representative or chair.

§470.4. Records of Official Action.

All official acts of the Board shall be evidenced by a recorded or written record. The minutes of the Board shall constitute 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. The Board may, in its discretion and in accordance with the open meetings law, Chapter 551, Government Code, conduct any portion of its meeting in executive session. The Board may in its discretion conduct deliberations relative to licensee disciplinary actions in executive session. 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. 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.

§470.5. Conduct and Decorum.

(a) Parties, authorized representatives, witnesses, and other participants in Board proceedings shall conduct themselves with proper dignity, courtesy, and respect for the Board, the executive director, the administrative law judge, and all other participants. Disorderly conduct will not be tolerated.

(b) All authorized representatives shall observe the standards of ethical conduct prescribed for their professions.

(c) The presiding officer may exclude a violator of this rule from the proceeding for such period as is just and may be subject to such other reasonable and lawful disciplinary action as the Board may prescribe.

§470.6. Agreement to be in Writing.

No stipulation or agreement between the parties or their representatives with regard to any matter involved in any proceeding before the Board shall be enforced unless it shall have been reduced to writing and signed by the parties or their authorized representatives, or unless it shall have been dictated into the record by them during the course of a hearing, or incorporated in an order bearing their written approval. This section does not limit a party's ability to waive, modify, or stipulate any right or privilege afforded by these sections, unless precluded by law.

§470.8. Informal Disposition of Complaints and Applications Disputes.

(a) Complaints.

(1) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, default, or dismissal in accordance with §2001.056 of the Administrative Procedure Act.

(2) 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.

(3) Informal conferences shall be conducted by the Chair of the Disciplinary Review Panel. The conference shall also be attended by the 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 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 and to present witnesses, affidavits, letters, reports, and any information deemed relevant for the Board's consideration in the matter. Although the licensee's attendance and participation is voluntary, the Committee may handle the matter as a default disposition if the licensee declines to attend or fails to appear at the informal conference.

(4) 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. A complainant who chooses to attend an informal conference shall be provided an opportunity to be heard, at a time separate from the respondent, with regard to violations based upon the information provided by the complainant. Nothing herein requires a complainant to attend an informal conference.

(5) 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. Any informal record of conferences shall be made by mechanical or electronic means at the discretion of the Committee Chair.

(6) 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 the minutes of the Board; and the proposed consent order shall be entered as an official action of the Board. Should no agreement be entered into, the Board may refer the matter to SOAH for a formal hearing.

(b) Applications Disputes.

(1) After an appeal has been properly requested in accordance with §463.30, the matter shall be referred to the Applications Dispute Committee. The applicant shall be offered an opportunity to attend an informal conference and show compliance with all Board licensing requirements, in accordance with §2001.054 of the Administrative Procedure Act.

(2) The Applicant shall be notified in writing and by certified mail of the time, place and location of the informal settlement conference. If the applicant declines to attend or fails to appear, the matter may be handled by the Committee as a default disposition.

(3) Informal conferences shall be conducted by the Chair of the Application Dispute Committee. The conference shall also be attended by the 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 and legal counsel may deem necessary for proper conduct of the conference. The applicant and/or the applicant's authorized representative(s) may attend the informal conference and shall be provided an opportunity to be heard and to present witnesses, affidavits, letters, reports, and any information deemed relevant for the Board's consideration in the matter.

(4) 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. Any informal record of conferences shall be made by mechanical or electronic means at the discretion of the Committee Chair.

(5) At the conclusion of the settlement conference, the Applications Dispute Committee shall make whatever proposals and/or recommendations that it deems appropriate to the Board for its review. At the conclusion of its review, the Board shall grant the appeal and approve the application for licensure or reaffirm its decision to disapprove the application. Should the applicant dispute the Board's final determination, the matter may be referred to SOAH for a formal hearing.

(c) Confidentiality of Informal Settlement Conferences. The Panel may take any and all steps necessary to ensure the confidentiality of the informal settlement conference in accordance with §25A of the Act.

§470.10. 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 §155.31 of Title I of the Texas Administrative Code (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.

§470.12. Contested Cases Referred to the State Office of Administrative Hearings.

Unless otherwise provided by statute, contested cases referred by the Board to the State Office of Administrative Hearings pursuant to the Administrative Procedure Act (APA), Texas Government Code, Chapter 2001, will be governed by the rules of practice and procedure in accordance with Title I, Chapter 155 of the Texas Administrative Code and applicable sections of the APA.

§470.15. Proposal for Decision.

(a) In a contested case, upon completion of the hearing before SOAH, the ALJ shall prepare 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 scheduled 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 by the ALJ in response to exceptions, replies and/or briefs submitted by the parties without again being served on the parties.

§470.16. 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.

(c) As the Board has been created by the legislature to protect the public interest as an independent agency of the executive branch of the government of the State of Texas so as to remain the primary means of licensing and regulating the practice of psychology consistent with federal and state law and to ensure that sound principles of psychology govern the decisions of the Board, the Board may, in accordance with §2001.058 of the APA, change a finding of fact or conclusion of law or to vacate or modify the proposed order of an administrative law judge, if the Board determines:

(1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under §2001.058(c), or prior administrative decisions;

(2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or

(3) that a technical error in a finding of fact should be changed.

(d) If the Board modifies, amends or changes the administrative law judge's proposal for decision, an order shall be prepared reflecting the Board's changes as stated in the record.

§470.17. Motion for Rehearing.

(a) 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 not later than the 20th day after the date on which the party or his attorney of record is notified of the final decision or order of the Board.

(b) Replies to a motion for rehearing shall be filed with the executive director/secretary not later than the 30th day after the date on which the party or his attorney of record is notified of the final decision or order in accordance with §2001.142 of the APA.

(c) Board action on the motion for rehearing shall be taken not later than the 45th day after the date on which the party or his attorney of record is notified of the final decision or order as required by §2001.142 or the motion is overruled by operation of law.

(d) 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 in accordance with §2001.142. 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.

(e) 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 in accordance with §2001.142 of the APA.

§470.19. Costs of Appeal.

A party appealing a final decision of the Board in a contested case may be ordered by the Board to pay all or a part of the cost of preparation of the original or a certified copy of the record of the proceeding that is required to be transmitted to the reviewing Court.

§470.21. Disciplinary Guidelines.

(a) Purpose. The Purpose of the guidelines is to:

(1) Provide guidance and a framework of analysis for administrative law judges in the making of recommendations in contested licensure and disciplinary matters;

(2) Promote consistency in the exercise of sound discretion by the Board in the imposition of sanctions in disciplinary matters; and,

(3) Provide guidance for the resolution of potentially contested matters.

(b) Limitations. This rule will be construed and applied so as to preserve Board members' discretion in the imposition of sanctions and remedial matters pursuant to Psychologists' Licensing Act, §23. This rule shall be further construed and applied so as to be consistent with the entire Psychologists' Licensing Act and shall be limited to the extent as otherwise proscribed by state law and Board rule.

(c) Revocation. The Board shall revoke the license of any licensee if the Board determines that the continued practice of psychology by the licensee poses a harm to the public.

(d) Disciplinary Sanctions. If the Board does not revoke the license of a licensee as part of a disciplinary matter, it may impose the following disciplinary sanctions which are listed in descending order of severity:

(1) Suspension for a definite period of time;

(2) Suspension plus probation of any or all of the suspension period;

(3) Probation of the license for a definite period of time;

(4) Reprimand for a definite period of time.

(e) Additional conditions. As terms of any sanction imposed by the Board upon a licensee pursuant to a disciplinary matter the Board may, at its discretion, impose any additional conditions and/or restrictions upon the license of the licensee that the Board deems necessary to facilitate the rehabilitation and education of the licensee and to protect the public, including but not limited to:

(1) Consultation with the licensee on matters of ethics rules, laws and standards of practice by a licensed psychologist approved by the Board;

(2) Restrictions on the licensee's ability to provide certain types of psychological services or to provide psychological services to certain classes of patients;

(3) Restrictions on the licensee's supervision of others in the practice of psychology;

(4) Completion of a specified number of continuing education hours on specified topics approved in advance by the Board in addition to any minimum number required of all licensees as a condition of licensure;

(5) Taking and passing with the minimum required score of any examination required by the Board of a licensee;

(6) Undergoing a psychological and/or medical evaluation by a qualified professional approved in advance by the Board and undergoing any treatment recommended pursuant to the evaluation;

(7) Writing a research paper on a specific topic;

(8) Any other condition reasonably related to the rehabilitation and education of the licensee.

(f) The length of the sanction period shall be determined by the Board taking into account the time reasonably required to complete the required terms and conditions set forth in the order imposing the sanction.

(g) Aggravation. The following may be considered as aggravating factors so as to merit more severe or restrictive sanction or action by the Board:

(1) Patient harm and the type and severity thereof;

(2) Economic harm to any individual or entity and the severity thereof;

(3) Increased potential for harm to the public;

(4) Attempted concealment of misconduct;

(5) Premeditated conduct;

(6) Intentional misconduct;

(7) Prior written warnings or written admonishments from any supervisor or governmental agency or official regarding statutes or regulations pertaining to the licensee's practice of psychology;

(8) Prior misconduct of a similar or related nature;

(9) Disciplinary history;

(10) Likelihood of future misconduct of a similar nature;

(11) Violation of a Board order;

(12) Failure to implement remedial measures to correct or alleviate harm arising from the misconduct;

(13) Lack of rehabilitative potential;

(14) Motive; and,

(15) Any relevant circumstances or facts increasing the seriousness of the misconduct.

(h) Extenuation and Mitigation. The absence of the circumstances listed as subsection (g)(1)-(10) of this section, as well as the presence of the following factors, may be considered as extenuating and mitigating factors so as to merit less severe or less restrictive sanctions or actions by the Board:

(1) Self-reported and voluntary admissions of misconduct;

(2) Implementation of remedial measures to correct or mitigate harm arising from the misconduct;

(3) Motive;

(4) Rehabilitative potential;

(5) Prior community service;

(6) Relevant facts and circumstances reducing the seriousness of the misconduct; and,

(7) Relevant facts and circumstances lessening responsibility for the misconduct.

§470.24. 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 13, 1999.

TRD-9905901
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

Chapter 473. FEES

22 TAC §473.1

The Texas State Board of Examiners of Psychologists proposes an amendment to §473.1, concerning Application Fees. The amendment is being proposed in order to collect fees in the 2000-2001 biennium sufficient to meet the requirements of House Bill 1, 76th Legislature, Texas State Board of Examiners of Psychologists, Rider #2, Contingent Revenue.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to secure funding adequate to allow the Texas State Board of Examiners of Psychologists to continue its mandated functions of licensing and enforcement. There will be no effect on small businesses. The anticipated economic cost to persons who are required to comply with the rule as proposed will be in direct proportion to the type of licensure application submitted to the Board.

Comments on the proposal may be submitted to Janice C. Alvarez, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, TX 78701, (512) 305-7700.

The amendment is proposed under Texas Civil Statutes, Article 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§473.1. Application Fees. (Not refundable)

(a) Psychological Associate Licensure [~~associate licensure~~] - - [~~$150~~]

(b) Provisionally Licensed Psychologist - - $310 [~~$300~~]

(c) Licensure - - $150 [~~$140~~]

[~~(d) Health Service Provider Certification - - $55~~]

[~~(e) Temporary License - - $260~~]

(d) [~~(f)~~] Reciprocity - - $450 [~~$440~~]

(e) [~~(g)~~] Licensed Specialist in School Psychology - - $190 [~~$180~~]

This 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 13, 1999.

TRD-9905902
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

Part 27. BOARD OF TAX PROFESSIONAL EXAMINERS

Chapter 623. REGISTRATION AND CERTIFICATION

22 TAC §623.8

The Board of Tax Professional Examiners proposes an amendment to §623.8, concerning Qualifications for Certification as a Registered Professional Appraiser. This amendment will allow registered professional appraisers an option to take and pass a Board of Tax Professional Examiners approved Appraisal Analysis Course in lieu of submitting a demonstration appraisal.

David E. Montoya, Executive Director of the Board of Tax Professional Examiners, has determined that for the first five-year period the rule is in effect there will be no effect on state or local government.

Mr. Montoya has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be none. 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 proposed amendment may be submitted to Christine Y. LaPenna, Director of Administration, Board of Tax Professional Examiners, 333 Guadalupe St., Tower 2, Suite 520, Austin, Texas 78701.

Texas Civil Statutes, Article 8885 is affected by this amended section.

§623.8. Qualifications for Certification as Registered Professional Appraiser.

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

(c) The registrant who is designated as Class III-appraiser must qualify for Class IV-appraisal (certification as registered professional appraiser) at a date no later than two years after the date of designation as Class III-appraiser. To qualify for Class IV-appraiser (RPA) the registrant must:

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

(4) submit one demonstration appraisal acceptable to the board, following an outline provided by the board, for income producing commercial or industrial property; or pass a Board of Tax Professional Examiners approved Appraisal Analysis Course in lieu of the demonstration appraisal.

(5) (No change.)

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

Filed with the Office of the Secretary of State, on September 7, 1999.

TRD-9905748
David E. Montoya
Executive Director
Board of Tax Professional Examiners
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 305-7301

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

Part 1. TEXAS DEPARTMENT OF HEALTH

Chapter 125. SPECIAL CARE FACILITIES

25 TAC §125.6, §125.9

The Texas Department of Health (department) proposes an amendment to §125.6, and new §125.9, concerning special care facilities. Specifically, the sections cover operating policies and procedures and administrative penalties.

The amendment to §125.6 will implement certain provisions of Senate Bill 1260, 76th Legislature, 1999. Senate Bill 1260 created the Advanced Directive Act, Health and Safety Code, Chapter 166, to replace the Natural Death Act. The bill also amended Chapter 248, Subchapter C, Health and Safety Code, by adding §248.0545 which requires the department to assess an administrative penalty of $500 against a special care facility that violates certain provisions of the Act. The amendment to §125.6 requires special care facilities to adopt policies and procedures for advance directives in accordance with the Advance Directive Act and includes provisions for the assessment of an administrative penalty against a facility for violation of the Act.

New §125.9 will implement Senate Bill 2085, Article 5, which amends Chapter 248, Health and Safety Code, by adding Subchapter D relating to administrative penalties for special care facilities. This subchapter sets forth standard language developed by the Sunset Advisory Commission regarding the imposition of an administrative penalty on a person who violates Chapter 248 or a rule adopted under that Chapter; the amount of the penalty; the report and notice of a violation and penalty; the penalty to be paid or hearing requested; a hearing; a decision by the commissioner; options following a decision to pay or appeal; stay enforcement of the penalty; collection of penalty; the decision by the court; the remittance of penalty and interest; the release of bond; and the administrative procedure. Section 125.9 incorporates the language of Subchapter D.

Jann Melton-Kissel, Bureau of Licensing and Compliance, has determined that for the first five years the proposed sections are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections.

Ms. Melton-Kissel also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be to ensure compliance by special care facilities with the new legislative mandates. There will be no significant costs to small/micro businesses to comply with the sections as proposed. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to John Evans, Program Director, Hospital Licensing Program, Division of Health Facility Licensing, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6647. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendment and new section are proposed under Health and Safety Code, Chapter 166 which establishes the requirements governing the use of advance directives for certain

health care facilities; Health and Safety Code, Subchapter C, §248.0545, which requires the department to assess an administrative penalty for violation by a special care facility of Health and Safety Code, Chapter 166; Health and Safety Code, Chapter 248, Subchapter D, which provides the department with the authority to assess administrative penalties against a special care facility for violation of Chapter 248 and the rules adopted thereunder; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendment and new section affect Health and Safety Code, Chapters 12, 166, and 248.

§125.6. Standards.

(a) Administrative management.

(1) (No change.)

(2) Operating policies and procedures. The facility shall comply with its own written policies and procedures. All policies shall be reviewed and updated annually.

(A)-(K) (No change.)

(L) The facility shall develop, implement, and enforce policies and procedures regarding the use of advance directives in the facility. These policies and procedures shall be in accordance with the Advance Directive Act, Health and Safety Code, Chapter 166.

(i) The department will assess an administrative penalty against a special care facility that violates Health and Safety Code, §166.004 relating to (Statement Relating to Advance Directive).

(ii) A penalty assessed under this subparagraph shall be $500.

(iii) The penalty will be assessed in accordance with §125.9 of this title (relating to Administrative Penalties).

(3)-(7) (No change.)

(b)-(g) (No change.)

§125.9. Administrative Penalties.

(a) Imposition of penalty.

(1) The Texas Department of Health (department) may impose an administrative penalty on a person licensed under this chapter who violates the Act, this chapter, or order adopted under this chapter.

(2) A penalty collected under this subchapter shall be deposited in the state treasury in the general revenue fund.

(3) Administrative procedure. A proceeding to impose the penalty is considered to be a contested case under Government Code, Chapter 2001.

(b) Amount of penalty.

(1) The amount of the penalty may not exceed $1,000 for each violation. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty. The total amount of the penalty assessed for a violation continuing or occurring on separate days under this paragraph may not exceed $5,000.

(2) In determining the amount of an administrative penalty assessed under this section, the department shall consider:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;

(B) the threat to health or safety caused by the violation;

(C) the history of previous violations;

(D) the amount necessary to deter a future violation;

(E) whether the violator demonstrated good faith, including when applicable whether the violator made good faith efforts to correct the violation; and

(F) any other matter that justice may require.

(c) Report and notice of violation and penalty.

(1) If the department initially determines that a violation occurred, the department will give written notice of the report by certified mail to the person alleged to have committed the violation not later than 90 days following the survey exit date.

(2) The notice must include:

(A) a brief summary of the alleged violation;

(B) a statement of the amount of the recommended penalty based on the factors listed in subsection (b)(2) of this section; and

(C) a statement of the person's right to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(d) Penalty to be paid or hearing requested.

(1) Within 20 days after the date the person receives the notice sent under subsection (c) of this section, the person in writing may:

(A) accept the determination and recommended penalty of the department; or

(B) make a request for a hearing on the occurrence of the violation, the amount of the penalty, or both.

(2) If the person accepts the determination and recommended penalty or if the person fails to respond to the notice, the commissioner of public health or the commissioner's designee by order shall approve the determination and impose the recommended penalty.

(e) Hearing.

(1) If the person requests a hearing, the commissioner of public health or the commissioner's designee shall refer the matter to the State Office of Administrative Hearings (SOAH).

(2) As mandated by Health and Safety Code, §248.106, the SOAH shall promptly set a hearing date and give written notice of the time and place of the hearing to the person.

(A) An administrative law judge of the SOAH shall conduct the hearing.

(B) The administrative law judge shall make findings of fact and conclusions of law and promptly issue to the commissioner of public health a proposal for a decision about the occurrence of the violation and the amount of a proposed penalty.

(f) Decision by commissioner.

(1) Based on the findings of fact, conclusions of law, and proposal for a decision made by the administrative law judge under subsection (e)(2) of this section, the commissioner of public health or the commissioner's designee by order may find that a violation has occurred and may impose a penalty or may find that no violation has occurred.

(2) The commissioner or the commissioner's designee shall give notice of the commissioner's order under paragraph (1) of this subsection to the person alleged to have committed the violation in accordance with Government Code, Chapter 2001. The notice must include:

(A) a statement of the right of the person to judicial review of the order;

(B) separate statements of the findings of fact and conclusions of law; and

(C) the amount of any penalty assessed.

(g) Options following decision: pay or appeal. Within 30 days after the date the order of the commissioner of public health under subsection (f) of this section that imposes an administrative penalty becomes final, the person shall:

(1) pay the penalty; or

(2) appeal the penalty by filing a petition for judicial review of the commissioner's order contesting the occurrence of the violation, the amount of the penalty, or both.

(h) Stay of enforcement of penalty.

(1) Within the 30-day period prescribed by subsection (g) of this section, a person who files a petition for judicial review in accordance with subsection (g)(2) of this section may:

(A) stay enforcement of the penalty by:

(i) paying the penalty to the court for placement in an escrow account; or

(ii) giving to the court a supersedeas bond that is approved by the court for the amount of the penalty and that is effective until all judicial review of the commissioner's order is final; or

(B) request the court to stay enforcement of the penalty by:

(i) filing with the court a sworn affidavit of the person stating that the person is financially unable to pay the penalty and is financially unable to give the supersedeas bond; and

(ii) sending a copy of the affidavit to the commissioner of public health by certified mail.

(2) If the commissioner of public health receives a copy of an affidavit under paragraph (1)(B) of this subsection, the commissioner may file with the court, within five days after the date the copy is received, a contest to the affidavit. In accordance with Health and Safety Code, §248.108(b), the court shall hold a hearing on the facts alleged in the affidavit as soon as practicable and shall stay the enforcement of the penalty on finding that the alleged facts are true. The person who files an affidavit has the burden of proving that the person is financially unable to pay the penalty or to give a supersedeas bond.

(i) Collection of penalty.

(1) If the person does not pay the penalty and the enforcement of the penalty is not stayed, the department may refer the matter to the attorney general for collection of the penalty.

(2) As provided by Health and Safety Code, §248.109(b), the attorney general may sue to collect the penalty.

(j) Decision by court. A decision by the court is governed by Health and Safety Code, §248.110, and provides the following.

(1) If the court sustains the finding that a violation occurred, the court may uphold or reduce the amount of the penalty and order the person to pay the full or reduced amount of the penalty.

(2) If the court does not sustain the finding that a violation occurred, the court shall order that no penalty is owed.

(k) Remittance of penalty and interest and release of supersedeas bond. The remittance of penalty and interest is governed by Health and Safety Code, §248.111 and provides the following.

(1) If the person paid the penalty and if the amount of the penalty is reduced or the penalty is not upheld by the court, the court shall order, when the court's judgment becomes final, that the appropriate amount plus accrued interest be remitted to the person within 30 days after the date that the judgment of the court becomes final.

(2) The interest accrues at the rate charged on loans to depository institutions by the New York Federal Reserve Bank.

(3) The interest shall be paid for the period beginning on the date the penalty is paid and ending on the date the penalty is remitted.

(l) Release of bond. The release of supersedeas bond is governed by Health and Safety Code, §248.112 and provides the following.

(1) If the person gave a supersedeas bond and the penalty is not upheld by the court, the court shall order, when the court's judgment becomes final, the release of the bond.

(2) If the person gave a supersedeas bond and the amount of the penalty is reduced, the court shall order the release of the bond after the person pays the reduced amount.

This 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 10, 1999.

TRD-9905852
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

Chapter 139. ABORTION FACILITY REPORTING AND LICENSING

Subchapter A. GENERAL PROVISIONS

25 TAC §§139.1-139.3

The Texas Department of Health (department) proposes amendments to §§139.1 - 139.3, concerning abortion facilities. Specifically, the sections cover purpose and scope, definitions, and exempt and unlicensed facilities.

The amendments implement certain provisions of House Bill 2085. Article 22, House Bill 2085, 76th Legislature, 1999, amended Health and Safety Code (HSC), Chapter 245. The statutory amendment to HSC, §245.004, relating to exemption from licensing requirement, provides an exemption for the office of a physician licensed under the Medical Practice Act (Article

4495b, Vernon's Texas Civil Statutes), unless the office is used for the purpose of performing more than 300 abortions in any 12-month period, effective September 1, 1999. The statute, prior to September 1, 1999, exempted the office of a physician provided the office was not used "primarily" for the purpose of performing abortions. "Primarily" was defined by rule (25 TAC, §139.2) as 51% or more of the patients actually treated within the previous calendar year. Statutory language was also added that excludes abortions performed by a physician to prevent the death of the patient or to prevent serious impairment of a patient's physical health in the calculation of the number of abortions performed. Physicians affected by these changes are required to be licensed by January 1, 2000. These statutory amendments are reflected in the amendments to §§139.1 - 139.3.

The statutory amendment to HSC, §245.014(b) relating to criminal penalties, makes it a "Class A" misdemeanor (changed from "Class C" misdemeanor) for a person who is not exempt from licensure to establish or operate an abortion facility in this state without an appropriate license issued under the Act, effective September 1, 1999. No rule change was necessary.

The statutory amendment to HSC, §245.016 relating to abortion in an unlicensed abortion facility to prevent death or serious impairment, removes from consideration "to prevent serious impairment of a patient's mental condition" as an option/ responsibility of a physician in consideration of performing an abortion in an unlicensed abortion facility effective September 1, 1999. No rule change was necessary.

Jann Melton-Kissel, Bureau of Licensing and Compliance, has determined that for the first five years the proposed sections are in effect, there will be fiscal implications as a result of enforcing or administering the sections. Based on the department's Bureau of Vital Statistics annual report for 1997, 12 physicians, which were exempt from licensure as an abortion facility, performed at least 300 or more abortions in 1997. Assuming these physicians continue to provide 300 or more abortions per year, the new statutory mandates will have fiscal implications to state government due to the increase in the number of licensure applications and the increase in the survey workload for regulating the additional abortion facilities. The additional costs to state government to enforce and administer the statutory mandates are estimated to be $20,883 each year for fiscal years 2000 - 2004. The increase in revenue to state government is estimated to be $30,000 each year for fiscal years 2000 - 2004. There will no be fiscal implications for local governments.

Ms. Melton-Kissel also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be to ensure compliance by abortion facilities with the new legislative mandates. There will be costs to small/micro businesses to comply with the sections as proposed. The office of a physician that was exempt from the licensing requirement of Health and Safety Code, Chapter 245, §245.004, and the rules adopted thereunder, as it existed prior to September 1, 1999, but is now required to be licensed, must be licensed on January 1, 2000. The initial and first annual license fees total $2,500 for the first year of licensure; the annual renewal license fee for subsequent years is $2,500. There are no anticipated economic costs to persons (other than a person that is considered to be an abortion facility) who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Cecil Jones, Program Director, Consolidated Programs, Division of Health Facility Licensing, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6647. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendments are proposed under Health and Safety Code, Chapter 245 which establishes the licensing requirements for abortion facilities; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

These sections affect Health and Safety Code, Chapters 12 and 245.

§139.1. Purpose and Scope.

(a) (No change.)

(b) Scope and applicability.

(1) Licensing requirements. A person other than an exempt abortion facility (as described [~~defined~~] in §139.3(a) of this title (relating to Exempt and Unlicensed Facility) [~~§139.2 of this title (relating to Definitions)~~] may not establish or operate an abortion facility in Texas without a license issued under this chapter.

(2) (No change.)

§139.2. Definitions.

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

(1)-(20) (No change.)

[~~(21) Exempt abortion facility - A facility where abortions are performed which is exempt from licensure under the Act, §245.004. Exempt abortion facilities include:~~]

[~~(A) hospitals licensed under the Texas Hospital Licensing Law, Health and Safety Code, Chapter 241; and~~]

[~~(B) the office of a physician who is licensed to practice under the Medical Practice Act, Texas Civil Statutes, Article 4495b, provided the office is not utilized primarily for the purpose of performing abortions. For the purpose of this subparagraph the term "primarily" means 51% or more of the patients actually treated within the previous calendar year.~~]

(21) [~~(22)~~] Facility - An abortion facility as defined in this section.

(22) [~~(23)~~] Health care facility - Any type of facility or home and community support services agency licensed to provide health care in any state or is certified for Medicare (Title XVIII) or Medicaid (Title XIX) participation in any state.

(23) [~~(24)~~] Health care worker - Any person who furnishes health care services in a direct patient care situation under a license, certificate, or registration issued by the State of Texas or a person providing direct patient care in the course of a training or educational program.

(24) [~~(25)~~] Hospital - A facility that is licensed under the Texas Hospital Licensing Law, Health and Safety Code, Chapter 241, or if exempt from licensure, certified by the United States Department of Health and Human Services as in compliance with conditions of participation for hospitals in Title XVIII, Social Security Act (42 United States Code, §1395 et. seq.).

(25) [~~(26)~~] Immediate jeopardy to health and safety - A situation in which there is a high probability that serious harm or injury to patients could occur at any time or already has occurred and may well occur again if patients are not protected effectively from the harm or if the threat is not removed.

(26) [~~(27)~~] Licensed mental health practitioner - A person licensed in the State of Texas to provide counseling or psychotherapeutic services.

(27) [~~(28)~~] Licensed vocational nurse (LVN) - A person who is currently licensed under Texas Civil Statutes, Article 4528c as a licensed vocational nurse.

(28) [~~(29)~~] Licensee - A person or entity who is currently licensed as an abortion facility.

(29) [~~(30)~~] Medical consultant - A physician who is designated to supervise the medical services of the facility.

(30) [~~(31)~~] Nonprofessional personnel - Personnel of the facility who are not licensed or certified under the laws of this state to provide a service and must function under the delegated authority of a physician, registered nurse, or other licensed health professional who assumes responsibility for their performance in the abortion facility.

(31) [~~(32)~~] Noncritical items - Items that come in contact with intact skin.

(32) [~~(33)~~] Notarized copy - A sworn affidavit stating that attached copy(ies) are true and correct copies of the original documents.

(33) [~~(34)~~] Patient - A female on whom an abortion is performed, but shall in no event be construed to include a fetus.

(34) [~~(35)~~] Person - Any individual, firm, partnership, corporation, or association.

(35) [~~(36)~~] Physician - An individual who is currently licensed to practice medicine under the Medical Practice Act, Texas Civil Statutes, Article 4495b.

(36) [~~(37)~~] Physician extender - A physician extender is:

(A) an advance practice nurse - An individual who is a registered professional nurse currently licensed by the Board of Nurse Examiners (BNE) for the State of Texas, and who is prepared for advanced nursing practice by virtue of knowledge and skills obtained through a post- basic advanced practice nurse educational program of study acceptable to the BNE in accordance with Title 22, Chapter 221, Advanced Practice Nurses, §221.3, relating to Education. An advanced practice nurse acts independently and/or in collaboration with other health care professionals in the delivery of health care services. Advanced practice nurses may include, but not be limited to, the following:

(i) certified registered nurse anesthetist;

(ii) certified nurse midwife;

(iii) nurse practitioner;

(iv) clinical nurse specialist; and

(v) other titles as approved by the BNE; or

(B) a physician assistant - A physician assistant must be currently licensed under the Physician Assistant Licensing Act, Texas Civil Statutes, Article 4495-1.

(37) [~~(38)~~] Plan of correction - A written strategy for correcting a licensing violation. The plan of correction shall be developed by the facility and shall address the system(s) operation(s) of the facility as the system(s) operation(s) apply to the deficiency.

(38) [~~(39)~~] Postprocedure infection - An infection acquired at or during an admission to a facility; there must be no evidence that the infection was present or incubating at the time of admission to the facility. Postprocedure infections and their complications that may occur after an abortion include, but are not limited to, endometritis and other infections of the female reproductive tract, laboratory-confirmed or clinical sepsis, septic pelvic thrombophlebitis, and disseminated intravascular coagulopathy.

(39) [~~(40)~~] Presurvey conference - A conference held with department staff and the applicant or his or her representative to review licensure standards, survey documents, and provide consultation prior to the on-site licensure survey.

~~[(41) Primarily - As used in the Act, §245.004, and in §139.4(b) of this title (relating to Exemptions), the term "primarily" refers to the number of patients having abortions which represents 51% or more of the patients actually treated within the previous calendar year.]~~

(40) [~~(42)~~] Professional personnel - Patient care personnel of the facility currently licensed or certified under the laws of this state to use a title and provide the type of service for which they are licensed or certified.

(41) [~~(43)~~] Quality - The degree to which care meets or exceeds the expectations set by the patient.

(42) [~~(44)~~] Quality assurance - An ongoing, objective, and systematic process of monitoring, evaluating, and improving the quality, appropriateness, and effectiveness of care.

(43) [~~(45)~~] Quality improvement - An organized, structured process that selectively identifies improvement projects to achieve improvements in products or services.

(44) [~~(46)~~] Registered nurse (RN) - A person who is currently licensed under the Nurse Practice Act, Texas Civil Statutes, Article 4513 et. seq. as a registered nurse.

(45) [~~(47)~~] Semicritical items - Items that come in contact with nonintact skin or mucous membranes. Semicritical items may include respiratory therapy equipment, anesthesia equipment, bronchoscopes, and thermometers.

(46) [~~(48)~~] Standards - Minimum requirements under the Act and this chapter.

(47) [~~(49)~~] Sterile field - The operative area of the body and anything that directly contacts this area.

(48) [~~(50)~~] Sterilization - The use of a physical or chemical procedure to destroy all microbial life, including bacterial endospores.

(49) [~~(51)~~] Supervision - Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity that includes initial direction and periodic inspection of the actual act of accomplishing the function or activity.

(50) [~~(52)~~] Surveys - An onsite inspection by the department in which a standard-by-standard evaluation is conducted, at a minimum, of each requirement in:

(A) §139.6 of this title (relating to Public Information; Toll-Free Telephone Number);

(B) §139.7 of this title (relating to Unique Identifying Number; Disclosure in Advertisement);

(C) §139.8 of this title (relating to Quality Assurance); and

(D) Subchapter D of this chapter (relating to Minimum Standards for Licensed Abortion Facilities).

(51) [~~(53)~~] Third trimester - A gestational period of not less than 26 weeks (following last-menstrual period (LMP)).

§139.3. Exempt and Unlicensed Facility.

(a) In accordance with the Texas Abortion Facility Reporting and Licensing Act (Act), §245.004, certain facilities which perform abortion services are exempt from the licensing requirements of the Act. [~~A facility is considered to be exempt from licensing requirements if it meets the definition of "exempt abortion facility" as defined in §139.2 of this title (relating to Definitions). However, an "exempt abortion facility" is not exempt from the reporting requirements in §139.5 of this title (relating to Annual Reporting Requirements).~~] The following facilities are not required to be licensed under the Act or this chapter:

(1) hospitals licensed under the Texas Hospital Licensing Law, Health and Safety Code, Chapter 241; and

(2) the office of a physician who is licensed to practice under the Medical Practice Act, Texas Civil Statutes, Article 4495b, provided the office is not utilized for the purpose of performing more than 300 abortions in any 12-month period.

(b) In computing the number of abortions performed in the office of a physician under subsection (a)(2) of this section, an abortion performed by a physician in an unlicensed abortion facility is not included if, at the commencement of the abortion, the physician reasonably believes that the abortion is necessary to prevent the death of the patient or to prevent serious impairment of the patient's physical health.

(c) A facility which is exempt from licensure under this section is not exempt from the reporting requirements in §139.5 of this title (relating to Annual Reporting Requirements).

(d) [~~(b)~~] If the Texas Department of Health (department) has reason to believe that a person or facility may be providing abortion services without a license as required by Act and this chapter, the department shall notify the person or facility in writing by certified mail, return receipt requested. The person or facility shall submit to the department the following information within 10 days of receipt of the notice:

(1) an application for a license and the license fee; or

(2) a notarized affidavit to support exemption under §245.004 of Act, including any and all documentation. The notarized affidavit shall attest to the fact that not more than 300 abortions have been performed in any 12- month period [~~the number of patients having abortions represents less than 51% of the patients actually treated within the previous calendar year~~]. The affidavit document will be provided by the department.

(e) [~~(c)~~] If the person or facility has submitted an application for a license, the application will be processed in accordance with §139.23 of this title (relating to Application Procedures and Issuance of Licenses).

This 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 10, 1999.

TRD-9905850
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

25 TAC §§139.4-139.5

The Texas Department of Health (department) proposes new §139.4 and §139.5, the repeal of §139.5, and amendments to §139.23 and §139.47 concerning abortion reporting requirements.

Existing §139.5 which includes annual reporting requirements and third trimester reporting requirements is being repealed to allow for the section to be restructured. The annual reporting requirements for facilities are being moved to new §139.4. The reporting requirements for third trimester abortions and emergency abortions performed on minors are under new §139.5. Cite references to §139.5 are being amended as appropriate in §139.23 (application procedures for annual renewal of a license) and §139.47 (facility administration).

New §139.5 includes new statutory requirements adopted during the 1999 legislative session relating to abortion reporting. Senate Bill 30 adopted new requirements for abortion notification (Title 2, Family Code, Chapter 33). Section 33.002 abridges a physician's performance of an abortion on a pregnant unemancipated minor until certain criteria have been met. The criteria include 48-hour parental notification, judicial approval, failure by a court to act, or determination by the physician that a medical emergency exists. A physician may perform an abortion on a minor without parental notification or a court order if the physician provides written certification to the Texas Department of Health and in the patient's medical record that immediately performing the abortion was necessary to prevent the minor's death or serious bodily injury. The department is responsible for preparing the form to be used by the physician for making the certification. The rule requires abortion facilities/physicians to comply with the new reporting requirement.

Jann Melton-Kissel, Bureau of Licensing and Compliance, has determined that for the first five years the proposed sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the sections as proposed.

Ms. Melton-Kissel also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be to ensure that abortion facilities/physicians comply with the legislative mandates. There will be no significant additional costs to small/micro businesses (abortion facilities/physicians) to comply with the sections as proposed. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Cecil Jones, Program Director, Consolidated Programs, Division of Health Facility Licensing, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756, (512) 834-6647. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The new sections are proposed under the Family Code, §33.002(a)(4) which requires a physician to provide written certification to the department for all abortions performed on an emergency basis on certain minors; the Texas Abortion Facility Reporting and Licensing Act, Health and Safety Code, Chapter 245, which provides the Texas Board of Health with the authority to establish rules governing the licensing and regulation of abortion facilities and to establish annual reporting requirements for abortion facilities; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The new sections affect Family Code, §33.002(a)(4); and Health and Safety Code, Chapters 245 and 12.

§139.4. Annual Reporting Requirements for All Abortion Facilities.

(a) The purpose of this section is to implement the abortion reporting requirements of the Texas Abortion Facility Reporting and Licensing Act (Act), Health and Safety Code, §245.011, which mandates that each abortion facility must submit an annual report to the Texas Department of Health on each abortion performed at the abortion facility. This section applies to any place where abortions are performed, and therefore applies to licensed, unlicensed, and exempt facilities (including physicians).

(b) Facilities must submit an abortion report on each abortion that was performed at the facility on at least an annual basis. The facility may choose to submit the abortion reports on a monthly or quarterly basis for greater efficiency.

(c) The reporting period for each facility is January 1-December 31 of each year. Each facility must submit the abortion report(s) to the department no later than January 31 of the subsequent year.

(d) The abortion reports must be submitted:

(1) on forms approved by the department, by certified mail marked as confidential, to the Texas Department of Health, Bureau of Vital Statistics, P.O. Box 4124, Austin, Texas 78765-4124;

(2) on a floppy disk in a format approved by the department, by certified mail marked as confidential, to the Texas Department of Health, Bureau of Vital Statistics, P.O. Box 4124, Austin, Texas 78765-4124; or

(3) via a modem in a format approved by the department.

(e) The first annual reporting period for a licensed facility commences on the day the initial license is issued. The report(s) must contain data for the calendar year in which the initial license is issued. If the first annual license is not issued, the report(s) must contain data from the date the initial license was issued through the date the initial license expired, was revoked, or was withdrawn.

(f) If a change of ownership has occurred, the previous owner shall submit the report(s) commencing from the date of the previous reporting period and ending on the date the change in ownership of the facility occurred; the report(s) is due 30 days after the date of acquisition. The annual reporting period for the newly acquired facility commences on the day the initial license is issued and shall contain data for the calendar year in which the initial license is issued. If the first annual license is not issued, the report(s) must contain data from the date the initial license was issued through the date the initial license expired, was revoked, or was withdrawn.

§139.5. Additional Reporting Requirements for Physicians.

In addition to the annual reporting required by §139.4 of this title (relating to Annual Reporting Requirements for All Abortion Facilities), physicians must comply with this section when performing third trimester abortions or when performing emergency abortions on certain minors.

(1) Reporting requirements for third trimester abortions.

(A) The purpose of this paragraph is to establish procedures for reporting third trimester abortions as required by the Texas Medical Practice Act, Texas Civil Statutes, Article 4495b, §4.011(f).

(B) A physician who performs a third trimester abortion of a viable fetus with a biparietal diameter of 60 millimeters or greater shall certify in writing to the Texas Department of Health the medical indications supporting the physician's judgement that the abortion is either necessary to prevent the death or a substantial risk of serious impairment to the physical or mental health of the woman or the fetus has a severe and irreversible abnormality, as identified through reliable diagnostic procedures.

(C) The certification shall be made on a form approved by the board.

(D) The physician shall return by certified mail, marked as confidential, the certification form and may submit any supporting documents to the Texas Department of Health, Bureau of Vital Statistics, P.O. Box 4124, Austin, Texas 78765-4124, not later than the 30th day after the date the abortion was performed.

(E) The department will retain the certification form and supporting documents as a cross-reference to the annual reporting requirements of the Act and this section. The certification form and supporting documents retained by the department are confidential. Any release of the documents will be in accordance with the provisions of the Texas Medical Practice Act, Texas Civil Statutes, Article 4495b.

(F) A physician performing abortions at a licensed abortion facility who fails to submit the certification form required under this paragraph may subject the licensed facility to denial, suspension, or revocation of the license in accordance with §139.32 of this title (relating to License Denial, Suspension, and Revocation).

(2) Reporting requirements for emergency abortions performed on unemancipated minors.

(A) The purpose of this paragraph is to establish procedures for reporting emergency abortions performed on unemancipated minors, as authorized by Family Code, §33.002(a)(4)(B).

(B) A physician who performs an emergency abortion on an unemancipated minor shall certify in writing to the Texas Department of Health the medical indications supporting the physician's judgment that the abortion is necessary either to avert her death or to avoid a serious risk of substantial and irreversible impairment of a major bodily function, as identified through reliable diagnostic procedures.

(C) The certification shall be made on a form approved by the board.

(D) The physician shall return by certified mail, marked as confidential, the certification form to the Texas Department of Health, Bureau of Vital Statistics, P.O. Box 4124, Austin, Texas 78765-4124 not later than 30 days after the date the abortion was performed.

(E) A physician performing abortions at a licensed abortion facility who fails to submit the certification form required by this paragraph may subject the licensed facility to denial, suspension, or revocation of the license in accordance with §139.32 of this title (relating to License Denial, Suspension, and Revocation).

(F) If the physician provides parental notice as prescribed by Family Code, §33.002(a)(1), or if the minor has obtained judicial approval as authorized by Family Code, §33.002(a)(2) or §33.002(a)(3), the emergency certification form is not required.

This 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 10, 1999.

TRD-9905846
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

25 TAC §139.5

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

The repeal is proposed under the Family Code, §33.002(a)(4) which requires a physician to provide written certification to the department for all abortions performed on an emergency basis on certain minors; the Texas Abortion Facility Reporting and Licensing Act, Health and Safety Code, Chapter 245, which provides the Texas Board of Health with the authority to establish rules governing the licensing and regulation of abortion facilities and to establish annual reporting requirements for abortion facilities; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeal affects Family Code, §33.002(a)(4); and Health and Safety Code, Chapters 245 and 12.

§139.5. Annual Reporting Requirements.

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

Filed with the Office of the Secretary of State, on September 10, 1999.

TRD-9905847
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

Subchapter B. LICENSING PROCEDURES

25 TAC §139.23

The amendment is proposed under the Family Code, §33.002(a)(4) which requires a physician to provide written certification to the department for all abortions performed on an emergency basis on certain minors; the Texas Abortion Facility Reporting and Licensing Act, Health and Safety Code, Chapter 245, which provides the Texas Board of Health with the authority to establish rules governing the licensing and regulation of abortion facilities and to establish annual reporting requirements for abortion facilities; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendment affects Family Code, §33.002(a)(4); and Health and Safety Code, Chapters 245 and 12.

§139.23. Application Procedures and Issuance of Licenses.

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

(e) Application procedures for annual renewal of a license.

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

(5) If a licensee makes timely and sufficient application for renewal, the license will not expire until the department issues the annual renewal license or until the department denies renewal of the license.

(A) (No change.)

(B) The department may propose to deny the issuance of a renewal license if:

(i)-(iii) (No change.)

(iv) a facility fails to file abortion reports in accordance with §139.4 of this title (relating to Annual Reporting Requirements for All Abortion Facilities) or fails to ensure the physicians report in accordance with §139.5 of this title (relating to Additional Reporting Requirements for Physicians [~~Annual Reporting Requirements~~]).

(6)-(10) (No change.)

(f)-(g) (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 10, 1999.

TRD-9905848
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

Subchapter D. MINIMUM STANDARDS FOR LICENSED ABORTION FACILITIES

25 TAC §139.47

The amendment is proposed under the Family Code, §33.002(a)(4) which requires a physician to provide written certification to the department for all abortions performed on an emergency basis on certain minors; the Texas Abortion

Facility Reporting and Licensing Act, Health and Safety Code, Chapter 245, which provides the Texas Board of Health with the authority to establish rules governing the licensing and regulation of abortion facilities and to establish annual reporting requirements for abortion facilities; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendment affects Family Code, §33.002(a)(4); and Health and Safety Code, Chapters 245 and 12.

§139.47. Facility Administration.

(a) (No change.)

(b) The administrator shall:

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

(13) ensure that the reporting requirements of §139.4 of this title (relating to Annual Reporting Requirements For All Abortion Facilities) [~~§139.5 of this title (relating to Annual Reporting Requirements~~] are performed.

(c)-(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 10, 1999.

TRD-9905849
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

Chapter 157. EMERGENCY MEDICAL SERVICES

Subchapter G. EMERGENCY MEDICAL SERVICES TRAUMA SYSTEMS

25 TAC §157.130

The Texas Department of Health (department) proposes an amendment to §157.130 concerning distribution of monies from the Emergency Medical Services (EMS) and Trauma Care System Fund (fund) as a result of legislative amendments to the Health and Safety Code, Chapter 773. The amendment modifies the allocations of the fund to EMS and the methodology for disbursement of the EMS and Regional Advisory Council (RAC) allotments.

The Health and Safety Code, Chapter 773, §§121-124, was amended by three bills enacted by the 76th Legislature, 1999. Rider 61 on House Bill (HB) 1 specified that at least 60% of the EMS allotment be allocated to rural counties and 40% to urban counties. Sections 19.07-19.09 of HB 2085, allow the EMS and RAC allotments to be disbursed directly to a RAC for distribution if the RAC is incorporated as an entity that is exempt from federal income tax under the Internal Revenue Code of 1986, §501(a), and its subsequent amendments, by being listed as an exempt organization under §501(c)(3) of the code. Section 16 of HB 3084 changes the status of the fund from a dedicated fund to an account in the state treasury.

Mr. Gene Weatherall, Chief, Bureau of Emergency Management, has determined that for each year of the first five years the section as proposed is in effect, there will be no fiscal impact on state and local governments as a result of administering this section. There will also be no fiscal impact on county governments.

Mr. Weatherall has also determined that for each year of the first five years the sections as proposed are in effect, the public benefit anticipated is the assurance that adequate trauma care is available to the citizens of Texas. There will be no effect on small businesses or micro-businesses, are no anticipated economic costs to persons who are required to comply with the section as proposed, and there is no impact on local employment.

Comments on the proposal may be submitted to Gene Weatherall, Chief, Bureau of Emergency Management, Texas Department of Health, 1100 W. 49th Street, Austin, Texas, 78756-3199, (512) 834-6740. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Health and Safety Code, §773.115, which provides the Texas Board of Health (board) with the authority to adopt rules for the development of an EMS/trauma care system; and Health and Safety Code §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendment affects the Health and Safety Code, Chapter 773.

§157.130. Emergency Medical Services and Trauma Care System Account [~~Fund~~].

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

(1) Extraordinary emergency - An event or situation which may disrupt the services of a regional ems/trauma system.

[~~(2) Frontier county - A county with a population that averages less than six people per square mile.~~]

(2) [~~(3)~~] Rural county - A county with a population of less than 50,000 [~~and that averages more than six people per square mile~~].

[~~(4) Trauma support area - Trauma service area.~~]

(3) [~~(5)~~] Urban county - A county with a population of 50,000 or more.

(b) Reserve. On September 1 of each year, there shall be a reserve of $250,000 in the emergency medical services (EMS) and trauma care system account (account) [~~fund (fund)~~] for extraordinary emergencies. During the fiscal year, distributions may be made from the reserve by the commissioner of health based on requests which demonstrate need and impact on the EMS and trauma care system (system).

(c) Allotments. The EMS and trauma service area (TSA) allotments shall be 70% and 25%, respectively, of the funds remaining in the account [~~fund~~] after any amount necessary to maintain the extraordinary emergency reserve of $250,000 has been deducted.

(1) By August 31 of each year, the bureau of emergency management (bureau) shall determine:

(A) eligibility of all EMS providers, regional advisory councils (RACs), trauma facilities, and counties;

(B) the TSA and EMS allotments;

(C) each county's share of the EMS allotment; and

(D) each RAC share of the TSA allotment.

(2) The bureau shall contract with each eligible RAC to distribute the county shares of the EMS allotment to eligible EMS providers based within counties which are aligned within the relevant RAC. Prior to distribution of the county shares to eligible providers, the RAC will submit a distribution proposal to the bureau for approval.

(3) [~~(2)~~] In cases where a RAC is ineligible to distribute the EMS allotment, the [~~The~~] bureau shall contract with each county in which eligible EMS providers are based to distribute the EMS allotment. In counties with a population of 291,000 or more, joint authorization of the chief executive of the county and the mayor of the principal municipality in the county is required for disbursement of the county allocation.

(4) The bureau shall contract with each eligible RAC to distribute the TSA allotment. Prior to distribution of the TSA allotment, the RAC will submit a budget proposal to the bureau for approval.

(5) [~~(3)~~] In cases where a RAC is ineligible to distribute the TSA allotment, the [~~The~~] bureau shall contract with each county in which a RAC chairperson resides to distribute the TSA allotment. For any RAC whose chairperson resides in a county outside of Texas, the chairperson must appoint another officer of the RAC who resides in a Texas county as his or her representative in order to determine to which county the RAC's share of the TSA allotment shall be distributed.

(6) [~~(4)~~] Contracts [~~with the counties~~] shall include at a minimum:

(A) a list of eligible participants;

(B) a list of eligible expenditures;

(C) requirements for reporting; and

(D) requirements for returning undisbursed monies to the account [~~fund~~].

(7) [~~(5)~~] The county allocations of the EMS allotment shall be distributed directly to eligible recipients without any reduction in the total amount allocated by the Texas Department of Health (department).

(8) [~~(6)~~] The county allocations of the EMS allotment shall be used as an addition to current county EMS funding of eligible recipients, not as a replacement.

(9) [~~(7)~~] The bureau shall investigate all complaints regarding distribution of the EMS and TSA allotments.

(d) Uncompensated care allotment. The uncompensated care allotment shall be 2.0% of the funds remaining in the account [~~fund~~] after any amount necessary to maintain the extraordinary emergency reserve of $250,000 has been deducted plus any monies not otherwise expended by counties and/or eligible recipients in a given fiscal year.

(1) Each fiscal year, the bureau shall request proposals to distribute funds from the uncompensated care allotment for uncompensated trauma care provided by designated trauma facilities in either the current or immediately previous fiscal year or innovative projects to enhance the delivery of patient care in the overall system.

(2) Contract awards from the uncompensated care allotment shall be made based on, but not limited to:

(A) demonstration of need and the amount of uncompensated trauma care provided;

(B) innovation of proposal;

(C) broad system impact;

(D) enhancement of system development; and

(E) availability of funds.

(e) Eligibility requirements. To be eligible for funding from the account [~~fund~~], all potential recipients must maintain active involvement in regional system development within all of the TSAs in which they operate and [~~. By August 31, 1998, to be eligible for funding from the fund all potential recipients must~~] meet requirements for reports of expenditures from the previous year and planning for use of the funding in the upcoming year.

(1) To be eligible for funding, an EMS provider must:

(A) by December 31, 1999: [~~1997, maintain provider licensure as described in §157.11 of this title (relating to Requirements for an EMS Provider License) and provide emergency medical services and/or emergency transfers; and~~]

[~~(B) by August 31, 1998;~~]

~~*(i)* maintain provider licensure as described in §157.11 of this title and provide emergency medical services and/or emergency transfers; and~~]

~~*(ii)* submit a plan for electronically submitting patient care report data to the RAC regional registry or the department as described in §157.129 of this title (relating to State Trauma Registry).~~]

[~~(C) by August 31, 1999:~~]

(i) maintain provider licensure as described in §157.11 of this title (relating to Requirements for an EMS Provider License) and provide emergency medical services and/or emergency transfers;

(ii) electronically submit at least the minimum essential data set to the RAC regional registry or the department [~~as described in §157.129 of this title~~]; and

(iii) demonstrate utilization of the RAC regional protocols regarding patient destination and transport in all TSAs in which they operate.

(B) [~~(D)~~] by August 31, 2000, and in subsequent years:

(i) maintain provider licensure as described in §157.11 of this title and provide emergency medical services and/or emergency transfers;

(ii) electronically submit at least the essential data set to the RAC regional registry or the department [~~as described in §157.129 of this title~~];

(iii) demonstrate utilization of the RAC regional protocols regarding patient destination and transport in all TSAs in which they operate; and

(iv) demonstrate active participation in the regional system quality improvement (QI) program in all TSAs in which they operate.

(2) To be eligible for funding, a RAC must:

(A) by December 31, 1999: [~~1997;~~]

~~*f(i)* be officially recognized by the department as described in §157.123 of this title (relating to Regional Advisory Councils); and]~~

~~*f(ii)* submit documentation of ongoing system development activity and future planning.]~~

~~[(B) by August 31, 1998;]~~

~~*f(i)* be officially recognized by the department as described in §157.123 of this title;]~~

~~*f(ii)* submit documentation of ongoing system development activity and future planning; and]~~

~~*f(iii)* have received approval from the department on at least three of its system plan components as described in §157.124 of this title (relating to Regional EMS/Trauma Systems) to include at least prehospital triage criteria and bypass protocols.]~~

[~~(C) by August 31, 1999;~~]

(i) be officially recognized by the department as described in §157.123 of this title;

(ii) submit documentation of ongoing system development activity and future planning;

(iii) have implemented a regional registry or submitted to the department documentation that at least 10% of the total number of EMS providers and hospitals in the TSA are electronically submitting the minimum [~~pertinent~~] essential data set to the department [~~as described in §157.129 of this title~~]; and

(iv) have received approval of its regional system plan from the department.

(B) [~~(D)~~] by August 31, 2000:

(i) be officially recognized by the department as described in §157.123 of this title;

(ii) submit documentation of ongoing system development activity and future planning;

(iii) have implemented a regional registry or submitted to the department documentation that at least 40% of the total number of EMS providers and hospitals in the TSA are electronically submitting the minimum [~~pertinent~~] essential data set to the department [~~as described in §157.129 of this title~~]; and

(iv) have demonstrated that a regional system QI process is ongoing.

(3) To be eligible for funding, a trauma facility must maintain its designation status.

(4) To be eligible to distribute the EMS and TSA allotments, a RAC must be incorporated as an entity that is exempt from federal income tax under the Internal Revenue Code of 1986, §501(a), and its subsequent amendments, by being listed as an exempt organization under §501(c)(3) of the code.

(f) Calculation of county shares.

(1) EMS allotment [~~for FY 1998 and FY 1999~~]

(A) Counties will be classified as urban or rural[~~, or frontier~~] based on the latest official federal census population figures.

(B) The EMS allotment will be divided into a 40% allocation for urban counties and a 60% allocation for rural counties. [~~allocations for urban, rural, and frontier counties based on the percentage of each type of county in the state~~]

(C) An individual county's share of the EMS allotment shall be based on its relative geographic size and population as compared to all other counties of its classification.

(D) The formula shall be: (((the county's percentage of the classification group's population) plus (the county's percentage of the classification group's geographic size) divided by 2)) times (the total classification group's allocation).

(E) After August 31, 2001, an individual county's share of the EMS allotment shall be based on its relative geographic size, population, and number of emergency health care runs as compared to all other counties of its classification.

(F) After August 31, 2001, the formula shall be: (((the county's percentage of the classification group's population) plus (the county's percentage of the classification group's geographic size) plus (the county's percentage of the classification group's total emergency health care runs) divided by 3)) times (the classification group's allocation). Total emergency health care runs shall be the number of emergency runs electronically transmitted to the department in a given year by EMS providers.

~~[(2) EMS allotment after August 31, 1999. Should the legislature allocate funds, they will be distributed as follows:]~~

~~[(A) The counties will not be divided into classifications.]~~

~~[(B) Each individual county's share shall be based on its relative geographic size, population and number of emergency runs as compared to all other counties.]~~

~~[(C) The formula shall be: (((the county's percentage of state population) plus (the county's percentage of the state's geographic size) plus (the county's percentage of total state emergency health care runs)) divided by 3) times the total EMS allotment. Total emergency health care runs shall be the number of emergency runs electronically transmitted to the department in a given year by EMS providers.]~~

(2) [~~(3)~~] TSA allotment.

(A) A RAC's share of the TSA allotment shall be based on its relative geographic size and population as compared to all other TSAs.

(B) The formula shall be: (((the TSA's percentage of the state's population) plus (the TSA's percentage of the state's geographic size)) divided by 2) times (the total TSA allotment).

(C) After August 31, 2001 [~~2000~~], a RAC's share of the TSA allotment shall be based on its relative geographic size, population, and trauma care provided as compared to all other TSAs.

(D) The formula shall be: ((the TSA's percentage of the state's population) plus (the TSA's percentage of the state's geographic size) plus (the TSA's percentage of the state's total trauma care) divided by 3)) times (the total TSA allotment). Total trauma care shall be the number of major and severe trauma patient records electronically transmitted to the department in a given year by EMS providers and hospitals.

(g) Loss of funding eligibility. If the department finds that a county, EMS provider, RAC, or trauma facility has violated the Health and Safety Code, §773.122 or fails to comply with this section, the department may withhold account [~~fund~~] monies for a period of one to three years depending upon the seriousness of the infraction.

This 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 10, 1999.

TRD-9905851
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

Chapter 229. FOOD AND DRUG

Subchapter B. SPECIAL DIETARY FOODS

25 TAC §§229.11-229.18

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

The Texas Department of Health (department) proposes the repeal of §§229.11-229.18, concerning special dietary foods. The repeal of these rules is necessary because the rules have become obsolete by new federal laws and regulations.

Pursuant to the Government Code, §2001.039 (formerly known as Rider 167), each state agency is required to review and consider for readoption each rule adopted by that agency. The sections have been reviewed and the department has determined that reasons for adopting the sections no longer exist.

Robert D. Sowards, Jr., Director, Manufactured Foods Division, has determined that for each year of the first five-year period the sections are no longer in effect there will be no fiscal implications to state government or local government as a result of the repeal of these sections.

Mr. Sowards also has determined that for each year of the first five years the sections are repealed, the public benefit anticipated as a result of repealing the sections is that the department will be consistent with federal regulations. There will be no effect on small businesses nor micro- businesses. There are no anticipated economic costs to persons who are required to comply with the sections as repealed. There is no impact on local employment.

Comments on the proposal may be submitted to Robert D. Sowards, Jr., Director, Manufactured Foods Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0243. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The repeals are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect the Health and Safety Code, Chapter 431; Chapter 12; and the Government Code, §2001.039 as passed by the 76th Legislature.

§229.11. General Provisions.

§229.12. General Label Statements.

§229.13. Label Statements Relating to Vitamins.

§229.14. Label Statements Relating to Minerals.

§229.15. Label Statements Relating to Infant Food.

§229.16. Label Statements Relating to Certain Food Used in Control of Body Weight or in Dietary Management with Respect to Disease.

§229.17. Label Statements Relating to Nonnutritive Constituents.

§229.18. Label Statements Relating to Hypoallergenic Food.

This 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 10, 1999.

TRD-9905853
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

Subchapter D. SANITARY RULES FOR FOOD AND DRUG ESTABLISHMENTS

25 TAC §§229.41-229.51

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

The Texas Department of Health (department) proposes the repeal of §§229.41-229.51, concerning sanitary rules for food and drug establishments. The repeal of these rules is necessary because the rules have become obsolete by proposed Good Manufacturing Practices and Good Warehousing Practices, Chapter 229, Food and Drug, §§229.211-229.222.

Pursuant to the Government Code, §2001.039 (formerly known as Rider 167), each state agency is required to review and consider for readoption each rule adopted by that agency. The sections have been reviewed and the department has determined that reasons for adopting the sections no longer exist.

Robert D. Sowards, Jr., Director, Manufactured Foods Division, has determined that for each year of the first five-year period the sections are no longer in effect there will be no fiscal implications to state government or local government as a result of the repeal.

Mr. Sowards also has determined that for each year of the first five years the sections are repealed, the public benefit

anticipated as a result of repealing the sections is that the department will be consistent with federal regulations. There will be no effect on small businesses nor micro- businesses. There are no anticipated economic costs to persons who are required to comply with the sections as repealed. There is no impact on local employment.

Comments on the proposal may be submitted to Robert D. Sowards, Jr., Director, Manufactured Foods Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0243. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The repeals are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect the Health and Safety Code, Chapter 431; Chapter 12; and the Government Code, §2001.039 as passed by the 76th Legislature.

§229.41. General Provisions.

§229.42. Sanitary Conditions.

§229.43. Sanitary Materials.

§229.44. Interiors of Establishments.

§229.45. Outside Openings.

§229.46. Toilet Facilities.

§229.47. Expectorating.

§229.48. Living or Sleeping in Establishments.

§229.49. Sidewalk or Street Displays.

§229.50. Foods Subject to Contamination.

§229.51. Dilapidated Establishments.

This 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 10, 1999.

TRD-9905855

Susan K. Steeg

General Counsel

Texas Department of Health

Earliest possible date of adoption: October 24, 1999

For further information, please call: (512) 458-7236

♦ ♦ ♦

Subchapter F. PRODUCTION, PROCESSING, AND DISTRIBUTION OF BOTTLED AND VENDED DRINKING WATER

The Texas Department of Health (department) proposes the repeal of §§229.87-229.88, new §§229.87-229.91, and the review of §§229.81-229.86 concerning production, processing, and distribution of bottled and vended drinking water. Specifically, the criteria and definitions in these sections shall apply to the production, processing, and distribution of safe and sanitary bottled and vended drinking water. The proposed new sections ensure that persons involved with the production, processing, and distribution of bottled and vended drinking water pass an examination and obtain a certificate of competency prior to engaging in the bottling or vending of drinking water.

Pursuant to the Government Code, §2001.039, each state agency is required to review and consider for readoption each rule adopted by that agency. Sections 229.81-229.88 have been reviewed and the department has determined that reasons for adopting the sections continue to exist. Sections 229.81-229.86 are being proposed without any changes, but are open for comment.

Robert D. Sowards, Jr., Director, Manufactured Foods Division, has determined that for each year of the first five-year period the sections are in effect there will be fiscal implications as a result of enforcing or administering the rules as proposed. The proposed certification fees are estimated to generate additional revenues of $3,250 per year each year of the first five years for state government. It is estimated that the costs to the department to administer the new provisions will equal the estimated revenue increases. There will be no impact on local government.

Mr. Sowards has also determined that for each year the sections are in effect, the public benefit will be that persons involved with production, processing, and distribution of bottled and vended drinking water must exhibit basic knowledge of rules regarding the sanitary requirements for the bottling and vending of drinking water ensuring a safer product. Small businesses and micro-businesses will be affected in that they will be required to have a certified operator. There are minimal anticipated economic costs to persons who are required to comply with the sections as adopted in that a $25 certification fee and an annual renewal of $25 are required. There is no impact on local employment.

Comments on the proposal may be submitted to Robert D. Sowards, Jr., Director, Manufactured Foods Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756, 512/719-0243. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

25 TAC §§229.87-229.91

The new sections are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendments and new sections affect the Health and Safety Code, Chapter 431; Chapter 12; and the Government Code, §2001.039, as passed by the 76th Legislature.

§229.87. Requirements for Approved Sources.

Sources in Texas shall comply with the following requirements.

(1) Public water systems. Sources in Texas which are public water systems shall comply with the Texas Health and Safety Code, Chapter 341, Subchapter C concerning drinking water standards and rules adopted thereunder by the Texas Natural Resource Conservation Commission, 30 Texas Administrative Code (TAC) §§290.101-290.121 (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public

Water Supply Systems), and §§290.38-290.47 (relating to Rules and Regulations for Public Water Systems).

(2) Other sources. Any other sources in Texas shall comply with 30 TAC §§290.101-290.121 concerning drinking water standards, and 30 TAC §§290.38-290.43 and 290.46 concerning rules and regulations for public water systems, except where variances are permitted in §229.81 of this title (relating to General Provisions).

(3) Compliance with these sections is required as if the source were a public water system.

§229.88. Certificates of Competency.

A person may not furnish bottled or vended water to the public or for distribution to the public unless the bottled or vended water operator holds a certificate of competency under this chapter. A person may not furnish bottled or vended water to the public or for distribution to the public unless the processing, bottling, and distribution of the bottled or vended water are performed by or under the supervision of a bottled or vended water operator who holds a certificate of competency under this chapter.

§229.89. Examination.

(a) After payment of the required fee, an applicant shall have passed a written examination prescribed by the department. To pass the examination for a certificate of competency, the applicant must make a score of 70% or more. In the case of failure, the applicant may reapply, pay another $25 application fee, and repeat the examination after a period of 30 days.

(b) An instructor may administer the department's examination provided the instructor complies with the department's security agreement.

§229.90. Fees.

The fees for certification shall be established as follows.

(1) Certification fee–$25.

(2) Annual renewal fee–$25.

(3) A new certificate can be obtained by submitting a new application with the $25 fee and receiving a passing score on the examination. All certificates will expire on December 31st of each year. Fees will not be prorated. If the department has not received a renewal by January 31st, the certificate holder shall submit a new application and retake the examination.

(4) Fees shall be paid by personal check, cashier's check, or money order. Cash cannot be accepted for payment of fees.

(5) An applicant or holder of a certificate shall pay the required fee before taking the examination or receiving a certificate of competency.

(6) All fees shall be made payable to the Texas Department of Health and are not refundable.

(7) All applicants shall be in compliance with §1.301 of this title (relating to Suspension of License for Failure to Pay Child Support).

§229.91. Suspension, Denial, or Revocation of Certificate.

(a) Basis for suspension. The certificate of competency shall be suspended if it is found that the operator practiced fraud or deceit; or failed to use reasonable care, judgement, or application of knowledge in the performance of their duties.

(b) Basis for denial. The certificate of competency shall be denied if it is found:

(1) that the application is incomplete or false;

(2) that the operator obtained the certificate through fraud or deceit; or

(3) that the operator practiced fraud or deceit; or failed to use reasonable care, judgement, or application of knowledge in the performance of their duties.

(c) Basis for revocation. The certificate of competency shall be revoked if it is found:

(1) that the certificate was issued in error;

(2) that the operator obtained the certificate through fraud, deceit, or through the submission of incorrect data on the application; or

(3) that the operator practiced fraud and deceit, or failed to use reasonable care, judgement, or application of knowledge in the performance of their duties.

(d) Examination of charges. When the department has reason to believe that charges against an operator may be valid, the department shall notify the operator by personal service or certified mail at his last known address:

(1) of the charges;

(2) that it intends to conduct an examination of the charges; and

(3) that the operator may request a formal hearing.

(e) Formal hearings. The department shall conduct hearings in accordance with the Administrative Procedures Act, Texas Government Code §§2001.051-2001.902; and the department's formal hearing procedures in §§1.21-1.34 of this title (relating to Formal Hearing Procedures).

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

Filed with the Office of the Secretary of State, on September 10, 1999.

TRD-9905857
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

25 TAC §229.87, §229.88

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

The repeals are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect the Health and Safety Code, Chapter 431; Chapter 12; and the Government Code, §2001.039, as passed by the 76th Legislature.

§229.87. Certificates of Competency.

§229.88. Requirements for Approved Sources.

This 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 10, 1999.

TRD-9905856
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

Chapter 295. OCCUPATIONAL HEALTH

Subchapter H. HAZARDOUS CHEMICAL RIGHT-TO-KNOW

25 TAC §§295.181-295.183

The Texas Department of Health (department) proposes amendments to §§295.181-295.183, concerning the requirements for operators of different types of facilities to provide information on hazardous chemicals at their facilities to the department, local fire departments, and local emergency planning committees (LEPCs) for the purposes of emergency planning and response and the public's right to know about hazardous chemicals in their communities. The proposed amendment to §295.181 concerns information which must be provided by manufacturing facilities; the proposed amendment to §295.182 concerns information which must be provided by public employers; and the proposed amendment to §295.183 concerns information which must be provided by non-manufacturing facilities.

Government Code §2001.039 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). Sections 295.181-295.183 have been reviewed and the department has determined that reasons for readopting the sections continue to exist.

Specifically, the proposed amendments address the reporting of hazardous chemicals (Tier Two forms), complaints and investigations, assessment of administrative penalties, and fees required for filing reports with the department. Sections 295.181 and 295.182 also address direct citizen access to a facility's chemical information.

The proposed amendments to §§295.181-295.183 update the legal citations for the federal Emergency Planning and Community Right-to-Know Act and provide legal citations for the Health and Safety Code, Chapters 505 (Manufacturing Facility Community Right-to-Know Act), 506 (Public Employer Facility Community Right-to-Know Act), or 507 (Nonmanufacturing Facilities Community Right-to-Know Act), as appropriate to the section. In addition, the proposed amendments to §§295.181 and 295.182 provide 13 new definitions and amend four others, and the proposed amendment to §295.183 provides 14 new definitions and amends five others in order to clarify the intent of the rules. The proposed amendments to §§295.181-295.183 provide the new name of the division, clarify the differences between the three types of Tier Two forms that are required under each of the Acts, and establish standards for submission of the Tier Two forms, including standards for electronic submission of data, reporting multiple workplaces, and providing descriptions of both urban and rural facility locations. The proposed amendments to §§295.181 and 295.182 provide clarification regarding direct citizen access to chemical information at manufacturing and public employer facilities. The proposed amendments to all of the sections establish standards for facility operators and the department related to complaint investigations and random compliance inspections. The proposed amendments to all of the sections clarify the procedures for facility operators to respond to written notices of violation and summary letters related to informal conferences, the conditions under which administrative penalties will be assessed, and the department's options in assessing administrative penalties. In addition, the proposed amendment to §295.181 establishes both a revised penalty matrix and examples of violations according to their severity levels. The proposed amendments to all of the sections clarify that fees are associated with required submissions related to individual facilities and establish a cap for the number of required submissions that may be consolidated under one fee. The proposed amendments to §295.181 establish a limit of two manufacturing facility reports which may be consolidated under a single filing fee. The proposed amendments to §§295.182 and 295.183 establish a limit of four public employer facility reports and four non-manufacturing facility reports, respectively, which may be consolidated under a single filing fee.

Claren Kotrla, Director, Toxic Substances Control Division, has determined that for each year of the first five years the sections are in effect, there will be fiscal implications as a result of administering the rules as proposed. The effect on state government will mean an increase in revenue to the state of approximately $300,300 per year as a result of the proposed caps on consolidation of filing fees for multiple required submissions. This revenue will be used by the department to fund increased costs of required data management, development of an electronic database of the chemical data, and grants to LEPCs for chemical emergency planning in their communities. Under the proposed cap on consolidation of filing fees, state government agencies that have multiple facilities which must file the Tier Two forms are estimated to pay an additional $6,700 per year in fees. Local government agencies that have multiple filing facilities are estimated to pay an additional $22,000 per year in fees.

Mr. Kotrla has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be increased safety for communities where hazardous chemicals are stored or used due to clarification of the Tier Two form data requirements and improved accessibility to the chemical data. The proposed amendments are anticipated to improve consistency in reporting forms and data formats and will require additional location information for rural facilities. In addition, the proposed increase in fees will provide additional revenue that will allow the department to perform essential computer programming and data entry and will provide funds for LEPC grants that may be used to purchase computers and related equipment. These activities will allow the department to share electronic chemical data with LEPCs for community planning purposes and will also allow electronic submission of chemical data to emergency responders. The anticipated effect on small businesses is increased filing fees for those manufacturing

businesses filing more than two and those non-manufacturing businesses filing more than four required submissions. Most small businesses and micro-businesses will not be affected. There will be no economic effect on manufacturers who file no more than two facility reports per year and public employers and non-manufacturers who file no more than four facility reports per year. Approximately 7.5% of 2,325 manufacturing facility operators filed more than two required submissions under a single filing fee for the calendar year 1997 reporting period. Under the proposed consolidated filing cap of two facility reports per fee, the anticipated additional average economic cost to each such manufacturer will be approximately $70 per additional facility per year. Approximately 39% of 848 public employers filed more than four required submissions under a single filing fee for the calendar year 1997 reporting period. Under the proposed consolidated filing cap of four facility reports per fee, the anticipated additional average economic cost to each such public employer will be approximately $27 per additional facility per year. Approximately 41% of 4,066 non-manufacturers filed more than four required submissions under a single filing fee for the calendar year 1997 reporting period. Under the proposed consolidated filing cap of four facility reports per fee, the anticipated additional average economic cost to each such non-manufacturer will be approximately $19 per additional facility per year. Under the proposed fee structure, the average cost per facility for all facilities filing Tier Two forms will be approximately $99 for manufacturers, $21 for public employers, and $15 for non-manufacturers. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Mr. Claren Kotrla, Director, Toxic Substances Control Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756, (512) 834-6603, or (800) 452-2791. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public hearing on the proposed sections will be held at 9:00 a.m., Friday, October 8, 1999, in the Texas Department of Health Auditorium, Room K-100, 1100 West 49th Street, Austin, Texas.

The amendments are proposed under the Health and Safety Code, §§505.016, 506.017, and 507.013, which provide the Texas Board of Health (board) with the authority to adopt necessary rules to administer and enforce Chapters 505, 506, and 507; and the Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendments affect the Health and Safety Code, §§505.016, 506.017, and 507.013; the Health and Safety Code, Chapter 12; and Government Code §2001.039.

§295.181. Manufacturing Facility Community Right-to-Know.

(a) Purpose and scope.

(1) The purpose of these rules is to provide facility operators [~~the public~~] with specific criteria needed to comply with the Manufacturing Facility Community Right-to-Know Act, Health and Safety Code, Chapter 505. [~~access to information on hazardous chemicals in their communities, to enhance community awareness of chemical hazards and facilitate community planning and response to chemical emergencies.~~]

(2) In order to avoid confusion among manufacturing employers and persons living in this state, the Texas Department of Health (department) shall implement the Manufacturing Facility Community Right-To-Know Act compatibly with the federal Emergency Planning and Community Right-To-Know Act (EPCRA), which is also known as the Superfund Amendments and Reauthorization Act of 1986 (SARA), Title III (42 USC §11001 et seq.), and related regulations (Title 40 Code of Federal Regulations (CFR), Parts 355-370), promulgated by [~~of~~] the United States Environmental Protection Agency (EPA).

(3) (No change.)

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings unless the context clearly indicates otherwise. [~~In addition to the terms which are defined by the Manufacturing Facility Community Right-To-Know Act, the following words, acronyms, and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.~~]

(1) Act - The Manufacturing Facility Community Right-To-Know Act, Health and Safety Code, Chapter 505.

(2) Appropriate facility identifiers - A physical location identification which provides a physical street address or other location identifiers, as specified in subsection (d)(17) of this section, which are sufficient for emergency planning purposes and for data management by the department.

(3) Department - The Texas Department of Health.

(4) [~~(2)~~] Director - The commissioner of the department.

(5) Current Tier Two threshold - A quantity which is assigned to a specific hazardous chemical or extremely hazardous substance in the most recent version of Title 40 CFR, Part 370, and which determines whether a specific hazardous chemical or extremely hazardous substance must be included on the Tier Two form.

(6) [~~(3)~~] EPCRA or SARA, Title III - The federal Emergency Planning and Community Right-To-Know Act, also known as the Superfund Amendments and Reauthorization Act of 1986, Title III, 42 USC, Chapter 116 [~~Public Law Number 99-499~~] et seq., and regulations promulgated by the EPA in Title 40 CFR, Parts 355- 370.

(7) [~~(4)~~] EHS or extremely hazardous substance - Any substance as defined in EPCRA, §302, or listed by the EPA in Title 40 CFR [~~Code of Federal Regulations~~], Part 355, Appendices A and B.

[~~(5) Hazardous chemical category - A group or class of hazardous chemicals with similar uses or production methods in a specified industrial process or processes which are specifically approved by the EPA to be reportable as a hazardous chemical.~~]

(8) Facility - All buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person or by any person who controls, is controlled by, or is under common control with that person, and that is in Standard Industrial Classification (SIC) 20-39.

(9) Facility operator - The person who controls the day-to-day operations of the facility.

(10) Fire chief - The elected or paid administrative head of the fire department having jurisdiction over a facility.

(11) LEPC- The Local Emergency Planning Committee, a group of individuals representing a designated emergency planning district and whose membership on the committee has been approved

by the Texas State Emergency Response Commission as meeting the requirements of EPCRA, §301.

(12) Research laboratory - A laboratory that engages in only research or quality control operations. Chemical specialty product manufacturing laboratories, full scale pilot plant operation laboratories that produces products for sale, and service laboratories are not research laboratories.

(13) Standard Industrial Classification (SIC) Code - The four digit number which describes a facility's primary activity, which is determined by its principal product or group of products produced. For the purposes of the Act, the SIC Code is the one that is assigned to a facility by the Texas Workforce Commission. If a facility does not have an SIC Code assigned by the Texas Workforce Commission, then the department must be consulted for assistance in determining the correct code.

(14) Submission or required submission - The facility chemical list information which is submitted to the department for a single facility to comply with subsection (d) of this section. When facility chemical list information for multiple facilities is submitted to the department on one Tier Two form for purposes of paperwork reduction, as allowed by subsection (d)(15) of this section, then the Tier Two form shall be counted by the department as multiple required submissions under subsections (h)(2) and (3) of this section.

(15) Technically qualified individual - An individual with a professional education and background working in the research or medical fields, such as a physician, a registered nurse, or an individual holding a college bachelor's degree in science.

(16) Texas Tier Two Cover Sheet form - A form developed by the department to collect general information about each reporting facility which is submitting a facility chemical list.

(17) Tier Two form - A document that provides information for all reportable hazardous chemicals and EHSs present at a reporting facility. An "annual Tier Two form" provides the information for all hazardous chemicals and EHSs present at a facility at any time during the previous calendar year in quantities that met or exceeded the current Tier Two thresholds. An "initial Tier Two form" is one that provides information for hazardous chemicals or EHSs that meet or exceed the current Tier Two thresholds, but which were not reported on a previously submitted annual Tier Two form. An "updated Tier Two form" is one that provides significant new information concerning an aspect of one or more hazardous chemicals or EHSs which were previously reported on either the annual or first time Tier Two forms submitted by a facility. A "modified Tier Two form" provides information for all hazardous chemicals and EHSs that are present at a facility at a threshold of 500 pounds; this type of report may be prepared in response to a request from a citizen for information, in lieu of the workplace chemical list. The Tier Two form is a set of completed reporting forms for submitting the information required for the facility chemical list, which consists of one of the following sets of forms:

(A) the most current version of the Texas Tier Two Cover Sheet form and one or more copies of the most current version of the Texas Tier Two Chemical Description Sheet form; or

(B) the most current version of the Texas Tier Two Cover Sheet form and one or more copies of the most current version of the federal Tier Two Emergency and Hazardous Chemical Inventory form.

(18) [~~(6)~~] Workplace chemical list - A list of hazardous chemicals developed under Title 29 CFR [~~Code of Federal Regulations~~], §1910.1200(e)(1)(i) [~~§1910.1200(e)(i)~~].

(c) Responsibility for implementation of program. The director's responsibilities under the Act are carried out through the Texas Department of Health, Toxic Substances Control Division [~~of Occupational Health~~], Hazard Communication Branch. Compliance documents and routine inquiries regarding this Act shall be addressed, until further notice by the director, to: Texas Department of Health, Toxic Substances Control Division [~~of Occupational Health~~], Hazard Communication Branch, 1100 West 49th Street, Austin, Texas 78756.

(d) Facility chemical list.

(1) A facility operator covered by this section shall compile and maintain a facility chemical list in the format of a Texas Tier Two form [~~using the most current version of the Texas Tier Two Cover Sheet and Texas Tier Two Chemical Description Sheet, or a federal Tier Two Emergency and Hazardous Chemical Inventory Form accompanied by a Texas Tier Two Cover Sheet. The Tier Two form must be typed or may be mechanically reproduced (subject to approval of the department) for all hazardous chemicals, hazardous chemical categories, and extremely hazardous substances present at the facility in quantities that meet or exceed current thresholds as determined by the EPA in Title 40, Code of Federal Regulations, Part 370~~].

(2) The completed Tier Two forms shall be typed or mechanically reproduced, subject to approval of the department. The Texas Tier Two Cover Sheet submitted as a part of the Tier Two form to the department shall bear an original signature of an authorized representative of the facility operator and the date on which the form was signed.

(3) [~~(2)~~] The initial [~~A Texas~~] Tier Two [~~Cover Sheet and either a Texas Tier Two Chemical Description Sheet or a federal Tier Two Emergency and Hazardous Chemical Inventory~~] form shall be used to comply with the reporting requirements of the Act, §505.006(e) and EPCRA, §11021(d)(1) [~~§311 and §312~~]. The updated Tier Two form shall be used to comply with the reporting requirements of the Act, §505.006(d) and EPCRA, §11021(d)(2). The annual Tier Two form shall be used to comply with the reporting requirements of the Act, §505.006(c) and EPCRA, §11022.

(4) [~~(3)~~] Facility operators shall file an annual Tier Two form, accompanied by the appropriate filing fee as provided under subsections (h)(2) and (3) of this section [~~the Act, §505.016(b),~~] with the department [~~Hazard Communication Branch~~] no later than March 1 of each year [~~, covering the previous calendar year. A facility operator beginning operation shall file a Tier Two form and the appropriate fee no later than the 90th day after the date on which the operator begins operation. The facility operator shall furnish a copy of each Tier Two form to the fire chief of the fire department having jurisdiction over the facility and to the appropriate local emergency planning committee~~].

(5) A facility operator required to submit an annual Tier Two form under paragraph (4) of this subsection shall furnish a copy of this form no later than March 1 of each year to the following entities:

(A) the appropriate fire chief; and

(B) the appropriate LEPC.

(6) A facility operator shall submit an initial Tier Two form and the appropriate filing fee as provided under subsection (h)(2)

and (3) of this section with the department within 90 days after the date that the facility operator:

(A) begins operation and acquires one or more hazardous chemicals or EHSs which meet or exceed any of the current Tier Two thresholds; or

(B) first acquires one or more hazardous chemicals or EHSs which meet or exceed any of the current Tier Two thresholds and which were not reported on the most recently submitted annual Tier Two form; or

(C) determines that one or more hazardous chemicals or EHSs which meet or exceed any of the current Tier Two thresholds were omitted from the most recently submitted annual Tier Two form.

(7) A facility operator required to submit an initial Tier Two form under paragraph (6) of this subsection shall furnish a copy of this form within 90 days after the date that the facility operator first becomes subject to the requirements of paragraph (6) of this subsection to the following entities:

(A) the appropriate fire chief; and

(B) the appropriate LEPC.

(8) [~~(4)~~] A facility operator shall file an updated Tier Two form with the department not later than the 90th day after the date on which the operator discovers significant new information concerning an aspect of [~~has a reportable addition of~~] a previously reported [~~unreported~~] hazardous chemical or EHS which was reported on either an annual or initial Tier Two form submitted by the facility. No fee will be charged for filing this report. [~~The facility operator shall furnish a copy of each updated Tier Two form to the fire chief and to the appropriate local emergency planning committee.~~]

(9) A facility operator required to submit an updated Tier Two form under paragraph (8) of this subsection shall furnish a copy of this form within 90 days after the date that the facility operator first becomes subject to the requirements of paragraph (8) of this subsection to the following entities:

(A) the appropriate fire chief; and

(B) the appropriate LEPC.

(10) For purposes of electronic reporting, a facility operator covered by this section may submit to the department an electronic file of the facility chemical list using software which has been approved by EPA or the department. A Texas Tier Two Cover Sheet, which has been signed and dated by the authorized representative of the facility operator, shall be submitted to the department with the electronic file of the facility chemical list. A copy of the completed versions of the electronic file of the facility chemical list and the Texas Tier Two Cover Sheet and the appropriate filing fee as provided under subsections (h)(2) and (3) of this section shall meet the requirements of this subsection and may be submitted to the department to comply with this subsection.

(11) A facility operator must contact the fire chief for approval to submit an electronic file of the facility chemical list in lieu of the paper copy of any required Tier Two form. If approved by the fire chief, a facility operator may submit an electronic file of the facility chemical list and shall be in compliance with paragraphs (5)(A), (7)(A), and (9)(A) of this subsection. A facility operator must contact the chair of the LEPC for approval to submit an electronic file of the facility chemical list in lieu of the paper copy of any required Tier Two form. If approved by the LEPC chair, a facility operator may submit an electronic file of the facility chemical list and shall be in compliance with paragraphs (5)(B), (7)(B), and (9)(B) of this subsection.

(12) [~~(5)~~] A facility operator required by paragraph (4) of this subsection to submit to the department an annual Tier Two form shall maintain at [~~in~~] the facility [~~workplace~~] a copy of the facility's current annual Tier Two form until such time as the facility operator files the following year's annual Tier Two form with the department.

(13) A facility operator required by paragraph (6) of this subsection to submit to the department one or more initial Tier Two forms shall maintain at the facility for one year copies of all initial Tier Two forms which have been filed with the department during the previous year.

(14) A facility operator required by paragraph (8) of this subsection to submit to the department one or more updated Tier Two forms shall maintain at the facility copies of all updated Tier Two forms which have been filed with the department during the previous year.

(15) [~~(6)~~] For the purpose of paperwork reduction, multiple facilities may be reported on the same Tier Two form, with appropriate facility identifiers, when all of the following conditions are met at all of the multiple facilities: [~~if the hazardous chemicals or hazardous chemical categories present at the multiple facilities are in the same ranges. In multiple facility reporting, the reporting thresholds must be applied to each facility rather than to the total quantities present at all facilities.~~]

(A) the same reportable hazardous chemicals are present at every facility in the paperwork reduced Tier Two report;

(B) for each specific hazardous chemical reported, the range value for the average daily amount is the same at each facility in the paperwork reduced Tier Two report;

(C) for each specific hazardous chemical reported, the range value for the maximum amount is the same at each facility in the paperwork reduced Tier Two report; and

(D) all of the facilities included in the paperwork reduced report are within the jurisdiction of a single LEPC.

(16) For purposes of paperwork reduction, a facility operator may substitute the Texas Tier Two Paperwork Reduction form for multiple Tier Two Cover Sheet forms when the facilities which are being included on the Paperwork Reduction form meet the requirements of paragraph (15) of this subsection.

(17) In providing appropriate facility identifiers, a facility operator shall provide under the Facility Identification sections of the Texas Tier Two form one of the following descriptions:

(A) for a facility located within a city's limits, the description must provide the following information:

(i) the street address;

(ii) the name of the city; and

(iii) the zip code for the facility.

(B) for a facility located in an area outside of a city's limits, the description must include both a map which shows, at a minimum, the facility site in relation to state and federal highways and major rivers and a written description which provides one of the following:

(i) when a street address has been assigned for purposes of emergency services, the street address and the name of the nearest city;

(ii) if the facility is located at the intersection of two roads, the names of the roads at the intersection and the name of the nearest city; or

(iii) if neither clause (i) or (ii) of this subparagraph apply to the facility, the approximate straight line distance and direction of the facility from the nearest city and the name of the nearest city.

(e) Direct citizen access to information.

(1) A facility must provide within 10 working days of the date of receipt of a citizen's request under the Act, §505.007(a), a copy of the facility's existing workplace chemical list or a modified [~~version of the most recent~~] Tier Two form using a 500-pound threshold for each hazardous chemical at the facility. Except as otherwise provided in this section, such documents shall be furnished or mailed to the citizen requesting the information. The modified [~~version of the most recent~~] Tier Two form must include completed chemical description blocks for each chemical reported.

(2) Any facility that has received requests equal to or in excess of those designated under the Act, §505.007(c), may elect to furnish the material to the department so the department may respond to further requests for information about hazardous chemicals at the facility.

(3) Any facility electing to furnish materials to the department must notify the department in writing, and must provide to the department copies of the previous requests which meet the request frequency rate as specified in the Act, §505.007(c). The facility must inform persons making requests of the availability of the information from the department, within the time frames established within the Act, §505.007(d).

(f) Complaints and investigations.

(1) The director or his designated representative shall investigate in a timely manner a complaint relating to an alleged violation of the Act. Such complaints do not have to be submitted to the department in writing and may be anonymous. An inspection based on a complaint is not limited to the specific allegations of the complaint. A facility operator who refuses to allow such an investigation shall be in violation of the Act.

(2) Complaints are not necessary to conduct an inspection under this section. The director or his designated representatives may enter a facility at reasonable times to conduct random compliance inspections. A facility operator [~~An employer~~] who refuses to allow such an inspection shall be in violation of the Act.

(3) The department may find multiple violations by a facility operator based on specific requirements of the Act.

(4) Upon request from a representative of the director, a facility operator shall make or allow photocopies of documents to be made and permit the representative to take photographs to verify the compliance status of the employer. Such requests may be made during a compliance inspection or in a written Notice of Violation issued by the department.

(g) Administrative penalties.

(1) Inspections may be conducted by the director or his designated representative to determine if persons are in violation of the Act or the rules adopted by the Board of Health to enforce the Act. Persons found to be in violation will be notified in writing of any alleged violations [~~the violation~~].

(2) Facility operators [~~Employers~~] found to be in violation of the Act are subject to administrative penalties, as authorized by the Act and to be administered in accordance with the procedures detailed in the Act, §§505.010, 505.011, and 505.012 [~~§§505.010-505.012~~]. Each violation may [~~will~~] be assessed as a separate penalty. The total penalty for a violation is [~~will be~~] the sum of all per day [~~individual~~] violation penalties. The per day violation penalties shall be based on the penalty matrix provided in paragraph (6) of this subsection.

(3) Penalties shall be due after an order is issued by the director. With the exception of a case where the written notice from the department documents that a violation involves failure to make a good faith effort to comply with the Act, an order may be issued on or after the 16th business day following the date that a written notification of violations is received by the facility operator, unless the department receives an acceptable written response which documents that each violation has been corrected, an informal conference has been requested, or that a formal hearing has been requested. If an informal conference is held, the facility operator must respond within 10 business days after the facility operator receives a summary letter following the informal conference. In a case where the written notice from the department documents that a violation involves failure to make a good faith effort to comply with the Act, an order may be issued at any time.

(4) The written response to the department's summary letter from the facility operator must address each violation separately and must provide the documentation requested by the department or an acceptable alternative agreed to by the department. An inappropriate or unacceptable response may result in a penalty being assessed for the underlying violations.

(5) [~~(3)~~] Violations will be classified in one of three severity levels:

(A) a minor violation is related to a minor records keeping deficiency [~~, which poses a minimal threat to the health and safety of the public~~];

(B) a serious violation is related to failure to pay filing fees for required submissions, minor omissions of information from Tier Two forms, or substantial records keeping deficiencies [~~, which is a threat to the health and safety of the public~~]; or

(C) a critical violation is related to substantial omissions of information from Tier Two forms, failure to submit required information, or denial of entry. [~~, which has caused or is likely to cause harm to the health and safety of the public~~].

(6) [~~(4)~~] Penalty amounts [~~Penalties~~] will be assessed [~~charged~~] based on the following schedule:
Figure: 25 TAC §295.181(g)(6)[~~(5)~~]

(7) [~~(5)~~] A penalty may [~~shall~~] be assessed for each day a violation continues, with a total penalty not to exceed $5,000 per violation. The cap of $5,000 is per specific violation and not per day.

(8) [~~(6)~~] Individual violations may be reduced or enhanced based on consideration of the history of previous violations, the degree of hazard to the health and safety of the public, good-faith efforts made to correct violations promptly, and on any other consideration that justice may require. Subject to the statutory limits of $500 per day for every day a violation continues and $5,000 total per violation, a maximum enhancement or reduction of 50% per individual violation may be considered, based on the facts presented to the department.

~~[(7) Follow-up inspections may be made to confirm the status of abatement of violations. Any violation found on such follow-~~

up inspections will be subject to an additional administrative penalty. If the first 15-day notice period has expired, that penalty will be due and a second or subsequent notice will be provided for determining second or subsequent penalty due dates.]

(9) [(8)] Failure to file a [an annual] Tier Two form [and necessary updates] with the department will be considered a violation of the Act which may not require an inspection. Other violations may be confirmed by the department through correspondence with authorized company officials and may not warrant an inspection.

(10) [(9)] At its option, the department may accept appropriate documentation provided by the facility as evidence of compliance status.

(11) [(10)] Examples of violations for the various severity levels include, but are not limited to:

(A) minor violation [- Level 1]:

(i) failure to sign or date Tier Two forms filed with the department [include up to 10% of reportable quantity hazardous chemicals on the annual facility chemical list (Tier Two form) submitted to the department, the fire chief of the fire department having jurisdiction over the facility, or the local emergency planning committee];

(ii) failure to maintain a copy of an updated Tier Two form [the annual facility chemical list] at the facility; or [and]

(iii) failure to provide adequate [complete the] chemical description information required for each hazardous chemical on the Tier Two form [facility chemical list];

(B) serious violation [- Level 2]:

(i) failure to include significant information regarding [up to 30% of] reportable quantity hazardous chemicals on any Tier Two form [the annual facility chemical list] submitted to the department, the fire chief [of the fire department having jurisdiction over the facility], or the LEPC [local emergency planning committee];

(ii) failure to file an initial Tier Two form [update facility chemical list information] with the department, the fire chief [of the fire department having jurisdiction over the facility], or the LEPC [local emergency planning committee], within 90 days after the date on which the operator begins operation or the facility exceeds the reporting threshold for a previously unreported hazardous chemical;

(iii) failure to submit the appropriate Tier Two form [annual facility chemical list] filing fee to the department;

(iv) failure to provide significant information required for the Texas Tier Two Cover Sheet [one or more material safety data sheets, on request, to the department, the fire chief of the fire department having jurisdiction over the facility, or the local emergency planning committee]; or

(v) failure to provide a map when required for submission of a Tier Two form. [to the fire chief or the local emergency planning committee additional information on types and amounts of any hazardous chemicals, when requested for emergency planning purposes; and]

[(vi) failure to provide a copy of the facility's existing workplace chemical list, or a modified version of the most recent Tier Two form using a 500-pound threshold, to a citizen making such a request; and]

(C) critical violation [- Level 3]:

(i) failure to include significant information related to [greater than 30% of reportable quantity] hazardous chemicals on a Tier Two form [the annual facility chemical list] submitted to the department, the fire chief [of the fire department having jurisdiction over the facility], or the LEPC [local emergency planning committee];

(ii) failure to submit a required Tier Two form [the annual facility chemical list] to the department, the fire chief [of the fire department having jurisdiction over the facility], or the LEPC [local emergency planning committee];

(iii) denial of access [failure] to [allow] a representative of the department to conduct a compliance inspection of a facility; [and]

(iv) denial of access [failure] to [allow] the fire chief or the fire chief's representative to conduct an on-site inspection of a facility; [.]

(v) upon request from a fire chief or LEPC, failure to provide such additional information as is needed for planning purposes; or

(vi) upon request from a citizen, failure to provide within the time limits specified in subsection (e)(1) of this section a copy of the facility's existing workplace chemical list or a modified Tier Two form using a 500-pound threshold for all hazardous chemicals at the facility.

(h) Fees.

(1) The department shall charge a fee for each required submission [Tier Two form] submitted under subsections [subsection] (d)(4) and (6) [(d)(3)] of this section (relating to the annual and initial Tier Two forms [facility chemical list]). The fee must accompany the Tier Two form when submitted to the department.

(2) Annual fees for the annual and initial Tier Two forms are based on the number of hazardous chemicals present at a facility and shall be:

(A) $100 for each required submission having no more than 25 hazardous chemicals [or hazardous chemical categories];

(B) $200 for each required submission having no more than 50 hazardous chemicals [or hazardous chemical categories];

(C) $300 for each required submission having no more than 75 hazardous chemicals [or hazardous chemical categories];

(D) $400 for each required submission having no more than 100 hazardous chemicals [or hazardous chemical categories]; or [and]

(E) $500 for each required submission having more than 100 hazardous chemicals [or hazardous chemical categories].

(3) For the purpose of minimizing fees, the department shall provide for consolidated filing of multiple Tier Two forms for facility operators if:

(A) each of the Tier Two forms contain fewer than 25 chemicals;

(B) Tier Two forms are filed under the same [owner or] operator name and address; [and]

(C) all consolidated Tier Two forms are mailed to the department in the same package; [.] and

(D) no more than two required submissions are consolidated under one filing fee.

(4) Fees paid by mail must be paid by check or money order (cash payments are not acceptable) to the Texas Department of Health and must be addressed to: Texas Department of Health, Toxic Substances Control Division [~~of Occupational Health~~], Hazard Communication Branch, 1100 West 49th Street, Austin, Texas 78756.

(5) No receipt will be provided for payment of fees which are mailed, but a canceled [~~cancelled~~] check may be considered adequate proof of payment.

(6) The department may refund a fee overpayment to a facility operator [~~an employer~~] provided that:

(A) the facility operator [~~employer~~] provides, in writing, proof of payment, the date(s) on which the required submissions [~~workplace chemical list~~] and fees were sent to or received by the department, the circumstances that caused the overpayment, and the reasons why it would have been considered an overpayment under the Act and rules in force at the time of the original filing;

(B) the facility operator [~~employer~~] requests the refund in writing within six months of the date on which the required submissions [~~workplace chemical list~~] and fee were received by the department; and

(C) the facility operator [~~employer~~] agrees that [~~provides to~~] the department can retain [~~, in the form of a refund reduction,~~] a handling fee of $10 per refund.

§295.182. Public Employer Community Right-To-Know.

(a) Purpose and scope.

(1) The purpose of these rules is to provide [~~the~~] public employers with specific criteria needed to comply with the Public Employer Community Right-to- Know Act, Health and Safety Code, Chapter 506. [~~access to information on hazardous chemicals in their communities, to enhance community awareness of chemical hazards, and facilitate community planning and response to chemical emergencies~~].

(2) In order to avoid confusion among public employers and persons living in this state, the Texas Department of Health (department) shall implement the Public Employer Community Right-To-Know Act compatibly with the federal Emergency Planning and Community Right-To-Know Act (EPCRA), which is also known as the Superfund Amendments and Reauthorization Act of 1986 (SARA), (42 USC §11001 et seq.), and related regulations (Title 40 Code of Federal Regulations (CFR), Parts 355-370), promulgated by [~~of~~] the United States Environmental Protection Agency (EPA).

(3) (No change.)

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings unless the context clearly indicates otherwise. [~~In addition to the terms which are defined by the Public Employer Community Right-To-Know Act, the following words, acronyms, and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.~~]

(1) Act - The Public Employer Community Right-To-Know Act, Health and Safety Code, Chapter 506.

(2) Appropriate facility identifiers - A physical location identification which provides a physical street address or other location identifiers, as specified in subsection (d)(17) of this section, which are sufficient for emergency planning purposes and for data management by the department.

(3) Department - The Texas Department of Health.

(4) [~~(2)~~] Director - The commissioner of the department.

(5) Current Tier Two threshold - A quantity which is assigned to a specific hazardous chemical or extremely hazardous substance in the most recent version of Title 40 CFR, Part 370, and which determines whether a specific hazardous chemical or extremely hazardous substance must be included on the Tier Two form.

(6) [~~(3)~~] EPCRA or SARA, Title III - The federal Emergency Planning and Community Right-To-Know Act, also known as the Superfund Amendments and Reauthorization Act of 1986, Title III, 42 USC, Chapter 116 [~~Public Law Number 99-499~~] et seq., and regulations promulgated by the EPA in Title 40 CFR, Parts 355- 370.

(7) [~~(4)~~] EHS or extremely hazardous substance - Any substance as defined in EPCRA, §302, or listed by the EPA in Title 40 CFR. [~~Code of Federal Regulations~~], Part 355, Appendices A and B.

(8) Facility - All buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person or by any person who controls, is controlled by, or is under common control with that person, and that is operated by the state or a political subdivision of the state.

(9) Facility operator - The person who controls the day-to-day operations of the facility.

(10) Fire chief - The elected or paid administrative head of the fire department having jurisdiction over a facility.

(11) LEPC - The Local Emergency Planning Committee, a group of individuals representing a designated emergency planning district and whose membership on the committee has been approved by the Texas State Emergency Response Commission as meeting the requirements of EPCRA, §301.

(12) Research laboratory - A laboratory that engages in only research or quality control operations. Chemical specialty product manufacturing laboratories, full scale pilot plant operation laboratories that produces products for sale, and service laboratories are not research laboratories.

(13) Standard Industrial Classification (SIC) Code - The four digit number which describes a facility's primary activity, which is determined by its principal service or function. For the purposes of the Act, the SIC Code is the one that is assigned to a facility by the Texas Workforce Commission. If a facility does not have an SIC Code assigned by the Texas Workforce Commission, then the department must be consulted for assistance in determining the correct code.

(14) Submission or required submission - The facility chemical list information which is submitted to the department for a single facility to comply with subsection (d) of this section. When facility chemical list information for multiple facilities is submitted to the department on one Tier Two form for purposes of paperwork reduction, as allowed by subsection (d)(15) of this section, then the Tier Two form shall be counted by the department as multiple required submissions under subsections (h)(2) and (3) of this section.

(15) Technically qualified individual - An individual with a professional education and background working in the research or

medical fields, such as a physician, a registered nurse, or an individual holding a college bachelor's degree in science.

(16) Texas Tier Two Cover Sheet form - A form developed by the department to collect general information about each reporting facility which is submitting a facility chemical list.

(17) Tier Two form - A document that provides information for all reportable hazardous chemicals and EHSs present at a reporting facility. An "annual Tier Two form" provides the information for all hazardous chemicals and EHSs present at a facility at any time during the previous calendar year in quantities that met or exceeded the current Tier Two thresholds. An "initial Tier Two form" is one that provides information for a facility which has hazardous chemicals or EHSs that meet or exceed the current Tier Two thresholds, but which were not reported on a previously submitted annual Tier Two form. An "updated Tier Two form" is one that provides significant new information concerning an aspect of one or more hazardous chemicals or EHSs which were previously reported on either the annual or first time Tier Two forms submitted by a facility. A "modified Tier Two form" provides information for all hazardous chemicals and EHSs that are present at a facility at a threshold of 500 pounds; this type of report may be prepared in response to a request from a citizen for information, in lieu of the workplace chemical list. The Tier Two form is a set of completed reporting forms for submitting the information required for the facility chemical list, which consists of one of the following sets of forms:

(A) more copies of the most current version of the Texas Tier Two Chemical Description Sheet form; or

(B) the most current version of the Texas Tier Two Cover Sheet form and one or more copies of the most current version of the federal Tier Two Emergency and Hazardous Chemical Inventory form.

(18) [~~(5)~~] Workplace chemical list - A list of hazardous chemicals developed under the Texas Hazard Communication Act, §502.005(a).

(c) Responsibility for implementation of program. The director's responsibilities under the Act are carried out through the Texas Department of Health, Toxic Substances Control Division [~~of Occupational Health~~], Hazard Communication Branch. Compliance documents and routine inquiries regarding this Act shall be addressed, until further notice by the director, to: Texas Department of Health, Toxic Substances Control Division [~~of Occupational Health~~], Hazard Communication Branch, 1100 West 49th Street, Austin, Texas 78756.

(d) Facility chemical list.

(1) A facility operator covered by this section shall compile and maintain a facility chemical list in the format of a Texas Tier Two form [~~using the most current version of the Texas Tier Two form published by the department. The Texas Tier Two form must be typed or may be mechanically reproduced (subject to approval of the department) for all hazardous chemicals present at the facility in quantities that meet or exceed current thresholds as determined by the EPA in Title 40, Code of Federal Regulations, Part 370~~].

(2) The completed Tier Two forms shall be typed or mechanically reproduced, subject to approval of the department. The Texas Tier Two Cover Sheet submitted as a part of the Tier Two form to the department shall bear an original signature of an authorized representative of the facility operator and the date on which the form was signed.

(3) The initial and updated Tier Two forms shall be used to comply with the reporting requirements of the Act, §506.006(d). The annual Tier Two form shall be used to comply with the reporting requirements of the Act, §506.006(c).

(4) [~~(2)~~] Facility operators shall file an annual [~~Texas~~] Tier Two form if reporting thresholds are exceeded, accompanied by the appropriate filing fee as provided under [~~by~~] subsection (h)(2) and (3) of this section [~~the Act, §506.017(b),~~] with the department [~~Hazard Communication Branch~~] no later than March 1 of each year [~~covering the previous calendar year. A facility operator beginning operation shall file a Texas Tier Two form and the appropriate fee no later than the 90th day after the date on which the operator begins operation. The facility operator shall furnish a copy of each Texas Tier Two form to the fire chief of the fire department having jurisdiction over the facility and to the appropriate local emergency planning committee~~].

(5) A facility operator required to submit an annual Tier Two form under paragraph (4) of this subsection shall furnish a copy of this form no later than March 1st of each year to the following entities:

(A) the appropriate fire chief; and

(B) the appropriate LEPC.

(6) A facility operator shall submit an initial Tier Two form with the department within 90 days after the date that the facility operator:

(A) begins operation and acquires one or more hazardous chemicals or EHSs which meet or exceed any of the current Tier Two thresholds; or

(B) first acquires one or more hazardous chemicals or EHSs which meet or exceed any of the current Tier Two thresholds and which were not reported on the most recently submitted annual Tier Two form; or

(C) determines that one or more hazardous chemicals or EHSs which meet or exceed any of the current Tier Two thresholds were omitted from the most recently submitted annual Tier Two form.

(7) A facility operator required to submit an initial Tier Two form under paragraph (6) of this subsection shall furnish a copy of this form within 90 days after the date that the facility operator first becomes subject to the requirements of paragraph (6) of this subsection to the following entities:

(A) the appropriate fire chief; and

(B) the appropriate LEPC.

(8) [~~(3)~~] A facility operator shall file an updated [~~Texas~~] Tier Two form with the department not later than the 90th day after the date on which the operator discovers significant new information concerning an aspect of [~~has a reportable addition of~~] a previously reported [~~unreported~~] hazardous chemical or EHS which was reported on either an annual or initial Tier Two form submitted by the facility. No fee will be charged for filing this report. [~~The facility operator shall furnish a copy of each updated Texas Tier Two form to the fire chief and to the appropriate local emergency planning committee.~~]

(9) A facility operator required to submit an updated Tier Two form under paragraph (8) of this subsection shall furnish a copy of this form within 90 days after the date that the facility operator first becomes subject to the requirements of paragraph (8) of this subsection to the following entities:

(A) the appropriate fire chief; and

(B) the appropriate LEPC.

(10) For purposes of electronic reporting, a facility operator covered by this section may submit to the department an electronic file of the facility chemical list using software which has been approved by EPA or the department. A Texas Tier Two Cover Sheet, which has been signed and dated by the authorized representative of the facility operator, shall be submitted to the department with the electronic file of the facility chemical list. A copy of the completed versions of the electronic file of the facility chemical list and the Texas Tier Two Cover Sheet and the appropriate filing fee as provided under subsections (h)(2) and (3) of this section shall meet the requirements of this subsection and may be submitted to the department to comply with this subsection.

(11) A facility operator must contact the fire chief for approval to submit an electronic file of the facility chemical list in lieu of the paper copy of any required Tier Two form. If approved by the fire chief, a facility operator may submit an electronic file of the facility chemical list and shall be in compliance with paragraphs (5)(A), (7)(A), and (9)(A) of this subsection. A facility operator must contact the chair of the LEPC for approval to submit an electronic file of the facility chemical list in lieu of the paper copy of any required Tier Two form. If approved by the LEPC chair, a facility operator may submit an electronic file of the facility chemical list and shall be in compliance with paragraphs (5)(B), (7)(B), and (9)(B) of this subsection.

(12) [~~(4)~~] A facility operator required by paragraph (4) of this subsection to submit to the department an annual Tier Two form shall maintain at [~~in~~] the facility [~~workplace~~] a copy of the facility's current annual [~~Texas~~] Tier Two form until such time as the facility operator files the following year's annual [~~Texas~~] Tier Two form with the department.

(13) A facility operator required by paragraph (6) of this subsection to submit to the department one or more initial Tier Two forms shall maintain at the facility for one year copies of all initial Tier Two forms which have been filed with the department during the previous year.

(14) A facility operator required by paragraph (8) of this subsection to submit to the department one or more updated Tier Two forms shall maintain at the facility copies of all updated Tier Two forms which have been filed with the department during the previous year.

(15) [~~(5)~~] For the purpose of paperwork reduction, [~~companies reporting~~] multiple facilities [~~having the same hazardous chemicals in the same reporting ranges~~] may be reported [~~report those multiple facilities~~] on the same Texas Tier Two form[~~.~~] , with appropriate facility identifiers, when all of the following conditions are met at all of the multiple facilities: [~~Instructions for the department's policy on paperwork reduction shall be available from the Hazard Communication Branch upon request.~~]

(A) the same reportable hazardous chemicals are present at every facility in the paperwork reduced Tier Two report;

(B) for each specific hazardous chemical reported, the range value for the average daily amount is the same at each facility in the paperwork reduced Tier Two report;

(C) for each specific hazardous chemical reported, the range value for the maximum amount is the same at each facility in the paperwork reduced Tier Two report; and

(D) all of the facilities included in the paperwork reduced report are within the jurisdiction of a single LEPC.

(16) For purposes of paperwork reduction, a facility operator may substitute the Texas Tier Two Paperwork Reduction form for multiple Tier Two Cover Sheet forms when the facilities which are being included on the Paperwork Reduction form meet the requirements of paragraph (15) of this subsection.

(17) In providing appropriate facility identifiers, a facility operator shall provide under the Facility Identification sections of the Texas Tier Two form one of the following descriptions:

(A) for a facility located within a city's limits, the description must provide the following information:

(i) the street address;

(ii) the name of the city; and

(iii) the zip code for the facility.

(B) for a facility located in an area outside of a city's limits, the description must include both a map which shows at a minimum the facility site in relation to state and federal highways and major rivers and a written description which provides one of the following:

(i) when a street address has been assigned for purposes of emergency services, the street address and the name of the nearest city;

(ii) if the facility is located at the intersection of two roads, the names of the roads at the intersection and the name of the nearest city; or

(iii) if neither clause (i) or (ii) of this subparagraph apply to the facility, the approximate straight line distance and direction of the facility from the nearest city and the name of the nearest city.

(e) Direct citizen access to information.

(1) A facility must provide within 10 working days of the date of receipt of a citizen's request under the Act, §506.007(a), a copy of the facility's existing workplace chemical list or a modified [~~version of the most recent Texas~~] Tier Two form using a 500-pound threshold for each hazardous chemical at the facility. Except as otherwise provided in this section, such documents shall be furnished or mailed to the citizen requesting the information. The modified [~~version of the most recent~~] Tier Two form must include completed chemical description blocks for each chemical reported.

(2) Any facility that has received requests equal to or in excess of those designated under the Act, §506.007(c), may elect to furnish the material to the department so the department may respond to further requests for information about hazardous chemicals at the facility.

(3) Any facility electing to furnish materials to the department must notify the department in writing, and must provide to the department copies of the previous requests which meet the request frequency rate as specified in the Act, §506.007(c). The facility must inform persons making requests of the availability of the information from the department, within the time frames established within the Act, §506.007(d).

(f) Complaints and investigations.

(1) The director or his designated representative shall investigate in a timely manner a complaint relating to an alleged violation of the Act. Such complaints do not have to be submitted to the department in writing and may be anonymous. An inspection based on a complaint is not limited to the specific allegations of

the complaint. A facility operator who refuses to allow such an investigation shall be in violation of the Act.

(2) Complaints are not necessary to conduct an inspection under this section. The director or his designated representatives may enter a facility at reasonable times to conduct random compliance inspections. A facility operator [~~An employer~~] who refuses to allow such an inspection shall be in violation of the Act.

(3) The department may find multiple violations by a facility based on specific requirements of the Act.

(4) Upon request from a representative of the director, a facility operator shall make or allow photocopies of documents to be made and permit the representative to take photographs to verify the compliance status of the employer. Such requests may be made during a compliance inspection or in a written Notice of Violation issued by the department.

(g) Administrative penalties.

(1) Inspections may be conducted by the director or his designated representative to determine if persons are in violation of the Act or the rules adopted by the Board of Health to enforce the Act. Persons found to be in violation will be notified in writing of any alleged violations [~~the violation~~].

(2) Facility operators [~~Employers~~] found to be in violation of the Act are subject to administrative penalties [~~not to exceed $50 per violation~~] as authorized by the Act and to be administered in accordance with the procedures detailed in the Act, §§506.010, 506.011, and 506.012. Each violation may [~~will~~] be assessed as a separate penalty. The total penalty for a violation is [~~will be~~] the sum of all per day [~~individual~~] violation penalties.

(3) Penalties shall be due after an order is issued by the director. An order may be issued on or after the 16th business day following the date that a written notification of violations is received by the facility operator, unless the department receives an acceptable written response which documents that each violation has been corrected, an informal conference has been requested, or that a formal hearing has been requested. If an informal conference is held, the facility operator must respond within 10 business days after the facility operator receives a summary letter following the informal conference.

(4) The written response to the department's summary letter from the facility operator must address each violation separately and must provide the documentation requested by the department or an acceptable alternative agreed to by the department. An inappropriate or unacceptable response may result in a penalty being assessed for the underlying violations.

(5) [~~(3)~~] A penalty may [~~shall~~] be assessed for each day a violation continues, with a total penalty not to exceed $1,000 per violation. The cap of $1,000 is per specific violation and not per day.

(6) Individual violations may be reduced or enhanced based on consideration of the history of previous violations, the degree of hazard to the health and safety of the public, good-faith efforts made to correct violations promptly, and on any other consideration that justice may require. Subject to the statutory limits of $50 per day for every day a violation continues and $1000 total per violation, a maximum enhancement or reduction of 50% per individual violation may be considered, based on the facts presented to the department.

[~~(4) Follow-up inspections may be made to confirm the status of abatement of violations. Any violation found on such follow-up inspections will be subject to an additional administrative penalty. If the first 15-day notice period has expired, that penalty will be due and a second or subsequent notice will be provided for determining second or subsequent penalty due dates.~~]

(7) [~~(5)~~] Failure to file a [~~an annual Texas~~] Tier Two form [~~and necessary updates~~] with the department will be considered a violation of the Act which may not require an inspection. Other violations may be confirmed by the department through correspondence with authorized company officials and may not warrant an inspection.

(8) [~~(6)~~] At its option, the department may accept appropriate documentation provided by the facility as evidence of compliance status.

(h) Fees.

(1) The department shall charge a fee for each required submission [~~Texas Tier Two form~~] submitted under subsection (d)(4) [~~(d)(3)~~] of this section (relating to the annual Tier Two forms [~~facility chemical list~~]). The fee must accompany the [~~Texas~~] Tier Two form when submitted to the department.

(2) Annual fees for the annual Tier Two forms are based on the number of hazardous chemicals present at a facility and shall be:

(A) $50 for each required submission having no more than 75 hazardous chemicals; or

(B) $100 for each required submission having more than 75 hazardous chemicals.

(3) For the purpose of minimizing fees, the department shall provide for consolidated filing of multiple [~~Texas~~] Tier Two forms for facility operators if:

(A) each of the [~~Texas~~] Tier Two forms contain fewer than 25 chemicals;

(B) [~~Texas~~] Tier Two forms are filed under the same [~~owner or~~] operator name and address; [~~and~~]

(C) all consolidated [~~Texas~~] Tier Two forms are mailed to the department in the same package; [~~.~~] and

(D) no more than four required submissions are consolidated under one filing fee.

(4) Fees paid by mail must be paid by check or money order (cash payments are not acceptable) to the Texas Department of Health and must be addressed to: Texas Department of Health, Toxic Substances Control Division [~~of Occupational Health~~], Hazard Communication Branch, 1100 West 49th Street, Austin, Texas 78756.

(5) No receipt will be provided for payment of the fee provided by mail, but a canceled [~~cancelled~~] check may be considered adequate proof of payment.

(6) The department may refund a fee overpayment to a facility operator [~~an employer~~] provided that:

(A) the facility operator [~~employer~~] provides, in writing, proof of payment, the date(s) on which the required submissions [~~workplace chemical list~~] and fees were sent to or received by the department, the circumstances that caused the overpayment, and the reasons why it would have been considered an overpayment under the Act and rules in force at the time of the original filing;

(B) the facility operator [~~employer~~] requests the refund in writing within six months of the date on which the required

submissions [~~workplace chemical list~~] and fee were received by the department; and

(C) the facility operator [~~employer~~] agrees that [~~provides to~~] the department can retain [~~, in the form of a refund reduction,~~] a handling fee of $10 per refund.

§295.183. Nonmanufacturing Facilities Community Right-To-Know.

(a) Purpose and scope.

(1) The purpose of these rules is to provide facility operators [~~the public~~] with specific criteria needed to comply with the Nonmanufacturing Facilities Community Right-to-Know Act, Health and Safety Code, Chapter 507. [~~access to information on hazardous chemicals in their communities, to enhance community awareness of chemical hazards and facilitate community planning and response to chemical emergencies~~].

(2) In order to avoid confusion among nonmanufacturing facilities and persons living in this state, the board shall implement the Nonmanufacturing Facilities Community Right- To-Know Act compatibly with the federal Emergency Planning and Community Right-To-Know Act (EPCRA), which is also known as the Superfund Amendments and Reauthorization Act of 1986 (SARA), Title III (42 USC §11001 et seq.), and related regulations (Title 40 Code of Federal Regulations (CFR), Parts 355-370), promulgated by [~~of~~] the United States Environmental Protection Agency (EPA).

(3) (No change.)

(b) Definitions. [~~In addition to the terms which are defined by the Nonmanufacturing Facilities Community Right-To-Know Act, the following words, acronyms, and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.~~] The following words and terms, when used in this section, shall have the following meanings unless the context clearly indicates otherwise.

(1) Act - The Nonmanufacturing Facilities Community Right-To-Know Act, Health and Safety Code, Chapter 507.

(2) Appropriate facility identifiers - A physical location identification which provides a physical street address or other location identifiers, as specified in subsection (d)(17) of this section, which are sufficient for emergency planning purposes and for data management by the department.

(3) Department - The Texas Department of Health.

(4) [~~(2)~~] Director - The commissioner of the department.

(5) Current Tier Two threshold - A quantity which is assigned to a specific hazardous chemical or extremely hazardous substance in the most recent version of Title 40 CFR, Part 370, and which determines whether a specific hazardous chemical or extremely hazardous substance must be included on the Tier Two form.

(6) [~~(3)~~] EPCRA or SARA, Title III - The federal Emergency Planning and Community Right-To-Know Act, also known as the Superfund Amendments and Reauthorization Act of 1986, Title III, 42 USC, Chapter 116 [~~Public Law Number 99-499~~] et seq., and regulations promulgated by the EPA in Title 40 CFR, Parts 355- 370.

(7) [~~(4)~~] EHS or extremely hazardous substance - Any substance as defined in EPCRA, §302, or listed by the EPA in Title 40 CFR [~~Code of Federal Regulations~~], Part 355, Appendices A and B.

(8) Facility - All buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person or by any person who controls, is controlled by, or is under common control with that person. The term does not include a facility subject to Chapter 505 or 506.

(9) Facility operator - The person who controls the day-to-day operations of the facility.

(10) Fire chief - The elected or paid administrative head of the fire department having jurisdiction over a facility.

(11) [~~(5)~~] Hazardous chemical category - A group [~~Group~~] or class of hazardous chemicals with similar uses or production methods in a specified industrial process or processes which are specifically approved by the EPA to be reportable as a hazardous chemical. An example of such an EPA-approved industrial process is oil and gas exploration and production in Standard Industrial Classification Code 13 facilities.

(12) Headquarters facility - Either the facility itself when the facility is staffed more than 20 hours per week, or, for facilities which are staffed less than 20 hours per week, the headquarters facility shall be an office which is operated full time by the facility operator and which serves as the central office for staff who are responsible for overseeing the operations of the facility.

(13) LEPC - The Local Emergency Planning Committee, a group of individuals representing a designated emergency planning district and whose membership on the committee has been approved by the Texas State Emergency Response Commission as meeting the requirements of EPCRA, §301.

(14) Research laboratory - A laboratory that engages in only research or quality control operations. Chemical specialty product manufacturing laboratories, full scale pilot plant operation laboratories that produces products for sale, and service laboratories are not research laboratories.

(15) Standard Industrial Classification (SIC) Code - The four digit number which describes a facility's primary activity, which is determined by its principal product or group of products being distributed or sold at the wholesale or retail level or the principal service being provided. For the purposes of the Act, the SIC Code is the one that is assigned to a facility by the Texas Workforce Commission. If a facility does not have an SIC Code assigned by the Texas Workforce Commission, then the department must be consulted for assistance in determining the correct code.

(16) Submission or required submission - The facility chemical list information which is submitted to the department for a single facility to comply with subsection (d) of this section. When facility chemical list information for multiple facilities is submitted to the department on one Tier Two form for purposes of paperwork reduction, as allowed by subsection (d)(15) of this section, then the Tier Two form shall be counted by the department as multiple required submissions under subsections (g)(2) and (3) of this section.

(17) Technically qualified individual - An individual with a professional education and background working in the research or medical fields, such as a physician, a registered nurse, or an individual holding a college bachelor's degree in science.

(18) Texas Tier Two Cover Sheet form - A form developed by the department to collect general information about each reporting facility which is submitting a facility chemical list.

(19) Tier Two form - A document that provides information for all reportable hazardous chemicals and EHSs present at a reporting facility. An "annual Tier Two form" provides the information

for all hazardous chemicals and EHSs present at a facility at any time during the previous calendar year in quantities that met or exceeded the current Tier Two thresholds. An "initial Tier Two form" is one that provides information for a facility which has hazardous chemicals or EHSs that meet or exceed the current Tier Two thresholds, but which were not reported on a previously submitted annual Tier Two form. An "updated Tier Two form" is one that provides significant new information concerning an aspect of one or more hazardous chemicals or EHSs which were previously reported on either the annual or first time Tier Two forms submitted by a facility. The Tier Two form is a set of completed reporting forms for submitting the information required for the facility chemical list, which consists of one of the following sets of forms:

(A) the most current version of the Texas Tier Two Cover Sheet form and one or more copies of the most current version of the Texas Tier Two Chemical Description Sheet form; or

(B) the most current version of the Texas Tier Two Cover Sheet form and one or more copies of the most current version of the federal Tier Two Emergency and Hazardous Chemical Inventory form.

(c) Responsibility for implementation of program. The director's responsibilities under the Act are carried out through the Texas Department of Health, Toxic Substances Control Division [~~of Occupational Health~~], Hazard Communication Branch. Compliance documents and routine inquiries regarding this Act shall be addressed, until further notice by the director, to: Texas Department of Health, Toxic Substances Control Division [~~of Occupational Health~~], Hazard Communication Branch, 1100 West 49th Street, Austin, Texas 78756.

(d) Facility chemical list.

(1) A facility operator covered by this section shall compile and maintain a facility chemical list using the most current version of the Texas Tier Two form [~~Cover Sheet and Texas Tier Two Chemical Description Sheet or a federal Tier Two Emergency and Hazardous Chemical Inventory Form accompanied by a Texas Tier Two Cover Sheet~~]. For purposes of reporting hazardous chemicals at oil and gas exploration and production (SIC Code 13) facilities, the API Generic Tier Two Inventory Form may be substituted for the federal Tier Two Emergency and Hazardous Chemical Inventory Form. If the director of the EPA approves a different generic Tier Two Inventory form, developed by another industry or group of industries, the director of the department may authorize specified industries to substitute that form for the federal Tier Two Emergency and Hazardous Chemical Inventory Form. [~~The Tier Two form must be typed or may be mechanically reproduced (subject to approval of the department) for all hazardous chemicals, hazardous chemical categories, and extremely hazardous substances present at the facility in quantities that meet or exceed current thresholds as determined by the EPA in Title 40, Code of Federal Regulations, Part 370.~~]

(2) The completed Tier Two forms shall be typed or mechanically reproduced, subject to approval of the department. The Texas Tier Two Cover Sheet submitted as a part of the Tier Two form to the department shall bear an original signature of an authorized representative of the facility operator and the date on which the form was signed.

(3) [~~(2)~~] The initial [~~A Texas~~] Tier Two [~~Cover Sheet and either a Texas Tier Two Chemical Description Sheet or a federal Tier Two Emergency and Hazardous Chemical Inventory Form (or API generic Tier Two inventory form, as appropriate)~~] form shall be used to comply with the reporting requirements of the Act, §505.006(e) and EPCRA, §11021(d)(1) [~~§311 and §312~~]. The updated Tier Two form shall be used to comply with the reporting requirements of the Act, §505.006(d) and EPCRA, §11021(d)(2). The annual Tier Two form shall be used to comply with the reporting requirements of the Act, §505.006(c) and EPCRA, §11022.

(4) [~~(3)~~] Facility operators shall file an annual Tier Two form if the thresholds are exceeded, accompanied by the appropriate filing fee as provided under subsections (g)(2) and (3) of this section [~~by the Act, §507.013(b),~~] with the department [~~Hazard Communication Branch~~] no later than March 1 of each year [~~covering the previous calendar year. A facility operator beginning operation shall file a Tier Two form and the appropriate fee no later than the 90th day after the date on which the operator begins operation. The facility operator shall furnish a copy of each Tier Two form to the fire chief of the fire department having jurisdiction over the facility and to the appropriate local emergency planning committee~~].

(5) A facility operator required to submit an annual Tier Two form under paragraph (4) of this subsection shall furnish a copy of this form to the following entities no later than March 1 of each year:

(A) the appropriate fire chief; and

(B) the appropriate LEPC.

(6) A facility operator shall submit an initial Tier Two form and the appropriate filing fee as provided under subsection (g)(2) and (3) of this section with the department within 90 days after the date that the facility operator:

(A) begins operation and acquires one or more hazardous chemicals or EHSs which meet or exceed any of the current Tier Two thresholds; or

(B) first acquires one or more hazardous chemicals or EHSs which meet or exceed any of the current Tier Two thresholds and which were not reported on the most recently submitted annual Tier Two form; or

(C) determines that one or more hazardous chemicals or EHSs which meet or exceed any of the current Tier Two thresholds were omitted from the most recently submitted annual Tier Two form.

(7) A facility operator required to submit an initial Tier Two form under paragraph (6) of this subsection shall furnish a copy of this form within 90 days after the date that the facility operator first becomes subject to the requirements of paragraph (6) of this subsection to the following entities:

(A) the appropriate fire chief; and

(B) the appropriate LEPC.

(8) [~~(4)~~] A facility operator shall file an [~~the~~] updated Tier Two form with the department not later than the 90th day after the date on which the operator discovers significant new information concerning an aspect of [~~has a reportable addition of~~] a previously reported [~~unreported~~] hazardous chemical or EHS which was reported on either an annual or initial Tier Two form submitted by the facility. No fee will be charged for filing this report. [~~The facility operator shall furnish a copy of each updated Tier Two form to the fire chief and to the appropriate local emergency planning committee.~~]

(9) A facility operator required to submit an updated Tier Two form under paragraph (8) of this subsection shall furnish a copy of this form within 90 days after the date that the facility operator first becomes subject to the requirements of paragraph (8) of this subsection to the following entities:

(A) the appropriate fire chief; and

(B) the appropriate LEPC.

(10) For purposes of electronic reporting, a facility operator covered by this section may submit to the department an electronic file of the facility chemical list using software which has been approved by EPA or the department. A Texas Tier Two Cover Sheet, which has been signed and dated by the authorized representative of the facility operator, shall be submitted to the department with the electronic file of the facility chemical list. A copy of the completed versions of the electronic file of the facility chemical list and the Texas Tier Two Cover Sheet and the appropriate filing fee as provided under subsections (g)(2) and (3) of this section shall meet the requirements of this subsection and may be submitted to the department to comply with this subsection.

(11) A facility operator must contact the fire chief for approval to submit an electronic file of the facility chemical list in lieu of the paper copy of any required Tier Two form. If approved by the fire chief, a facility operator may submit an electronic file of the facility chemical list and shall be in compliance with paragraphs (5)(A), (7)(A), and (9)(A) of this subsection. A facility operator must contact the chair of the LEPC for approval to submit an electronic file of the facility chemical list in lieu of the paper copy of any required Tier Two form. If approved by the LEPC chair, a facility operator may submit an electronic file of the facility chemical list and shall be in compliance with paragraphs (5)(B), (7)(B), and (9)(B) of this subsection.

(12) A facility operator required by paragraph (4) of this subsection to submit to the department an annual Tier Two form shall maintain at the headquarters facility a copy of the facility's current annual Tier Two form until such time as the facility operator files the following year's annual Tier Two form with the department.

(13) A facility operator required by paragraph (6) of this subsection to submit to the department one or more initial Tier Two forms shall maintain at the facility for one year copies of all initial Tier Two forms which have been filed with the department during the previous year.

(14) A facility operator required by paragraph (8) of this subsection to submit to the department one or more updated Tier Two forms shall maintain at the headquarters facility copies of all updated Tier Two forms which have been filed with the department during the previous year.

(15) [~~(5)~~] For the purpose of paperwork reduction, multiple facilities may be reported on the same Tier Two form, with appropriate facility identifiers, when all of the following conditions are met at all of the multiple facilities: [~~if the hazardous chemicals or hazardous chemical categories present at the multiple facilities are in the same ranges. In multiple facility reporting, the reporting thresholds must be applied to each facility rather than to the total quantities present at all facilities.~~]

(A) the same reportable hazardous chemicals are present at every facility in the paperwork reduced Tier Two report;

(B) for each specific hazardous chemical reported, the range value for the average daily amount is the same at each facility in the paperwork reduced Tier Two report;

(C) for each specific hazardous chemical reported, the range value for the maximum amount is the same at each facility in the paperwork reduced Tier Two report; and

(D) all of the facilities included in the paperwork reduced report are within the jurisdiction of a single LEPC.

(16) For purposes of paperwork reduction, a facility operator may substitute the Texas Tier Two Paperwork Reduction form for multiple Tier Two Cover Sheet forms when the facilities which are being included on the Paperwork Reduction form meet the requirements of paragraph (15) of this subsection.

(17) In providing appropriate facility identifiers, a facility operator shall provide under the Facility Identification sections of the Texas Tier Two form one of the following descriptions:

(A) for a facility located within a city's limits, the description must provide the following information:

(i) the street address;

(ii) the name of the city; and

(iii) the zip code for the facility.

(B) for a facility located in an area outside of a city's limits, the description must include both a map which shows at a minimum the facility site in relation to state and federal highways and major rivers and a written description which provides one of the following:

(i) when a street address has been assigned for purposes of emergency services, the street address and the name of the nearest city;

(ii) if the facility is located at the intersection of two roads, the names of the roads at the intersection and the name of the nearest city; or

(iii) if neither clause (i) or (ii) of this subparagraph apply to the facility:

(I) the approximate straight line distance and direction of the facility from the nearest city and the name of the nearest city;

(II) the latitude and longitude for the facility; or

(III) for SIC Code 13 facilities, the plat information, as provided to the Texas Railroad Commission for the facility.

(e) Complaints and investigations.

(1) The director or his designated representative shall investigate in a timely manner a complaint relating to an alleged violation of the Act. Such complaints do not have to be submitted to the department in writing and may be anonymous. An inspection based on a complaint is not limited to the specific allegations of the complaint. A facility operator who refuses to allow such an investigation shall be in violation of the Act.

(2) Complaints are not necessary to conduct an inspection under this section. The director or his designated representatives may enter a facility at reasonable times to conduct random compliance inspections. A facility operator [~~An employer~~] who refuses to allow such an inspection shall be in violation of the Act.

(3) The department may find multiple violations by a facility based on specific requirements of the Act.

(4) Upon request from a representative of the director, a facility operator shall make or allow photocopies of documents to be made and permit the representative to take photographs to verify the compliance status of the employer. Such requests may be made during a compliance inspection or in a written Notice of Violation issued by the department.

(f) Administrative penalties.

(1) Inspections may be conducted by the director or his designated representative to determine if persons are in violation of the Act or the rules adopted by the Board of Health to enforce the Act. Persons found to be in violation will be notified in writing of any alleged violations [~~the violation~~].

(2) Facility operators [~~Employers~~] found to be in violation of the Act are subject to administrative penalties [~~not to exceed $50 per violation~~] as authorized by the Act and to be administered in accordance with the procedures detailed in the Act, §§507.009, 507.010, and 507.011 [~~§§507.009-507.011~~]. Each violation may [~~will~~] be assessed as a separate penalty. The total penalty for a violation is [~~will be~~] the sum of all per day [~~individual~~] violation penalties.

(3) Penalties shall be due after an order is issued by the director. An order may be issued on or after the 16th business day following the date that a written notification of violations is received by the facility operator, unless the department receives an acceptable written response which documents that each violation has been corrected, an informal conference has been requested, or that a formal hearing has been requested. If an informal conference is held, the facility operator must respond within 10 business days after the facility operator receives a summary letter following the informal conference. In a case where the written notice from the department documents that a violation involves failure to make a good faith effort to comply with the Act, an order may be issued at any time.

(4) The written response to the department's summary letter from the facility operator must address each violation separately and must provide the documentation requested by the department or an acceptable alternative agreed to by the department. An inappropriate or unacceptable response may result in a penalty being assessed for the underlying violations.

(5) [~~(3)~~] A penalty may [~~shall~~] be assessed for each day a violation continues, with a total penalty not to exceed $1,000 per violation. The cap of $1,000 is per specific violation and not per day.

(6) Individual violations may be reduced or enhanced based on consideration of the history of previous violations, the degree of hazard to the health and safety of the public, good-faith efforts made to correct violations promptly, and on any other consideration that justice may require. Subject to the statutory limits of $50 per day for every day a violation continues and $1000 total per violation, a maximum enhancement or reduction of 50% per individual violation may be considered, based on the facts presented to the department.

[~~(4) Follow-up inspections may be made to confirm the status of abatement of violations. Any violation found on such follow-up inspections will be subject to an additional administrative penalty. If the first 15-day notice period has expired, that penalty will be due and a second or subsequent notice will be provided for determining second or subsequent penalty due dates.~~]

(7) [~~(5)~~] Failure to file a [~~an annual~~] Tier Two form [~~and necessary updates~~] with the department will be considered a violation of the Act which may not require an inspection. Other violations may be confirmed by the department through correspondence with authorized company officials and may not warrant an inspection.

(8) [~~(6)~~] At its option, the department may accept appropriate documentation provided by the facility as evidence of compliance status.

(g) Fees.

(1) The department shall charge a fee for each required submission [~~Tier Two form~~] submitted under subsection (d)(4) and (6) [~~(d)(3)~~] of this section (relating to the annual and initial Tier Two forms [~~facility chemical list~~]). The fee must accompany the Tier Two form when submitted to the department.

(2) Annual fees for the annual and initial Tier Two forms are based on the number of hazardous chemicals present at a facility and shall be:

(A) $50 for each required submission having no more than 75 hazardous chemicals or hazardous chemical categories; or

(B) $100 for each required submission having more than 75 hazardous chemicals or hazardous chemical categories.

(3) For the purpose of minimizing fees, the department shall provide for consolidated filing of multiple Tier Two forms for facility operators if:

(A) each of the Tier Two forms contain fewer than 25 chemicals or hazardous chemical categories;

(B) Tier Two forms are filed under the same [~~owner or~~] operator name and address; [~~and~~]

(C) all consolidated Tier Two forms are mailed to the department in the same package; [~~.~~] and

(D) no more than four required submissions are consolidated under one filing fee.

(4) Fees paid by mail must be paid by check or money order (cash payments are not acceptable) to the Texas Department of Health and must be addressed to: Texas Department of Health, Toxic Substances Control Division [~~of Occupational Health~~], Hazard Communication Branch, 1100 West 49th Street, Austin, Texas 78756.

(5) No receipt will be provided for payment of fees which are mailed, but a canceled [~~cancelled~~] check may be considered adequate proof of payment.

(6) The department may refund a fee overpayment to a facility operator [~~an employer~~] provided that:

(A) the facility operator [~~employer~~] provides, in writing, proof of payment, the date(s) on which the required submissions [~~workplace chemical list~~] and fees were sent to or received by the department, the circumstances that caused the overpayment, and the reasons why it would have been considered an overpayment under the Act and rules in force at the time of the original filing;

(B) the facility operator [~~employer~~] requests the refund in writing within six months of the date on which the required submissions [~~workplace chemical list~~] and fee were received by the department; and

(C) the facility operator [~~employer~~] agrees that [~~provides to~~] the department can retain [~~, in the form of a refund reduction,~~] a handling fee of $10 per refund.

This 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 10, 1999.

TRD-9905845
Susan K. Steeg
General Counsel
Texas Department of Health

Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

Chapter 337. WATER HYGIENE

Subchapter C. CERTIFICATION OF BOTTLED WATER PLANT OPERATORS

25 TAC §§337.111-337.118

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

The Texas Department of Health (department) proposes the repeal of §§337.111 - 337.118, concerning certification of bottled water plant operators. The repeal of these rules is necessary because the rules are obsolete and are being replaced by Chapter 229, Title 25, Texas Administrative Code, §§229.81 - 229.91, based upon enactment of new enabling legislation in House Bill 2013, 76th Legislature.

Pursuant to the Government Code, §2001.039 (formerly known as Rider 167), each state agency is required to review and consider for readoption each rule adopted by that agency. The sections have been reviewed and the department has determined that reasons for adopting the sections no longer exist.

Robert D. Sowards, Jr., Director, Manufactured Foods Division, has determined that for each year of the first five-year period the sections are no longer in effect there will be no fiscal implications to state government or local government as a result of the repeal.

Mr. Sowards also has determined that for each year of the first five years the sections are repealed, the public benefit anticipated as a result of repealing the sections is that the department will be consistent with federal regulations. There will be no effect on small businesses nor micro- businesses. There are no anticipated economic costs to persons who are required to comply with the sections as repealed. There is no impact on local employment.

Comments on the proposal may be submitted to Robert D. Sowards, Jr., Director, Manufactured Foods Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, 512/719-0243. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The repeals are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect the Health and Safety Code, Chapter 431; Chapter 12; and the Government Code, §2001.039 as passed by the 76th Legislature.

§337.111. Purpose.

§337.112. Definitions.

§337.113. Types of Certificates.

§337.114. Applications for a Certificate.

§337.115. Examination.

§337.116. Renewals.

§337.117. Revocation of Certificates.

§337.118. Fees.

This 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 10, 1999.

TRD-9905854
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

TITLE 28. INSURANCE

Part 1. TEXAS DEPARTMENT OF INSURANCE

Chapter 34. STATE FIRE MARSHAL

Subchapter I. SECURITY BARS

28 TAC §§34.901-34.904

The Texas Department of Insurance proposes new §§34.901 through 34.904 under new Subchapter I concerning security bars on residential dwellings. This proposal is necessary to implement legislation enacted by the 76th Legislature in Senate Bill 839. Senate Bill 839 added new Subchapter F to Chapter 756, Health and Safety Code, which sets forth requirements for security bars installed in a bedroom in a residential dwelling, as defined by the statute, and requires the state fire marshal to adopt rules concerning labeling and notice requirements and a release mechanism. The new legislation also says that the state fire marshal or a testing laboratory, under conditions and procedures approved by the state fire marshal, may recommend an interior release mechanism that has been shown to be effective. The state fire marshal's office interviewed representatives from the security bars industry, Underwriters Laboratories, and the National Fire Protection Association High Risk Center in developing its proposal to implement the new legislation. Currently, there is no recognized national standard for release devices. The state fire marshal's office, therefore, utilized portions of the National Fire Protection Association's Life Safety Code and obtained examples of the industry's offerings of interior release mechanisms in developing its recommendations for an interior release mechanism as required by the new legislation. Proposed new §34.901 states the purpose and application of proposed new Subchapter I of Chapter 34, Insurance Code, relating to the State Fire Marshal, and provides for the severability of the provisions of the proposed subchapter. The purpose of the proposed new subchapter is to administer the law regarding security bars on residential dwellings and to set forth the rules for the labeling, notice, and release requirements of security bars. The proposed new subchapter applies only to security bars installed, sold, or offered for sale on or after January 1,

2000. Proposed new §34.902 sets forth the definitions of the new subchapter which incorporates some of the definitions from the new legislation. Proposed new §34.903 states the labeling and notice requirements for the selling and offering to sell of security bars in this state. The label must be in 14-point, all capital letters, bold-faced type and must be attached to security bars or the packaging of security bars sold or offered for sale in this state. It must be printed in both English and Spanish. The notice must be in the same form as the label, and both the notice and label must state the requirement of the new law that the security bars may not be installed in a bedroom or other area used for sleeping unless the security bars on at least one door or window in the room have an interior release mechanism or at least one window or door from the room to the outside may be opened for emergency escape or rescue. Proposed new §34.904 provides the state fire marshal's recommendations for a release mechanism for security bars. The proposed section specifies the height, method of operation, and maintenance requirements of an interior release mechanism. The department specifically invites comments and recommendations from the public as well as industry input concerning interior release mechanisms on security bars.

G. Mike Davis, state fire marshal, has determined that for each year of the first five years the proposed sections are in effect, there will be no fiscal impact to state government. There will be no fiscal implications for local government as a result of enforcing or administering the new standards, and no effect on the local economy or local employment.

Mr. Davis also has determined that for each year of the first five years that the proposed new sections are in effect, the anticipated public benefit from enforcing and administering these sections is improved and more efficient regulation of security bar devices. Additionally, the public will be better protected from fire or other hazardous condition as a result of the adoption and enforcement of labeling and notice requirements and recommended release mechanisms to allow for emergency escape or rescue from residential dwellings containing security bars. The effect of the proposed new sections on large, small, and micro-businesses results mostly, if not entirely, from the legislative enactment of Senate Bill 839, 76th Legislature, which mandates that the state fire marshal adopt rules to implement the legislation. The estimated cost to persons required to comply with the labeling and notice requirements is $.10 per tag or label or notice for each security bar, and the estimated cost to persons required to comply with the recommended interior release mechanism installed is $150 per security bar containing the release mechanism. The cost of compliance with this proposed rule is the cost to manufacturers and installers of security bars to provide the labeling and notice requirements and to install security bars with the recommended interior release mechanism. Currently, security bars are provided in this state generally by persons who also install the security bars. The total estimated cost is dependent on the volume of business conducted by security bar sellers and installers and will be the same cost for all persons and companies, including large, small, and micro-businesses, who engage in the business of selling and installing security bars. It is also anticipated that any increases in costs as a result of the proposal will be passed on to consumers and will ultimately be recouped by the security bars industry. The cost to persons selling and installing security bars who qualify as a small or micro-business under the Government Code §2006.001 will be the same as the cost to the largest business because the cost is not dependent upon the size of the business but rather is the same price for all persons selling and installing security bars. The proposed new sections may not be waived for persons selling and installing security bars who qualify as a small or micro-business because the use of these standards is prescribed by statute.

Comments on the proposal must be submitted in writing within 30 days after publication of the proposal in the Texas Register, to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Texas Department of Insurance, P.O. Box 149104, Mail Code 113-2A, Austin, Texas 78714-9104. An additional copy of the comments must be submitted to G. Mike Davis, State Fire Marshal, Texas Department of Insurance, P.O. Box 149221, Mail Code 108-FM, Austin, Texas 78714-9221. Requests for a public hearing should be submitted separately to the Office of the Chief Clerk.

The new sections are proposed pursuant to the Health and Safety Code, §§756.081 - 756.084, the Government Code, §417.008, and the Insurance Code §36.001 (former Article 1.03A). The 76th Legislature enacted Senate Bill 839, which added new Subchapter F to Chapter 756, Health and Safety Code. The new legislation sets forth the requirements for security bars installed in a bedroom in a residential dwelling and requires the state fire marshal to adopt rules concerning labeling and notice requirements and a release mechanism. The Government Code, §417.008, grants to the state fire marshal authority for right of entry and examination and correction of dangerous conditions. Insurance Code, §36.001 (former Article 1.03A) authorizes the Commissioner of Insurance to adopt rules and regulations, which must be for general and uniform application, for the conduct and execution of the duties and functions of the Texas Department of Insurance only as authorized by a statute.

The following statutes are affected by the proposed sections: Health and Safety Code, §§756.081 - 756.084

§34.901. Purpose and Application.

(a) The purpose of this subchapter is to administer the law set forth in the Health and Safety Code, Chapter 756, regarding security bars on residential dwellings.

(b) The sections of this subchapter shall be known as and may be cited as the rules for the labeling, notice, and release requirements of security bars on residential dwellings.

(c) This subchapter applies only to security bars installed, sold, or offered for sale on or after January 1, 2000.

(d) If any provision of this subchapter or the application thereof to any person or circumstance is held invalid for any reason, the invalidity shall not affect the other provisions or any other application of these rules which can be given effect without the invalid provisions or application. To this end, all provisions of this subchapter are declared to be severable.

§34.902. Definitions.

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

(1) Bedroom - An area of a dwelling intended as sleeping quarters.

(2) Residential dwelling - Includes a single-family home, a duplex, a triplex, an apartment, a motel or hotel, and a mobile home.

(3) Security bars - Burglar bars or other bars located on the inside or outside of a door or window of a residential dwelling.

§34.903. Labeling and Notice Requirements.

(a) The following label in 14-point, all capital letters, bold-faced type must be attached to security bars or the packaging of security bars sold or offered for sale in this state. The label must be printed in both English and Spanish.
Figure: 28 TAC §34.903(a)

(b) A person who is not regularly and actively engaged in business as a wholesale or retail dealer may sell or offer to sell security bars in this state provided that a written notice containing the requirements of subsection (a) of this section is provided to the buyer of the security bars.

§34.904. Recommended Release Mechanism.

(a) The state fire marshal recommends an interior release mechanism for security bars that consists of a lever, knob, handle, panic bar, or other simple type of releasing device having an obvious method of operation under all lighting conditions. The release mechanism for any security bar shall be located not more than 36 inches (91 centimeters) above the finished floor and shall require no more than two movements in order to accomplish the release. The interior release mechanism shall not require the use of a key, a tool, or special knowledge or effort for operation from the inside of the room.

(b) The state fire marshal recommends that the interior release mechanism be inspected or maintained on a periodic basis to make sure that it operates when needed.

This 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 8, 1999.

TRD-9905784
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-6327

♦ ♦ ♦

Part 2. TEXAS WORKERS' COMPENSATION COMMISSION

Chapter 102. PRACTICE AND PROCEDURES

28 TAC §102.2

The Texas Workers' Compensation Commission (the Commission) proposes amendments to §102.2, concerning gifts, grants, and donations. The amendment is proposed to reflect the changes made by two recent pieces of legislation regarding the processes by which the Commission may accept a gift, grant, or donation.

Senate Bill 183, 76th Legislature, 1999, amended §575.003 of the Texas Government Code by changing a governing board's requirements for acceptance of a gift. The legislation requires a governing board to acknowledge a gift's acceptance in a public meeting rather than having to approve acceptance of the gift. The acknowledgment must be made no later than 90 days after acceptance of the gift.

Senate Bill 2510, 76th Legislature, 1999, amended §402.062 of the Texas Labor Code to specify that the Commission may accept a grant from the Texas Workers' Compensation Insurance Fund (the Fund) for specified purposes. The legislation establishes requirements for publication of such a grant in the Texas Register and for the provision of an opportunity for public comment prior to acceptance of a grant.

The Texas Register published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

Proposed subsection (a) delineates the processes to be followed in the acceptance of three kinds of gifts. Proposed subsection (a)(1) specifies that acceptance of gifts over $500 must be accepted by the commissioners at a public meeting. Proposed subsection (a)(2) retains the basic language regarding acceptance of gifts under $500 which has been moved from current subsection (e). Proposed subsection (a)(3) establishes the notice, public comment, and acknowledgment requirements for the Commission's acceptance of a grant from the Fund for the purpose of controlling medical costs and ensuring the delivery of quality medical care.

Proposed new subsection (b) provides that the acceptance of a gift of $500 or more or a grant from the Fund must be reflected in the minutes of the public meeting at which the gift/grant was accepted or acknowledged. The subsection further requires that the name of the donor/grantor, a description of the gift, and statement of purpose for which the gift will be used be included in the minutes.

Proposed subsections (c), (d), and (e) retain the language contained in current subsections (b), (c), and (d). The subsections have only been re-lettered.

Proposed new subsection (f) includes the prohibition against accepting a gift valued at $500 or more from a party to a proceeding before the agency which is contained in Government Code, §575.005. There may be other instances in which acceptance of a gift by the agency would be inappropriate. Such issues will be determined on a case by case basis.

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

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed.

Mr. Rodriguez has also determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule will be:

The Commission should benefit by having clearer guidance in handling the acceptance of gifts, grants, or donations and in appropriately disclosing to the general public acceptance of a gift, grant, or donation.

Compliance with Chapter 575 of the Government Code and §402.062 of the Texas Labor Code as amended by the 76th Legislature.

There will be no anticipated economic costs to persons who are required to comply with the rule amendments as proposed because the new requirements do not require any expenditures. There will be no adverse economic impact to small businesses or micro-businesses. There will be no difference in cost of compliance for small business or micro-businesses as compared to larger businesses.

Comments on the proposal must be received by 5:00 p.m., October 25, 1999. You may comment via the Internet by accessing the Commission's website at *http://www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to RuleComments@twcc.state.tx.us or by mailing or delivering your comments to Donna Davila at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Due to the large number of rules proposed by the Commission at its September meeting, commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The Commission may not be able to respond to comments which cannot be linked to a particular proposed rule. Along with your comment, it is suggested that the reasoning for the comment also be included for Commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon action by the commissioners at the public meeting, the rule(s) as adopted may be revised from the rule(s) as proposed in whole or in part. Persons in support of the rule(s) as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be scheduled for sometime in November, at the Austin central office of the Commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 440-5690 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the Commission's website at *http://www.twcc.state.tx.us.*

The amendment is proposed under the Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act, the Texas Labor Code, §402.062, which allows the commission to accept gifts, grants, or donations, and the Texas Government Code, Chapter 575, which relates to the acceptance of gifts by a state agency.

The proposed amendment affects the following statutes: Texas Labor Code, §402.062, which allows the commission to accept gifts, grants, or donations, and Texas Government Code, Chapter 575, which relates to the acceptance of gifts by a state agency.

§102.2. Gifts, Grants, and Donations

(a) The commission may accept gifts, grants, and donations made to the Texas Workers' Compensation Commission as follows:

(1) If the value is $500 or more, the commissioners must, at a public meeting, accept the gift, grant, or donation.

(2) If the value is less than $500, the Executive Director may accept the gift, grant, or donation on behalf of the commission. The Executive Director shall report all accepted gifts, grants, and donations to the commissioners.

(3) If the gift is a grant from the Texas Workers' Compensation Insurance Fund for the purpose of implementing steps to control and lower medical costs in the workers' compensation system and to ensure the delivery of quality medical care, the commission must additionally:

(A) publish the name of the grantor and the purpose and conditions of the grant in the Texas Register;

(B) provide a 20-day public comment period prior to acceptance of the grant; and

(C) within 90 days after the date of acceptance of the grant, acknowledge acceptance through the commissioners at a public meeting, unless the commissioners accepted the grant in accordance with subsection (a)(1) of this section. [~~If the value of the gift is $500 or more, the commission must approve acceptance of a gift, or donation by a majority vote at a public meeting. The minutes of the public meeting shall include the name of the donor, a description of the gift or donation, and a statement of the purpose of the gift or donation.~~]

(b) The acceptance or acknowledgment of a gift, grant, or donation made in accordance with subsection (a)(1) or (a)(3) must be reflected in the minutes of the public meeting at which the gift, grant, or donation was accepted or acknowledged. The minutes must include the name of the grantor; a description of the gift, grant, or donation; and a general statement of the purpose for which the gift, grant, or donation will be used.

(c) [~~(b)~~] The Executive Director shall forward all money or financial instruments received as a gift, grant, or donation to the Comptroller of Public Accounts, for deposit in the appropriate commission fund.

(d) [~~(c)~~] The Executive Director shall, where appropriate, convert non-monetary gifts, grants, and donations to cash.

(e) [~~(d)~~] A donor may direct the use of the gift, grant, or donation in writing. This direction will be followed by the commission, as nearly as practicable, and in accordance with state and federal law.

[~~(e) On behalf of the commission, the Executive Director may accept gifts, grants, or donations of less than $500 made to the Workers' Compensation Commission and shall report all gifts, grants, and donations received to the commission.~~]

(f) The Commission may not accept a gift of $500 or more from a person who is a party to a contested case before the agency until the 30th day after the decision in the case becomes final under §2001.144 of the Texas Government Code. For purposes of this rule, "contested case" has the meaning assigned by §2001.003 of the Texas 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 13, 1999.

TRD-9905929
Susan Cory
Assistant General Counsel

Texas Workers' Compensation Commission
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 707-5829

♦ ♦ ♦

Chapter 110. REQUIRED NOTICE OF COVERAGE

Subchapter A. CARRIER NOTICE

28 TAC §110.1

The Texas Workers' Compensation Commission (the Commission) proposes amendments to §110.1, concerning the requirements for notifying the Commission of insurance coverage. The amendments are being proposed to outline specific responsibilities of an insurance carrier and employer in notifying the Commission of employer workers' compensation insurance coverage status and claims administration information in accordance with House Bill 2511 of the 76th Texas Legislature.

The Texas Register published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

Proposed amendments to subsection (a) broadened its application to include political subdivisions and certified self-insurers. This broader application was set out in recent amendments to the Texas Labor Code which are effective September 1, 1999, except for political subdivisions and certified self-insurers not previously required to file this information for which the requirement becomes effective January 1, 2000.

Proposed new subsection (b) is added to allow the Commission to prescribe how and where the employer and insurance carrier shall submit workers' compensation insurance coverage or non-coverage information. This proposed new subsection allows the Commission the option of contracting with a data collection agent to collect and maintain employer coverage information.

Proposed amendments to subsections (c) and (d) remove the specific reference to form TWCC-5 (Employer Notice of No Coverage or Termination of Coverage) for submission of notice of non-coverage to the Commission and removes the requirement that it be submitted by certified mail or personal delivery.

Proposed amendments to subsection (f) to remove the specific reference to form TWCC-20 (Insurance Carrier Notice of Coverage/Cancellation/Non-Renewal of Coverage) and form TWCC 20-1 (Location of Employer's Business(es)) for sending information regarding employer coverage and location to the Commission by certified mail or personal delivery.

Proposed amendments to subsection (g) remove the specific reference to the TWCC-20 form and replace it with "notification from the insurance carrier of policy cancellation or non-renewal.

Proposed new subsection (h) sets forth the requirement that insurance carriers designate a claim administration contact who is responsible for identifying or confirming an employers coverage information with the Commission. Proposed subsection (h) also establishes time limits for designation of the contact and for providing the contact's address to the Commission.

Subsection (g) is proposed to be deleted because it does not reference the extension of coverage in the Texas Labor Code, §406.008(c), which states "Failure of the insurance company to give notice as required by this section extends the policy until the date on which the required notice is provided to the employer and the commission."

Subsection (i) is proposed to be deleted to remove specific language regarding enforcement and violations. Removal of the enforcement language is not intended to limit the Commission's authority to take enforcement action for violations of this or any other rule. Rather, the existing language did not address all of the methods of enforcement that the Commission has at its disposal for these violations. The Commission's authority to enforce the statute and rules is granted in multiple provisions of the statute and duplicate language in rules is redundant.

Victor Rodriguez, Chief Financial Officer, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule. While there will be no fiscal impact on state or local government, there will be a procedural impact on the submission of coverage information.

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed.

Mr. Rodriguez has also determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule will be:

Compliance with the requirements of the Texas Labor Code, §§406.006, 406.007, 406.008, and 406.009 as amended by the 76th legislature.

Insurance carriers should benefit by being able to facilitate timely reporting of coverage and claims administration contact information. Streamlining the coverage reporting process by eliminating dual reporting requirements.

Non-Covered Employers should benefit by being able to submit non-coverage notification to the Commission electronically when this method becomes available. There will be no anticipated economic costs to persons who are required to comply with the rule as proposed. There will be no adverse economic impact on small businesses or micro-businesses.

Comments on the proposal must be received by 5:00 p.m., October 25, 1999. You may comment via the Internet by accessing the Commission's website at *http://www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to RuleComments@twcc.state.tx.us or by mailing or delivering your comments to Donna Davila at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Due to the large number of rules proposed by the Commission at its September meeting, commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The Commission may not be able to respond to comments which cannot be linked to a particular proposed rule. Along with your comment, it is suggested that the reasoning for the comment also be included for Commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon action by the commissioners at the public

meeting, the rule(s) as adopted may be revised from the rule(s) as proposed in whole or in part. Persons in support of the rule(s) as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be scheduled for sometime in December, at the Austin central office of the Commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 440-5690 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the Commission's website at *http://www.twcc.state.tx.us.*

The amendment is proposed under the Texas Labor Code, §401.024, which allows the Commission to collect coverage information by electronic transmission; Texas Labor Code, §402.042, which authorizes the Executive Director to prescribe the form, manner, and procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.006, which requires insurance carriers to report new employer coverage and claim administration contact information to the Commission; Texas Labor Code, §406.008, which requires insurance carriers to report changes they initiate, to employer coverage and claim administration contact information, to the Commission; Texas Labor Code, §406.009, which requires the Commission to collect and maintain coverage information; monitor and enforce the compliance of the timely submission of coverage information; and Texas Labor Code, §504.001, which defines a political subdivision.

This proposed amendment affects the following statutes: Texas Labor Code, §401.024, which allows the Commission to collect coverage information by electronic transmission; Texas Labor Code, §402.042, which authorizes the Executive Director to prescribe the form, manner, and procedure for transmission of information to the Commission; Texas Labor Code §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.006, which requires insurance carriers to report new employer coverage and claim administration contact information to the Commission; Texas Labor Code, §406.008, which requires insurance carriers to report changes they initiate, to employer coverage and claim administration contact information, to the Commission; Texas Labor Code, §406.009, which requires the Commission to collect and maintain coverage information; monitor and enforce the compliance of the timely submission of coverage information; and Texas Labor Code, §504.001, which defines a political subdivision.

§110.1. Requirements for Notifying the Commission of Insurance Coverage.

(a) This rule applies to employers whose employees are not exempt from coverage under the Workers' Compensation Act (the Act), and to insurance carriers. It does not apply to [~~self- insured political subdivisions,~~] employers whose only employees are exempt from coverage under the Act [~~, and certified self insurers~~]. Certified Self Insurers are also subject to requirements specified in Chapter 114 of this title (relating to Self-Insurance).

(b) Employers and insurance carriers shall submit to the Commission, or its designee, insurance coverage information in the form and manner prescribed by the Commission. The Commission may designate and contract with a data collection agency to collect and maintain coverage information.

(c) [~~(b)~~] Employers are required to provide notice of non-coverage information in accordance with subsection (d) of this section [~~form TWCC-5 to the commission by certified mail or personal delivery~~] as follows:

(1) if the employer elects not to be covered by workers' compensation insurance, the earlier of the following:

(A) 30 days after receiving a commission request for the filing of a notice of non-coverage [~~TWCC-5~~] and annually thereafter on the anniversary date of the original filing;

(B) 30 days after hiring an employee who is subject to coverage under the Act, and annually thereafter on the anniversary date of the original filing;

(2) if the employer cancels coverage without purchasing a new policy or becoming a certified self-insurer, within 10 days after notifying the insurance carrier and annually thereafter on the anniversary of the cancellation date of the workers' compensation policy; or

(3) if the employer is principally located outside of Texas, within 10 days after receiving a written request from the commission for information about the coverage status of its Texas operations.

(d) [~~(c)~~] When an employer elects to cancel coverage, the effective date of that cancellation shall be the later of:

(1) 30 days after filing the notice of non-coverage [~~TWCC-5~~] with the commission; or

(2) the cancellation date of the policy.

(e) [~~(d)~~] The insurance coverage shall be extended until the effective date of withdrawal as established in subsection (d) [~~(c)~~] of this section, and the employer is obligated to pay premiums which accrue during this period.

(f) [~~(e)~~] Insurance carriers are required to provide coverage information for insured Texas employers in accordance with subsection (d) of this rule [~~form TWCC-20 to the commission by certified mail or personal delivery.~~] as follows:

(1) within 10 days after the effective date of coverage [~~of the policy~~] or endorsement and annually thereafter no later than 10 days after the anniversary date of coverage [~~the policy and, if the employer has multiple business locations, the Form TWCC-20-1~~];

(2) 30 days prior to the date on which the cancellation or nonrenewal becomes effective if the insurance carrier cancels, or does not renew, an employer's workers' compensation coverage [~~policy~~] on the anniversary date; or

(3) 10 days prior to the date on which the cancellation becomes effective if the insurance carrier cancels an employer's workers' compensation coverage [~~policy~~] in accordance with Texas Labor Code, §406.008(a)(2) [~~Article 8308-3.28(c)~~].

(g) [~~(f)~~] Insurance coverage remains in effect until the end of the policy period, the beginning date of a new policy, or until the commission and the employer receive the notification from the insurance carrier of coverage cancellation or non-renewal [~~TWCC-20~~] and the later of:

(1) the date 30 days after receipt of the notice required by Texas Labor Code, §406.008(a)(1) [~~Article 8308-3.28(b)~~];

(2) the date 10 days after receipt of the notice required by Texas Labor Code, §406.008(a)(2);[~~Article 8308-3.28(c); or~~]

(3) the effective date of the cancellation if later than the date [~~dates~~] in paragraphs (1) or (2) of this subsection.

(h) "Claim administration contact" as it applies to this chapter is the person responsible for identifying or confirming an employer's coverage information with the Commission. Each insurance carrier shall file a notice with the Commission of their designated claim administration contact not later than the 10th day after the date on which the coverage or claim administration agreement takes effect. A single administration address for the purpose of identifying or confirming an employer's coverage status shall be provided. If the single claims administration contact address changes, the insurance carrier shall provide the new address to the Commission at least 30 days in advance of the change taking effect. This information shall be filed in the form and manner prescribed by the Commission.

[~~(g) In no event shall this rule serve to extend coverage beyond the end of the policy period.~~]

(i) [~~(h)~~] An insurance carrier may elect to have a servicing agent process and file all coverage information, but the insurance carrier remains responsible for meeting all filing requirements of this rule.

[~~(i) Failure to provide notice as required by this rule is an administrative violation and may subject the employer and/or the insurance carrier to administrative penalties.~~]

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

Filed with the Office of the Secretary of State, on September 13, 1999.

TRD-9905916
Susan Cory
Assistant General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 707-5829

♦ ♦ ♦

Chapter 112. SCOPE OF LIABILITY FOR COMPENSATION

The Texas Workers' Compensation Commission (the Commission) proposes amendments to §112.101 concerning Agreement Regarding Workers' Compensation Insurance Coverage Between General Contractors and Subcontractors, §112.201 concerning Agreement to Establish Employer-Employee Relationship for Certain Building and Construction Workers, §112.202 concerning Joint Agreement to Affirm Independent Relationship for Certain Building and Construction Workers, §112.203 concerning Exception to Application of Agreement to Affirm Independent Relationship for Certain Building and Construction Workers, and §112.401 concerning Election of Coverage by Certain Professional Athletes. The proposed amendments regard the requirements for notifying the Commission of insurance coverage. The proposed amendments outline specific responsibilities of franchises who employ certain professional athletes, general contractors, and hiring contractors in notifying the Commission of agreements regarding who will be responsible for providing workers compensation insurance coverage for their employees in accordance with House Bill 2511 of the 76th Texas Legislature.

The Texas Register published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

Proposed amendments to §112.101(a), (d), (e) and (f) update references to the Workers' Compensation Act (the Act) by citing the appropriate section of the Texas Labor Code.

Proposed new §112.101(c) is added to clarify that an agreement between a general contractor and a subcontractor cannot alter the nature of the employer/employee relationship between the two as that relationship is defined in the Act.

Proposed amendments to §112.101(d) deletes the requirement for agreements between a general contractor and a subcontractor to be filed with the Commission by personal delivery or registered or certified mail. The section would allow the Commission to determine the form and manner for filing such agreements. The proposed amendments also require the hiring contractor to maintain the original agreement.

It is proposed that current §112.101(e) be deleted to remove specific language regarding enforcement and violations. Removal of the enforcement language is not intended to limit the Commission's authority to take enforcement action for violations of this or any other rule. Rather, the existing language did not address all of the methods of enforcement that the Commission has at its disposal for these violations. The Commission's authority to enforce the statute and rules is granted in multiple provisions of the statute and duplicate language in rules is redundant.

Proposed amendments to §112.201(a), (b), (i), and (j) update references to the Workers' Compensation Act (the Act) by citing the appropriate section of the Texas Labor Code.

Proposed new §112.201(f) is added to clarify that an agreement between a general contractor and a subcontractor cannot alter the nature of the employer/employee relationship between the two as that relationship is defined in the Act.

Proposed amendments to §112.201(g) deletes the requirement for agreements between a independent contractor and a hiring to be filed with the Commission by personal delivery or registered or certified mail. The section would allow the Commission to determine the form and manner for filing such agreements. The proposed amendments also require the hiring contractor to maintain the original agreement.

Proposed amendments to §112.202(b) update references to the Act by citing the appropriate section of the Texas Labor Code.

Proposed new §112.202(c) is added to clarify that an agreement between a general contractor and a subcontractor cannot alter the nature of the employer/employee relationship between the two as that relationship is defined in the Act.

Amended §112.202(d) deletes the requirement for agreements between a independent contractor and a hiring contractor to be filed with the Commission by personal delivery or registered or certified mail. The section would allow the Commission to determine the form and manner for filing such agreements. The proposed amendments also require the hiring contractor to maintain the original agreement.

The proposed amendment to §112.203(a) requires that the hiring contractor shall maintain the original hiring agreement.

The proposed amendment to §112.203(b)(2) is a clerical correction of the word "jobsites" to "job sites."

Proposed new §112.203(c) is added to clarify that an agreement between a general contractor and a subcontractor cannot alter the nature of the employer/employee relationship between the two as that relationship is defined in the Act.

Proposed amendments to §112.203(d) deletes the requirement for notice of exception to application of agreement to be filed with the Commission by personal delivery or registered or certified mail. The section would allow the Commission to determine the form and manner for filing such notices.

Proposed amendments to §112.401(a) and (b) update references to the Workers' Compensation Act (the Act) by citing the appropriate section of the Texas Labor Code.

Amended §112.401(d) deletes the requirement for an election of coverage by a professional athlete to be filed with the Commission by personal delivery or registered or certified mail. The section would allow the Commission to determine the form and manner for filing such agreements. The proposed amendments also require the franchise to maintain the original agreement.

Victor Rodriguez, Chief Financial Officer, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule. While there will be no fiscal impact on state or local government, there will be a procedural impact on the submission of joint agreement information.

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed.

Mr. Rodriguez has also determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule will be:

Compliance with the requirement of Texas Labor Code, §406.006 as passed by the 76th legislature.

General contractors, hiring contractors, and employers who employ professional athletes should benefit by being able to submit joint agreement information to the Commission, insurance carrier, and other contractors by faster more efficient methods such as electronic transmission.

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

There will be no adverse economic impact on small businesses or micro-businesses.

Comments on the proposal must be received by 5:00 p.m., October 25, 1999. You may comment via the Internet by accessing the Commission's website at*http://www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to RuleComments@twcc.state.tx.us or by mailing or delivering your comments to Donna Davila at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Due to the large number of rules proposed by the Commission at its September meeting, commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The Commission may not be able to respond to comments which cannot be linked to a particular proposed rule. Along with your comment, it is suggested that the reasoning for the comment also be included for Commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon action by the commissioners at the public meeting, the rule(s) as adopted may be revised from the rule(s) as proposed in whole or in part. Persons in support of the rule(s) as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be scheduled for sometime in December, at the Austin central office of the Commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 440-5690 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the Commission's website at *http://www.twcc.state.tx.us.*

Subchapter B. APPLICATION TO GENERAL CONTACTOR/SUBCONTRACTOR AND MOTOR CARRIER/OWNER OPERATOR

28 TAC §112.101

The amendments are proposed under the Texas Labor Code, §401.024, which allows the Commission to collect coverage information by electronic transmission; Texas Labor Code, §402.042, which authorizes the Executive Director to prescribe the form, manner, and procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.095, which requires the franchise of professional athletes to submit the athletes election to receive either the benefits available under Texas statute or the benefits under the contract or agreement; Texas Labor Code, §§406.121 to 406.127 and §§406.141 to 406.146, which permit certain agreements to be made between general/hiring contractors and subcontractors. The purpose of the agreements is to specify who will be the employer for the purpose of workers' compensation; and Texas Labor Code, §406.009, which requires the Commission to collect and maintain coverage information; monitor and enforce the compliance of the timely submission of coverage information.

The proposed amendments affect the following statutes: Texas Labor Code, §401.024, which allows the Commission to collect coverage information by electronic transmission; Texas Labor Code, §402.042,which authorizes the Executive Director to prescribe the form, manner, and procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.095, which requires the franchise of professional athletes to submit the athletes election to receive either the benefits available under Texas statute or the benefits under the contract or agreement; Texas Labor Code, §406.121 to §406.127 and §§406.141 to 406.146, which permit certain agreements to be made between

general/hiring contractors and subcontractors. The purpose of the agreements is to specify who will be the employer for the purpose of workers' compensation; and Texas Labor Code, §406.009, which requires the Commission to collect and maintain coverage information; monitor and enforce the compliance of the timely submission of coverage information;

§112.101. Agreement Regarding Workers' Compensation Insurance Coverage Between General Contractors and Subcontractors.

(a) An agreement between a general contractor and a subcontractor made in accordance with the Texas Labor Code, §406.123(a),(d),(e) [~~Workers' Compensation Act (the Act),~~ §3.05(e)] or (l) shall:

(1) be in writing;

(2) state that the subcontractor and the subcontractor's employees are employees of the general contractor for the sole purpose of workers' compensation coverage;

(3) indicate whether the general contractor will make a deduction for the premiums;

(4) specify whether this is a blanket agreement or if it applies to a specific job location and, if so, list the location;

(5) contain the signatures of both parties; and

(6) indicate the date the agreement was made, the term the agreement will be effective, and the estimated number of workers affected by the agreement.

(b) The workers' compensation insurance coverage provided by the general contractor under the agreement shall take effect no sooner than the date on which the agreement was executed and deductions for the premiums shall not be made for coverage provided prior to that date.

(c) An agreement which is not consistent with the Labor Code regarding the employer/employee relationship is void. Signing the agreement does not alter the relationship.

(d) [~~(c)~~] The general contractor shall maintain the original and file a legible copy of the agreement with the general contractor's workers' compensation insurance carrier and the Commission within 10 days of the date of execution. If a general contractor and subcontractor enter into a written agreement in which the subcontractor assumes the responsibilities of an employer, as provided in the Texas Labor Code, §406.122(b) [~~Act,3.05(c)~~] the general contractor shall provide a copy of the agreement to its carrier within 10 days of execution. After January 1, 1993, a general contractor who is a certified self-insurer shall file a copy of the agreement with the Division of Self-Insurance Regulation within 10 days of the date of execution. Filing shall be made in the form and manner prescribed by the Commission[~~with the Commission by personal delivery, registered or certified mail~~].

(e) [~~(d)~~] The general contractor shall be required to give the subcontractor's employees the notice required under the Texas Labor Code, §406.005 [~~Act, §3.24(c)~~]when such an agreement is made.

[~~(e)~~] [~~A person who fails to file this agreement may be assessed an administrative penalty up to $5,000.~~]

(f) If a subcontractor makes an agreement in accordance with this rule, an employee of the subcontractor may elect to retain his common law rights as provided by the Texas Labor Code, §406.034 [~~Act, §3.08~~].

This 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 13, 1999.

TRD-9905924
Susan Cory
Assistant General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 707-5829

♦ ♦ ♦

Subchapter C. APPLICATION TO CERTAIN BUILDING AND CONSTRUCTION WORKERS

28 TAC §§112.201, 112.202, 112.203

The amendments are proposed under the Texas Labor Code, §401.024, which allows the Commission to collect coverage information by electronic transmission; Texas Labor Code, §402.042, which authorizes the Executive Director to prescribe the form, manner, and procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.095, which requires the franchise of professional athletes to submit the athletes election to receive either the benefits available under Texas statute or the benefits under the contract or agreement; Texas Labor Code, §§406.121 to 406.127 and §§406.141 to 406.146, which permit certain agreements to be made between general/hiring contractors and subcontractors. The purpose of the agreements is to specify who will be the employer for the purpose of workers' compensation; and Texas Labor Code, §406.009, which requires the Commission to collect and maintain coverage information; monitor and enforce the compliance of the timely submission of coverage information.

The proposed amendments affect the following statutes: Texas Labor Code, §401.024, which allows the Commission to collect coverage information by electronic transmission; Texas Labor Code, §402.042,which authorizes the Executive Director to prescribe the form, manner, and procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.095, which requires the franchise of professional athletes to submit the athletes election to receive either the benefits available under Texas statute or the benefits under the contract or agreement; Texas Labor Code, §406.121 to §406.127 and §§406.141 to 406.146, which permit certain agreements to be made between general/hiring contractors and subcontractors. The purpose of the agreements is to specify who will be the employer for the purpose of workers' compensation; and Texas Labor Code, §406.009, which requires the Commission to collect and maintain coverage information; monitor and enforce the compliance of the timely submission of coverage information;

§112.201. Agreement to Establish Employer-Employee Relationship for Certain Building and Construction Workers

(a) This section applies only to building and construction projects as provided by the Texas Labor Code, §406.142 [~~Workers' Compensation Act(the Act),~~ §3.06(a)].

(b) An independent contractor and a hiring contractor, as defined in the Texas Labor Code, §406.141 [~~Act,~~ §3.06], may enter into a written agreement:

(1) to allow the hiring contractor to withhold the cost of workers' compensation insurance from the contract price; and

(2) to stipulate that, for the sole purpose of providing workers' compensation insurance, the hiring contractor will be the employer of the independent contractor and the independent contractor's employees.

(c) An agreement made under subsection (b) of this section shall be made on a form TWCC-83 or as otherwise prescribed by the commission.

(d) The agreement shall:

(1) be in writing;

(2) indicate whether the hiring contractor will make a deduction for the premiums;

(3) specify that the hiring contractor will be the employer of the independent contractor and the independent contractor's employees for the sole purpose of providing workers' compensation insurance;

(4) specify the location of the job sites subject to the contract and the agreement;

(5) contain the signatures of both parties; and

(6) indicate the date the agreement was made, the term the agreement will be effective, and the estimated number of employees affected by the agreement.

(e) The workers' compensation insurance coverage provided by the hiring contractor under the agreement shall take effect no sooner than the date on which the agreement was executed and deductions for the premiums shall not be made for coverage provided prior to that date.

(f) An agreement which is not consistent with the Labor Code regarding the employer/employee relationship is void. Signing the agreement does not alter the relationship.

(g) [~~(f)~~] The hiring contractor shall file a legible copy of [~~by personal delivery, registered or certified mail~~] the agreement with the commission, in the form and manner prescribed by the Commission. The hiring contractor must also maintain the original and file [~~and~~] a legible copy of the agreement with the hiring contractor's workers' compensation insurance carrier within 10 days of the date of execution.

(h) [~~(g)~~] A hiring contractor electing to provide workers' compensation insurance coverage through an agreement under subsection (b) of this section shall be deemed to have accepted the rights and responsibilities of an employer imposed under the Act as of the effective date of the workers' compensation insurance coverage.

(i) [~~(h)~~] If an independent contractor makes an agreement under this SECTION, the employee of the independent contractor may elect to retain his common law rights as provided by the Texas Labor Code, §406.034 [~~Act,~~ §3.08].

(j) [~~(i)~~] For purposes of the Texas Labor Code, §406.142 [~~Act,~~ §3.06,] 20,000 square feet is measured on the outside perimeter of the structure.

§112.202. Joint Agreement to Affirm Independent Relationship for Certain Building and Construction Workers.

(a) An independent subcontractor and a hiring contractor may enter into an agreement which states that the subcontractor is an independent contractor and is not an employee of the hiring contractor.

(b) The agreement shall be on the form TWCC-83 or as otherwise prescribed by the Commission and shall:

(1) be in writing;

(2) state that the subcontractor meets the qualifications of an independent contractor under the Texas Labor Code, §406.142 [~~Workers' Compensation Act,~~ §3.06];

(3) state that the subcontractor is an independent contractor and is not an employee of the hiring contractor;

(4) contain the signatures of both parties;

(5) indicate the date the agreement was made; and

(6) state that: "Once this agreement is signed, the subcontractor and the subcontractor's employees shall not be entitled to workers' compensation coverage from the hiring contractor unless a subsequent written agreement is executed, and filed according to Commission rules, expressly stating that this agreement does not apply."

(c) An agreement which is not consistent with the Labor Code regarding the employer/employee relationship is void. Signing the agreement does not alter the relationship.

(d) [~~(c)~~] The hiring contractor shall maintain the original and file a legible copy of the agreement[~~by personal delivery, registered or certified mail~~]with the Commission in the form and manner prescribed by the Commission. The hiring contractor must also file [~~and~~] a legible copy of the agreement with the hiring contractor's workers' compensation insurance carrier, if any, within 10 days of the date of execution.

(e) [~~(d)~~] If the agreement is made in compliance with subsections (a) through [~~to~~] (d) of this section and a separate agreement has not been made in accordance with §112.201 of this title (relating to Agreement to Establish Employer-Employee Relationship for Certain Building and Construction Workers):

(1) the subcontractor and the subcontractor's employees shall not be entitled to workers' compensation coverage from the hiring contractor; and

(2) the hiring contractor's workers' compensation insurance carrier shall not require premiums to be paid by the hiring contractor for coverage of the independent contractor or the independent contractor's employees, helpers, or subcontractors.

(f) [~~(e)~~] All hiring contracts executed by the parties during the year after an agreement under subsection (a)of this section is filed are subject to that agreement, unless such contract expressly states that the agreement does not apply.

§112.203. Exception to Application of Agreement to Affirm Independent Relationship for Certain Building and Construction Workers.

(a) If a subsequent hiring agreement is made that expressly states that the joint statement made under §112.202 of this title (relating to Joint Agreement to Affirm Independent Relationship of Certain Building and Construction Workers) does not apply to that hiring agreement, the hiring contractor shall maintain the original agreement and notify the Commission and the hiring contractor's insurance carrier in writing. Nothing in this section otherwise nullifies the joint statement as it applies to other hiring agreements made during the term of the joint statement.

(b) The notification shall be on the form TWCC-84 or as otherwise prescribed by the Commission and shall:

(1) specify the date the agreement to affirm an independent relationship was made;

(2) specify the parties to the agreement and the location of the job site(s) [~~job sites~~];

(3) specify the date this agreement was made; and

(4) contain the signatures of both parties.

(c) An agreement which is not consistent with the Labor Code regarding the employer/employee relationship is void. Signing the agreement does not alter the relationship.

(d) [~~(c)~~] The notice shall be provided in the form and manner prescribed by the Commission,[~~by personal delivery or certified mail~~] no later than 10 days from the date the subsequent hiring agreement was executed.

This 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 13, 1999.

TRD-9905925
Susan Cory
Assistant General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 707-5829

♦ ♦ ♦

Subchapter E. PROFESSIONAL ATHLETES ELECTION OF COVERAGE

28 TAC §112.401

The amendment is proposed under the Texas Labor Code, §401.024, which allows the Commission to collect coverage information by electronic transmission; Texas Labor Code, §402.042, which authorizes the Executive Director to prescribe the form, manner, and procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.095, which requires the franchise of professional athletes to submit the athletes election to receive either the benefits available under Texas statute or the benefits under the contract or agreement; Texas Labor Code, §§406.121 to 406.127 and §§406.141 to 406.146, which permit certain agreements to be made between general/hiring contractors and subcontractors. The purpose of the agreements is to specify who will be the employer for the purpose of workers' compensation; and Texas Labor Code, §406.009, which requires the Commission to collect and maintain coverage information; monitor and enforce the compliance of the timely submission of coverage information.

The proposed amendment affects the following statutes: Texas Labor Code, §401.024, which allows the Commission to collect coverage information by electronic transmission; Texas Labor Code, §402.042,which authorizes the Executive Director to prescribe the form, manner, and procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.095, which requires the franchise of professional athletes to submit the athletes election to receive either the benefits available under Texas statute or the benefits under the contract or agreement; Texas Labor Code, §406.121 to §406.127 and §§406.141 to 406.146, which permit certain agreements to be made between general/hiring contractors and subcontractors. The purpose of the agreements is to specify who will be the employer for the purpose of workers' compensation; and Texas Labor Code, §406.009, which requires the Commission to collect and maintain coverage information; monitor and enforce the compliance of the timely submission of coverage information;

§112.401. Election of Coverage by Certain Professional Athletes.

(a) A professional athlete employed by a franchise with workers' compensation insurance coverage and subject to the Texas Labor Code, §406.095 [~~Workers' Compensation Act (the Act), Article 8308 §3.075~~], shall elect to receive either the benefits available under the Act or the equivalent benefits available under the athlete's contract or collective bargaining agreement. The election shall be made not later than the 15th day after the athlete sustains an injury in the course and scope of employment. If the athlete fails to make an election, the athlete will be presumed to have elected the option which provides the highest benefits.

(b) When a contract is signed by a professional athlete, the employer shall give the athlete a copy of the following statement: "(Name of employer) has workers' compensation coverage from (name of insurance carrier). If the benefits available to you under your contract and any applicable collective bargaining agreement are equivalent to or greater than those available to you under the Texas Labor Code, §406.095 [~~Workers' Compensation Act, Article 8308 §3.075 of that Act requires~~] you are required to elect whether to receive the benefits available to you under the Act or the benefits available to you under your contract and any applicable collective bargaining agreement. You must make this election no later than 15 days after sustaining an injury. If you elect to receive the benefits available to you under your contract and any applicable collective bargaining agreement, you cannot obtain workers' compensation income or medical benefits if you are injured. You can get more information about your workers' compensation rights and the benefits available to you under the Act from any office of the Texas Workers' Compensation Commission, or by calling 1-800-252-7031."

(c) The election shall be in writing and shall:

(1) indicate the date of the injury for which the election is being made;

(2) indicate whether the athlete elects to receive the benefits available under the Act or the benefits provided under the contract or agreement; and

(3) be signed by the athlete and the employer.

(d) If the athlete elects to receive the benefits available under the Act, a legible copy of the election shall be provided to the Commission [~~by personal delivery or registered or certified mail~~] in the form and manner prescribed by the Commission, within 10 days of the date of execution. A copy must [~~shall~~] also be provided to the franchise's workers' compensation insurance carrier within 10 days of the date of execution. [~~Both the athlete and the~~] The franchise shall maintain the original election and provide [~~also keep~~]a copy to the athlete [~~of the election~~].

(e) If the athlete elects to receive the benefits available under the contract and any agreement, the election shall be provided to the franchise's workers' compensation insurance carrier by personal

delivery or registered or certified mail within 10 days of the date of execution. Both the athlete and the franchise shall keep a copy of the election.

(f) An election made under this section is irrevocable and binding on the athlete and the athlete's legal beneficiaries for a compensable injury incurred on the date specified in the election.

This 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 13, 1999.

TRD-9905926
Susan Cory
Assistant General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 707-5829

♦ ♦ ♦

Chapter 114. SELF-INSURANCE

28 TAC §114.5, §114.13

The Texas Workers' Compensation Commission (the Commission) proposes amendments to §114.5 concerning Excess Insurance Coverage and §114.13 concerning Required Notices to the director. The amendments are proposed to outline specific responsibilities of the certified self-insurer in notifying the Commission of coverage information and claim administration contact information in accordance with House Bill 2511 of the 76th Texas Legislature, 1999.

The Texas Register published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

Proposed amendments to §114.5(b)(1) and (2) will eliminate the requirement for written notice by return receipt requested for notices to the director of Self Insurance (the director) in the event of cancellation or non-renewal of excess coverage by the excess carrier. The amendments allow the director to prescribe the form, manner, and/or procedure for notification which will allow use of electronic transmission when this becomes available.

Proposed amendments to §114.5(b)(4)(A), (B), and (C) clarify that this rule applies exclusively to certified self-insured employers as opposed to employers who have coverage through insurance companies.

Proposed amendments to §114.5(b)(4)(D) update the reference the the Workers' Compensation Act (the Act) by citing the appropriate section of the Texas Labor Code.

Proposed amendments to §114.5(c) clarify that the rule applies exclusively to certified self insurers.

Proposed amendments to §114.5(d) clarify that the rule applies exclusively to certified self-insurers and allows the director to prescribe the form, manner, and/or procedure for notifying the director in the event of cancellation or non-renewal of excess coverage by the certified self-insurer.

Proposed amendments to §114.13(a) clarify that the rule applies exclusively to certified self-insurers and allows the director to prescribe the form, manner, and/or procedure for notifying the director in the event of changes that will materially alter the status of the certified self-insurer.

Proposed amendments to §114.13(b) clarify that the rule applies exclusively to certified self-insurers and allows the director to prescribe the form, manner, and/or procedure for notifying the director in the event the certified self-insurer ceases doing business entirely or in Texas or disposes of controlling interest of the business for which the certificate of self-insurance was issued.

Proposed amendments to §114.13(c) clarify that the rule applies exclusively to certified self-insurers and allows the director to prescribe the form, manner, and/or procedure for notifying the director in the event of a change in the contact person.

Proposed amendments to §114.13(d) clarify that the rule applies exclusively to certified self-insurers and allows the director to prescribe the form, manner, and/or procedure for notifying the director in the event of a change in the claims contractor. This amendment also updates the reference to the Act by citing appropriate sections of the Texas Labor Code.

Proposed amendments to §114.13(e) clarify that the rule applies exclusively to certified self-insurers and allows the director to prescribe the form, manner, and/or procedure for notification in the event of a change or expected change that will alter the liability or solvency of the certified self-insurer.

Proposed new §114.13(f) establishes that a certified self-insurer shall notify the director of all specific Texas locations and/or subsidiaries to be covered under the certificate of self-insurance in accordance with Texas Labor Code, §406.006, including any additions or deletions of specific locations and/or subsidiaries. This notice must be sent in the form and manner prescribed by the director.

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

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed.

Mr. Rodriguez has also determined that each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule will be:

Compliance with the requirement of Texas Labor Code, §406.006, as amended by the 76th Texas Legislature, 1999.

Certified self-insureds will no longer be required to notify the director of certain actions by certified mail. This deletion will allow the director to prescribe speedier, more efficient methods of submission such as electronic transmission as these methods become available. This should be less expensive for the certified self-insured.

Speedier and more efficient transmission of information benefits all system participants by making updated information available sooner.

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

There will likewise be no adverse economic impact to small businesses or micro-businesses.

Comments on the proposal must be received by 5:00 p.m., October 25, 1999. You may comment via the Internet by accessing the Commission's website at *http://www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to *RuleComments@twcc.state.tx.us* or by mailing or delivering your comments to Donna Davila at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Due to the large number of rules proposed by the Commission at its September meeting, commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The Commission may not be able to respond to comments which cannot be linked to a particular proposed rule. Along with your comment, it is suggested that the reasoning for the comment also be included for Commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon action by the commissioners at the public meeting, the rule(s) as adopted may be revised from the rule(s) as proposed in whole or in part. Persons in support of the rule(s) as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be scheduled for sometime in December, at the Austin central office of the Commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 440-5690 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the Commission's website at *http://www.twcc.state.tx.us*.

The amendments are proposed under Texas Labor Code, §402.061, which authorizes the Commission to adopt rules as necessary to administer the Act; Texas Labor Code, §406.006, as amended by the 76th Texas Legislature, which requires insurance carriers, including certified self-insurers, to report coverage and claims administration contact information to the Commission; and Texas Labor Code, §407.001, which defines terms used in this subchapter; and Texas Labor Code, §407.045, which identifies provisions for withdrawal as a certified self insurer.

The proposed amendments affect the following statutes: Texas Labor Code, §402.061, which authorizes the Commission to adopt rules as necessary to administer the Act; Texas Labor Code, §406.006 as amended by the 76th Texas Legislature, which requires insurance carriers, including certified self-insurers, to report coverage and claims administration contact information to the Commission; Texas Labor Code, §407.001, which defines terms used in this subchapter; and Texas Labor Code, §407.045, which identifies provisions for withdrawal as a certified self insurer.

§114.5. Excess Insurance Requirements.

(a) The upper limit of liability for a contract or policy of excess insurance shall be in the amount required by the director. The minimum amount the director may require is $5 million per accident or occurrence.

(b) A contract or policy of excess insurance must be issued by an insurance company authorized by the State of Texas to transact such business and shall include the following provisions:

(1) cancellation requires [~~written~~] notice to the director, in the form and manner prescribed by the director [~~return receipt requested or by personal delivery~~] at least 60 days before termination;

(2) non-renewal requires [~~written~~] notice to the director, in the form and manner prescribed by the director [~~return receipt requested or by personal delivery~~] at least 60 days before the end of the policy;

(3) the association must be named as an additional insured on the excess policy and may assume the rights and responsibilities of the certified self-insurer under the policy when the certified self-insurer is declared to be impaired; and

(4) all of the following benefits to which the injured employee is entitled under the Act must be applied toward reaching the retention amount:

(A) payments made by the certified self-insured employer;

(B) payments due and owing by the certified self-insured employer;

(C) payments made on behalf of the certified self-insured employer by any form of security as required by the Act or commission rules; and

(D) payments made by the association pursuant to Texas Labor Code, §407.121 and §407.127 [~~Texas Civil Statutes, Article 8308-3.70~~].

(c) The excess insurance carrier must send a letter to the director certifying:

(1) that the certified self-insurer has a policy of excess insurance which fully complies with the requirements of this section together with a copy of the declarations page of the policy; or

(2) that the policy will be issued to an applicant upon certification.

(d) The certified self-insurer who elects to cancel or chooses not to renew a policy of excess insurance shall notify the director 60 days prior to the cancellation or termination in the form and manner prescribed by the director.

§114.13. Required Notices to the Director.

(a) A certified self-insurer that amends its charter, articles of incorporation, or partnership agreement to change its identity or business structure, or in any other manner materially alters its status as it existed at the time of issuance of its certificate shall, within 30 days after the amendment or other action, notify the director [~~in writing~~] of such action in the form and manner prescribed by the director and provide the director with a copy of such amendment or other action.

(b) A certified self-insurer that ceases doing business entirely, [~~or~~] ceases doing business in Texas, or disposes of, by sale or otherwise, the controlling interest of the business for which the certificate was issued, shall immediately notify the director in the form and manner prescribed by the director [~~in writing~~] of such action and the director will notify the Commissioners who will act on the notice pursuant to Texas Labor Code, §407.045 [~~Texas Civil Statutes, Article 8308-3.65~~].

(c) A certified self-insurer shall give [~~written~~] notice to the director in the form and manner prescribed by the director of any change in contact person within 10 working days of this change. The notice shall include, the name, title, office address, and telephone number, facsimile number and e-mail address of the new contact person.

(d) A certified self-insurer shall give [~~written~~] notice to the director in the form and manner prescribed by the director at least 30 days prior to any change in the claims contractor. The notice shall include the name, title, office address, and telephone number, facsimile number and e-mail address of the person or persons appointed to administer both the existing cases and the new cases and the location or locations of records required to be kept and maintained pursuant to Texas Labor Code, §407.082 [~~Texas Civil Statutes, Article 8308-3.61~~].

(e) A certified self-insurer shall notify the director in the form and manner prescribed by the director of any change or expected change which will significantly alter the liability or solvency of the certified self-insurer within 30 days of the certified self-insurer's knowledge of the change.

(f) A certified self-insurer shall notify the director of all specific Texas locations and subsidiaries to be covered under the certificate of self-insurance in accordance with Texas Labor Code, §406.006. Any changes which include additions or deletions of specific locations and/or subsidiaries shall be sent to the director within 30 days of the change. This notice must be in the form and manner prescribed by the director.

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

Filed with the Office of the Secretary of State, on September 13, 1999.

TRD-9905917

Susan Cory

Assistant General Counsel

Texas Workers' Compensation Commission

Earliest possible date of adoption: September 13, 1999

For further information, please call: (512) 707-5829

♦ ♦ ♦

Chapter 116. GENERAL PROVISIONS - - SUBSEQUENT INJURY FUND

28 TAC §116.11, §116.12

The Texas Workers' Compensation Commission (the Commission) proposes amendments to §116.11 concerning Request for Reimbursement from the Subsequent Injury Fund for Overpayment of Benefits and §116.12 concerning Periodic Reimbursement Schedule for Overpayment of Benefits.

The amendments are proposed to address indirect impacts of new legislation enacted by the 76th Texas Legislature, 1999. Specifically, through House Bill (HB) 2510 and HB 2512, the Legislature created additional opportunities for carriers to receive reimbursement from the Subsequent Injury Fund ("SIF") for overpayments of benefits pursuant to an order or decision that is finally overturned or modified by a higher authority. In addition, the bills created additional authority to issue interlocutory orders dealing with medical benefits. Given the additional focus on the SIF and the increase in requests for reimbursement that are likely to result from the new legislation, the Commission is amending these rules to better clarify the process for requesting reimbursements and to implement by rule many of the Commission's longstanding procedures and statutory requirements relating to the SIF.

The Texas Register published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

Amendment of §116.11.

The main changes in this rule are proposed to address the additional conditions under which a carrier may be entitled to reimbursement from the SIF; to better define the amount of money that a carrier may be entitled to in reimbursement; and to provide more guidance regarding how to make a request for reimbursement.

The rule title was amended to better reflect the rule contents.

Subsection (a) was amended to reference the statutory changes which allow a carrier to seek reimbursement from the SIF for overpayments caused by reversed or modified contested case hearing decisions and to allow for reimbursement in the situation where an interlocutory order for medical benefits issued by the Executive Director, or a designee, is reversed or modified by final arbitration, order, or decision of the Commission, the State Office of Administrative Hearings, or a court of last resort.

A new subsection (b) was added to provide definition to the type of reimbursement to which a carrier may be entitled. The reimbursement will not cover overpayments caused by carrier error in complying with the order and will also require a carrier to take credit against other income benefits in the case of an overpayment to an injured employee prior to being entitled to reimbursement. For example, if a carrier overpaid temporary income benefits by $500 pursuant to an interlocutory order and the employee was entitled to an additional $300 in the form of impairment income benefits, the unrecoupable overpayment for which the carrier would be entitled to request reimbursement would be $200.

Current subsection (b) was renumbered as subsection (c) as a result of the addition of the new subsection (b). The changes to this subsection involve providing more detail about how to request reimbursement including what documentation the carrier will be required to provide with the request. Most of the documentation being required is the same documentation that the administrator of the SIF currently requires. The addition of the employer's reports in the case of lifetime income benefit payments and income benefit reimbursements and the medical documentation in the case of medical benefit reimbursement is intended to ensure that the SIF can determine the amount of money the carrier or claimant is entitled.

Amendment of §116.12.

Changes to §116.12 were relatively minor and mostly intended to clean up statutory references and clarify procedural issues. The main changes dealt with: ensuring that the prioritization of claims included all types of claims that the SIF is required to pay; cleaning up statutory citations; and providing additional clarification of the process.

The rule title was amended to better reflect the rule contents.

Subsection (a) was amended to include all types of claims that the SIF may be required to pay. The legislative changes in HB

2512 changed the citations that needed to be referenced and the current rule does not address the situation where the carrier overpays death benefits to the SIF even though it has always been a potential source of claims.

New subsection (b) was added to make clear the fiscal year on which the Subsequent Injury Fund operates since not all system participants may be aware that the state fiscal year ends on August 31st each year.

New subsection (c) was added to make it clear that orders associated with lifetime income benefits or death benefit reimbursements may be issued at any time during the fiscal year.

Current subsection (b) was renumbered as subsection (d) as a result of the addition of the new subsections (b) and (c). The subsection was amended to clarify that the review shall include "completed" requests since §116.11 is being simultaneously amended to provide more specificity regarding how to make a request for reimbursement.

Subsections (e), (f) and (g) were amended for consistency and to clarify existing language.

Victor Rodriguez, Chief Financial Officer, has determined that for the first five-year period the proposed rules are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rules. Local government and state government as covered regulated entities will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed. The Subsequent Injury Fund is expected to be impacted as a result of complying with the statutory changes as implemented by these rules. The changes to these rules will create additional opportunities for claims for reimbursements against the Subsequent Injury Fund. These additional claims will require corresponding additional time for review and handling, additional paperwork for response and handling, and an increase in the number of payments to be ordered by the Subsequent Injury Fund administrator.

Mr. Rodriguez has also determined that for each year of the first five years the rules as proposed are in effect, the public benefits anticipated as a result of enforcing the rule will be:

Carriers should benefit from the amendments by having a clearer process for requesting reimbursements which should result in more timely processing of requests.

The Commission/Subsequent Injury Fund should benefit because a higher percentage of requests for reimbursements which contain complete documentation will make it easier to process the requests and ensure that the amount of reimbursement ordered does not exceed the amount that the carrier is entitled to.

Carriers should benefit from the additional reimbursements which should have a corresponding impact on employers' premiums.

Employers should benefit from reduced premiums as a result of the increased reimbursements to carriers.

Mr. Rodriguez has also determined that for each year of the first five years the rules as proposed are in effect, the requirements to comply with the rules will have the following effects on costs to system participants:

Carriers should not see a significant increase in costs since many of the changes being proposed for these rules involve implementing by rule, statutory and longstanding policies and procedures relating to the SIF.

The requirements of these rules are not expected to affect costs for micro-businesses and small businesses except that, by helping to reduce claim administration costs and penalty exposure, the employer's premiums may be positively affected. The cost of compliance for micro-businesses and small businesses as compared to large businesses will be identical and there is no anticipated adverse economic impact on small businesses or micro-businesses.

Comments on the proposal must be received by 5:00 p.m., October 25, 1999. You may comment via the Internet by accessing the Commission's website at *http://www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to RuleComments@twcc.state.tx.us or by mailing or delivering your comments to Donna Davila at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Due to the large number of rules proposed by the Commission at its September meeting, commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The Commission may not be able to respond to comments which cannot be linked to a particular proposed rule. Along with your comment, it is suggested that the reasoning for the comment also be included for Commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon action by the commissioners at the public meeting, the rule(s) as adopted may be revised from the rule(s) as proposed in whole or in part. Persons in support of the rule(s) as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be scheduled for sometime in November, at the Austin central office of the Commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 440-5690 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the Commission's website at *http://www.twcc.state.tx.us.*

The proposed amendments are proposed under following statutes: Texas Labor Code, §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; Texas Labor Code, §402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form, manner and procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §403.007, which allows carriers to seek reimbursement from the Subsequent Injury Fund if the carrier has overpaid death benefits to the SIF as a result of a eligible beneficiary claiming entitlement after the carrier has paid benefits to the SIF; Texas Labor Code, §406.010, which authorizes the Commission to adopt rules regarding claims service; Texas Labor Code, §408.162, which

provides that the Subsequent Injury Fund with compensate an employee whose entitlement to lifetime income benefits is based upon a combination of two or more separate injuries; Texas Labor Code, §410.209, which provides that a carrier can seek reimbursements from the Subsequent Injury Fund if the carrier has made an overpayment pursuant to a decision or interlocutory order which was modified or overturned the court of last resort; and Texas Labor Code, §413.055, which provides that a carrier can seek reimbursements from the Subsequent Injury Fund if the carrier has made an overpayment pursuant to an interlocutory order for medical benefits issued by the executive director or a designee which is modified or overturned by the court of last resort.

These proposed amendments affect the following statutes: Texas Labor Code, §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; Texas Labor Code, §402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form manner and procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §403.007, which allows carriers to seek reimbursement from the Subsequent Injury Fund if the carrier has overpaid death benefits to the SIF as a result of a eligible beneficiary claiming entitlement after the carrier has paid benefits to the SIF; Texas Labor Code, §406.010, which authorizes the Commission to adopt rules regarding claims service; Texas Labor Code, §408.162, which provides that the Subsequent Injury Fund with compensate an employee whose entitlement to lifetime income benefits is based upon a combination of two or more separate injuries; Texas Labor Code, §410.209, which provides that a carrier can seek reimbursements from the Subsequent Injury Fund if the carrier has made an overpayment pursuant to a decision or interlocutory order which was modified or overturned the court of last resort; and Texas Labor Code, §413.055, which provides that a carrier can seek reimbursements from the Subsequent Injury Fund if the carrier has made an overpayment pursuant to an interlocutory order for medical benefits issued by the executive director or a designee which is modified or overturned by the court of last resort.

§116.11. Request for Reimbursement or Payment from the Subsequent Injury Fund [for Overpayment of Benefits].

(a) A carrier may request reimbursement from the Subsequent Injury Fund ("SIF") for an overpayment of income, death, or medical benefits when the carrier has made an unrecoupable overpayment pursuant to decision of a hearing officer or the appeals panel or an interlocutory order, and that decision or order is reversed or modified by final arbitration, order, or decision of the Commission, the State Office of Administrative Hearings, or a court of last resort.[:]

[(1) the carrier has paid benefits pursuant to an interlocutory order entered by a benefit review officer, and a hearing officer or arbitrator subsequently reverses the interlocutory order, or modifies it by reducing the amount of benefits due; or]

[(2) the carrier has paid benefits pursuant to a decision of the appeals panel, and the court of last resort reverses the decision, or modifies it by reducing the amount of benefits due.]

(b) The amount of reimbursement that the carrier may be entitled to is equal to the amount of unrecoupable overpayments paid and does not include any amounts the carrier overpaid as a result of its own errors. An unrecoupable overpayment of income benefits for the purpose of reimbursement from the Subsequent Injury Fund only includes those benefits that were overpaid by the carrier pursuant to an interlocutory order or decision which were finally determined to be not owed and which, in the case of an overpayment to the employee, were not recoverable or convertible from other income benefits.

(c) [(b)] The request for reimbursement or payment from the Subsequent Injury Fund shall be filed with the SIF administrator and shall be in writing and include:

(1) a claim-specific summary of the reason the carrier is seeking reimbursement [be in writing];

(2) if the request is being made based upon lifetime income benefits or an overpayment of income benefits, copies of all reports by the employer including, but not limited to, the Employer's First Report of Injury, the Wage Statement, and all Supplemental Reports of Injury [state the total amount of overpayment];

(3) if the request is being made based upon an overpayment of medical benefits, copies of all medical bills and preauthorization request forms associated with the overpayment; [enclose copies of :]

[(A) the interlocutory order and the decision of the hearing officer or arbitrator; or]

[(B) the appeals panel's decision and the judgement of the court of last resort; and]

(4) a detailed payment record showing the dates of payments, the amounts of the payments, the payees, and the periods of benefits paid, as well as documentation that shows that the overpayment was unrecoupable as described in subsection (b);

(5) the name, address, and federal employer identification number of the payee for any reimbursement that may be due;

(6) [(4) be filed with the administrator of the Subsequent Injury Fund.] if the carrier is requesting reimbursement based upon an unrecoupable overpayment made pursuant to a modified or overturned decision or interlocutory order:

(A) a copy of the decision or interlocutory order under which the carrier made the unrecoupable overpayment; and

(B) the final decision of the Commission, State Office of Administrative Hearings, or the judgement of the court of last resort that modified or overturned the decision or interlocutory order; and

(7) any other documentation required by the SIF administrator to process the request for reimbursement or payment from the Subsequent Injury Fund.

§116.12. [Periodic] Subsequent Injury Fund Payment/ Reimbursement Schedule [for Overpayment of Benefits].

(a) Claims against the Subsequent Injury Fund shall be paid in the following priority:

(1) claims by injured workers for lifetime benefits, as provided by §408.162 of the Act; [, Article 8308-4.47; and]

(2) claims by carriers for reimbursement made pursuant to §403.007 of the Act and §132.10(g) of this title (relating to Payment of Death Benefits to the Subsequent Injury Fund); and

(3) [(2)] claims by [insurance] carriers for reimbursement, made pursuant to [the Act, Articles 8308-6.15 and 8308-6.42,] §410.209 and §413.055 of the Act and §116.11 of this title (relating to Request for Reimbursement or Payment from the Subsequent Injury Fund [for Overpayment of Benefits]).

(b) The Subsequent Injury Fund uses the fiscal year September 1 through August 31.

(c) Claims described in section (a)(1) and (a)(2) may be reviewed and ordered paid by the SIF administrator at any time during the fiscal year.

(d) [~~(b)~~] Following [~~At~~] the end of the [~~each state~~] fiscal year, the administrator of the Subsequent Injury Fund shall review:

(1) the SIF [~~fund's~~] available balance and projected revenues and liabilities;

(2) the current claims against the SIF [~~fund~~], in the order of priorities set out in subsection (a) of this section; and

(3) all completed requests for reimbursement as described in §116.11 and §132.10 of this title, received during the prior fiscal year, except as provided in subsection (g) [~~(e)~~] of this section.

(e) [~~(c)~~] After review, the SIF [~~fund's~~] administrator shall, no later than October 30, enter appropriate orders for [~~reimbursement~~] claims described in subsection (a)(3). Each order shall specify whether the reimbursement shall be paid periodically or in a lump sum.

(f) [~~(d)~~] [~~The orders shall be submitted to the state comptroller for payment. The requesting carrier shall be sent a copy of the pertinent order.~~] The SIF administrator shall submit orders to the state comptroller for payment and send a copy of the order to the requesting carrier.

(g) [~~(e)~~] [~~If the carrier requests reimbursement under §116.11(a)(1) of this title (relating to Request for Reimbursement from the Subsequent Injury Fund for Overpayment of Benefits), and the hearing officer's decision is subsequently appealed, the~~] The SIF administrator will refrain from acting on [~~the~~] a carrier's claim against the Subsequent Injury Fund [~~request~~] until final resolution of the [~~issue~~] claim by [~~the appeals panel~~] a final decision of the Commission, State Office of Administrative Hearings or the court of last resort.

This 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 13, 1999.

TRD-9905919
Susan Cory
Assistant General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 707-5829

♦ ♦ ♦

Chapter 130. IMPAIRMENT AND SUPPLEMENTAL INCOME BENEFITS

Subchapter A. IMPAIRMENT INCOME BENEFITS

28 TAC §130.5

The Texas Workers' Compensation Commission (the Commission) proposes amended §130.5 concerning Impairment Rating Disputes. The amended rule is proposed to clarify the conditions under which an impairment rating may be considered final and to create specific exceptions to that finality. The proposed new rule includes language to accomplish this.

The Texas Register shows the full text of the proposed amended rule and should be read to determine all new language.

The existing rule can be argued to allow an impairment rating that was not assigned in accordance with the correct version of the American Medical Association's Guides to the Evaluation of Permanent Impairment to become final. The proposed rule clearly prohibits this. In some cases, impairment ratings assigned by a doctor who never examined the injured employee became final and resulted in the injured employee not receiving income benefits that the employee might otherwise have been entitled to. Therefore, the rule needed to have exceptions to the finality issue added. The Appeals Panel on an ad hoc basis crafted a set of exceptions which the Texas Supreme Court found to be inappropriate because they were not contained in the rule.

Proposed amendments to §130.5 address problems which have arisen under the current rule by broadening the scope of the rule to create exceptions to the finality of an impairment rating.

Proposed amended subsection (e) establishes the exceptions to finality of the assignment of an impairment rating. The exceptions established are similar to the exceptions recognized by the Commission's Appeals Panel and deemed by the Texas Supreme Court to be invalid ad hoc rule making: the certifying doctor committed a significant error; there was a clear mis-diagnosis or incomplete diagnosis of the employee's medical condition; or the employee received improper or inadequate medical treatment which would render the certification of maximum medical improvement invalid.

Victor Rodriguez, Chief Financial Officer, has determined that for the first five-year period the proposed rule is in effect there should be no financial impact for state or local governments as a result of enforcing or administering the rules because the proposed rule essentially includes what has already been taking place. Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed.

Mr. Rodriguez has also determined that for each year of the first five years the rule as proposed is in effect, the public benefits anticipated as a result of enforcing the rule will be:

Injured employees should benefit by the opportunity to challenge certifications of MMI and assigned impairment ratings that were invalid or flawed even if the deadline for such a dispute has otherwise passed.

Insurance carriers may be negatively impacted due to the ability of an injured employee to raise a dispute past the date of finality and succeed in the establishment of an increased impairment rating. Conversely, the insurance carrier may be benefit from the possibility of a disputed impairment rating being reduced.

The Commission should benefit from being able to continue longstanding practices of considering exceptions to the current 90-day finality rule.

Mr. Rodriguez has also determined that for each year of the first five years the rules as proposed are in effect, the requirements to comply with the rules will have the following affects on costs of system participants:

Claimants will probably not see either an increase or decrease in costs although they are less likely to be denied benefits based upon an incorrect certification or impairment rating.

Employers are not likely to see costs increase or decrease.

Health care providers are not likely to see costs increase or decrease.

Insurance carriers should not see an increase in costs because many of the proposals in the new rule are current Commission policy.

The requirements of these rules are not expected to affect costs for small businesses. The cost of compliance for small businesses as compared to large businesses will be identical and there is no anticipated adverse economic impact on small businesses or micro-businesses.

Comments on the proposal must be received by 5:00 p.m., October 25, 1999. You may comment via the Internet by accessing the Commission's website at *http://www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to RuleComments@twcc.state.tx.us or by mailing or delivering your comments to Donna Davila at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Due to the large number of rules proposed by the Commission at its September meeting, commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The Commission may not be able to respond to comments which cannot be linked to a particular proposed rule. Along with your comment, it is suggested that the reasoning for the comment also be included for Commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon action by the commissioners at the public meeting, the rule(s) as adopted may be revised from the rule(s) as proposed in whole or in part. Persons in support of the rule(s) as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be scheduled for sometime in November, at the Austin central office of the Commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 440-5690 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the Commission's website at *http://www.twcc.state.tx.us.*

The amendment is proposed under the following statutes: Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.010, which authorizes the Commission to adopt rules regarding claims service; Texas Labor Code, §408.025, which requires the Commission to specify by rule what reports a health care provider is required to file; Texas Labor Code, §408.121, which states that entitlement to IIBs begins on the day after MMI; Texas Labor Code, §408.122, which establishes eligibility for IIBs and provides for use of designated doctors when a dispute exists regarding the certification of MMI; Texas Labor Code, §408.123, which requires a doctor certifying MMI to file a report and which requires a certification of MMI and assignment of an impairment rating by a doctor other than the treating doctor, to be sent to the treating doctor who must indicate either agreement or disagreement with the certification and evaluation; Texas Labor Code, §408.124, which prescribes the guides to be used for assigning impairment ratings; Texas Labor Code, §408.125, which addresses use of a designated doctor to resolve impairment rating disputes.

This proposal affects the following statutes: Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §406.010, which authorizes the Commission to adopt rules regarding claims service; Texas Labor Code, §408.025, which requires the Commission to specify by rule what reports a health care provider is required to file; Texas Labor Code, §408.121, which states that entitlement to IIBs begins on the day after MMI; Texas Labor Code, §408.122, which establishes eligibility for IIBs and provides for use of designated doctors when a dispute exists regarding the certification of MMI; Texas Labor Code, §408.123, which requires a doctor certifying MMI to file a report and which requires a certification of MMI and assignment of an impairment rating by a doctor other than the treating doctor, to be sent to the treating doctor who must indicate either agreement or disagreement with the certification and evaluation; Texas Labor Code, §408.124, which prescribes the guides to be used for assigning impairment ratings; Texas Labor Code, §408.125, which addresses use of a designated doctor to resolve impairment rating disputes.

§130.5. Impairment Rating Disputes.

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

(e) The first impairment rating assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned unless the certification is invalid because of:

(1) a significant error;

(2) a clear mis-diagnosis or a previously undiagnosed medical condition; or

(3) prior improper or inadequate treatment of the injury which would render the certification of MMI invalid.

This 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 13, 1999.

TRD-9905920
Susan Cory
Assistant General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 707-5829

♦ ♦ ♦

Chapter 132. DEATH BENEFITS–DEATH AND BURIAL BENEFITS

28 TAC §132.10, §132.17

The Texas Workers' Compensation Commission (the Commission) proposes amendments to §132.10 concerning Payment of Death Benefits to the Subsequent Injury Fund and new §132.17 concerning Dispute of Eligibility.

The amendments are proposed to address indirect impacts of new legislation enacted by the 76th Texas Legislature. Specifically, through HB 2510 and HB 2512, the Legislature created additional opportunities for carriers to receive reimbursement from the Subsequent Injury Fund ("SIF") for overpayments of benefits pursuant to an order or decision that is overturned or modified by a higher authority. In addition, the bills created additional authority to issue interlocutory orders dealing with medical benefits. Given the additional focus on the Subsequent Injury Fund and the increases in requests for reimbursement that are likely to result from the new legislation, the Commission is proposing amendments to §132.10 for clarification to ensure that moneys owed by carriers to the SIF are more quickly deposited into the SIF. In addition, the Commission is proposing a new rule to address disputes of a claimant's eligibility to receive death benefits.

The Texas Register published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

Proposed Amendments to §132.10 - Payment of Death Benefits to the Subsequent Injury Fund.

The main changes in this rule are proposed to ensure that carriers more timely pay money owed to the SIF; to ensure that the SIF has enough information to determine that carriers are paying the correct amounts and to establish compensability or liability of the claim.

Proposed subsection (a) was amended to ensure that carriers have conducted an investigation of the claim, including attempts to identify potential legal beneficiaries other than the SIF, and to require carrier payment of death benefits to the SIF without order of the Commission. This clarifies existing statutory and process requirements. It also was amended to require the carrier to provide copies of the Employer's First Report of Injury and the Wage Statement with the payment records or summaries so that the administrator of the SIF can determine if the correct amount of money has been paid to the SIF.

Proposed new subsection (b) was added to address the situation where, after paying death benefits to legal beneficiaries, all beneficiaries other than the SIF become ineligible to receive death benefits. In such instances the carrier shall pay to the SIF the difference between the amount of death benefits that had been paid to the other beneficiaries and the 364 weeks of benefits. It also provides that the carrier must provide copies of claim documentation such as the Employer's First Report of Injury and the Wage Statement and payment summaries with the payment so that the SIF administrator can determine if the correct amount of money has been paid to the SIF.

Proposed new subsection (c) replaces old subsection (b) and has been added to specify when a payment under subsection (a) or new subsection (b) are due.

Proposed new subsection (d) ensures that the administrator of the SIF has access to information that will make it possible for the SIF to determine whether a carrier's denial of a claim should be disputed and if so, ensure that the SIF has the documentation to attempt to prove compensability of or liability for the injury.

Proposed new subsection (e) provides the SIF can pursue the issues of compensability or liability.

Proposed new subsection (f) replaces old subsection (c) and provides that the carrier can elect to commute the benefits it is to pay to the SIF or in the alternative, the Commission may order a carrier to commute the payments and pay in lump sum.

Current subsection (d) was renumbered as subsection (g) and was modified to provide more specificity regarding what must be included in a request for overpayment of death benefits to the SIF. The changes to this subsection involve providing more detail about how to request reimbursement including what documentation the carrier will be required to provide with the request. Most of the documentation being required is the same documentation that the SIF currently requires by procedure. The addition of the employer's reports is intended to ensure that the SIF can determine the amount of money the carrier is entitled to.

Current subsection (e) was renumbered as subsection (h) and was modified to include and updated statutory reference and for grammatical purposes.

Current subsection (f) was renumbered as subsection (i) and was amended to reference the carrier's required investigation of the claim including the search for potential beneficiaries.

Current subsection (g) was renumbered as subsection (j) and was modified to update the reference of renumbered (f) to (i).

Proposed new subsection (k) was added to clarify that the Subsequent Injury Fund is a potential beneficiary in any fatality and therefore is entitled to bring or enter into a dispute.

Proposed New §132.17 - Dispute of Eligibility.

The proposed new rule is proposed to provide clear guidance about when to dispute the eligibility of a potential beneficiary to receive death benefits; what to do when a carrier has denied compensability of or liability for a death prior to a potential beneficiary making a claim of entitlement; and addressing disputing a beneficiary's entitlement to death benefits after beginning payment of the benefits to the claimant.

Proposed subsection (a) is added to explain the effect that a dispute of eligibility of a claimant to receive death benefits has on the carrier's duty to pay those benefits. The requirements here parallel the requirements of §124.3 and state that in order to not have to pay any benefits that accrued prior to the dispute, the carrier must file the dispute within seven days of receiving the claim of entitlement.

Proposed subsection (b) has been added to ensure that the requirements of subsection (a) are not seen as requiring a carrier to pay benefits to a claimant when the carrier has denied the claim in accordance with §124.2 and §124.3.

Victor Rodriguez, Chief Financial Officer, has determined that for the first five-year period the proposed rules are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rules. Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed.

Mr. Rodriguez has also determined that for each year of the first five years the rules as proposed are in effect, the public benefits anticipated as a result of enforcing the rule will be:

Claimants should benefit from the clearer requirements relating to disputes and their affect on the payment of death benefits.

Carriers should benefit from the amendments by having a clearer process for requesting reimbursements which should result in more timely processing of requests and from the guidance in how to file disputes of eligibility.

The Commission/Subsequent Injury Fund should benefit because a higher percentage of requests for reimbursements which contain complete documentation will make it easier to process the requests and ensure that the amount of reimbursement ordered does not exceed the amount that the carrier is entitled to. In addition, the SIF should benefit from the change which clarifies the requirement that the carrier pay death benefits to the SIF without an order from the Commission to simplify the process of receiving the moneys that are owed to the SIF.

Mr. Rodriguez has also determined that for each year of the first five years the rules as proposed are in effect, the requirements to comply with the rules will have the following affects on costs of system participants:

Claimants will not see either an increase or decrease in costs.

Employers will not see either an increase or decrease in costs.

Health care providers will not see either an increase or decrease in costs.

Carriers should not see a significant increase in costs since many of the changes being proposed for these rules involve implementing by rule, statutory requirements and longstanding policies and procedures relating to the SIF. However, to the extent that carriers were refusing to pay money to the SIF and were not ordered by the Commission to pay the money, there may be an increase in their costs as they will now be required to pay the benefits without order. However, since the statute makes it clear that the carrier is required to pay death benefits to the SIF if there are no beneficiaries, the "increased costs" really come in the form of a loss of moneys that the carriers were not entitled to. Further, this requirement to pay the SIF without order of the Commission should help ensure the solvency of the SIF and likewise ensure that carriers are able to receive reimbursements for overpayments as provided in the statute.

The requirements of these rules are not expected to affect costs for small businesses except that by helping to reduce claim administration costs and penalty exposure, the employer's premiums may be positively affected. The cost of compliance for micro-business and small businesses as compared to large businesses will be identical and there is no anticipated adverse economic impact on small businesses or micro-businesses.

Comments on the proposal must be received by 5:00 p.m., October 25, 1999. You may comment via the Internet by accessing the Commission's website at *http://www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to RuleComments@twcc.state.tx.us or by mailing or delivering your comments to Donna Davila at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Due to the large number of rules proposed by the Commission at its September meeting, commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The Commission may not be able to respond to comments which cannot be linked to a particular proposed rule. Along with your comment, it is suggested that the reasoning for the comment also be included for Commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon action by the commissioners at the public meeting, the rule(s) as adopted may be revised from the rule(s) as proposed in whole or in part. Persons in support of the rule(s) as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be scheduled for sometime in November, at the Austin central office of the Commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 440-5690 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the Commission's website at *http://www.twcc.state.tx.us.*

The proposed amendment and new section are proposed under following statutes: Texas Labor Code, §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; Texas Labor Code, §402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form manner and procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §403.007, which allows carriers to seek reimbursement from the Subsequent Injury Fund if the carrier has overpaid death benefits to the SIF as a result of a eligible beneficiary claiming entitlement after the carrier has paid benefits to the SIF; Texas Labor Code, §406.010, which authorizes the Commission to adopt rules regarding claims service; Texas Labor Code, Chapter 408, Subchapter J, which concerns Death and Burial Benefits; Texas Labor Code, §410.032, as amended by the 76th Legislature, which provides a benefit review officer the authority to enter interlocutory orders; Texas Labor Code, §410.209 as added by the 76th Legislature, which provides for reimbursement of an insurance carrier for overpayment of benefits resulting from an interlocutory order; Texas Labor Code, §413.055, as added by the 76th Legislature, which authorizes the executive director, as provided by Commission rule, to enter an interlocutory order for the payment of medical benefits, provides for an insurance carrier to be reimbursed by the Subsequent Injury Fund for overpayment of benefits made under an interlocutory order, and provides for a hearing before the State Office of Administration Hearings when an order issued under this section is disputed.

The proposed amendment and new rule affect the following statutes: Texas Labor Code, §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; Texas Labor Code, §402.042, which authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form manner and procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; Texas Labor Code, §403.007, which allows carriers to seek reimbursement from the Subsequent

Injury Fund if the carrier has overpaid death benefits to the SIF as a result of a eligible beneficiary claiming entitlement after the carrier has paid benefits to the SIF; Texas Labor Code, §406.010, which authorizes the Commission to adopt rules regarding claims service; Texas Labor Code, Chapter 408, Subchapter J, which concerns Death and Burial Benefits; Texas Labor Code, §410.032, as amended by the 76th Legislature, which provides a benefit review officer the authority to enter interlocutory orders; Texas Labor Code, §410.209 as added by the 76th Legislature, which provides for reimbursement of an insurance carrier for overpayment of benefits resulting from an interlocutory order; Texas Labor Code, §413.055, as added by the 76th Legislature, which authorizes the executive director, as provided by Commission rule, to enter an interlocutory order for the payment of medical benefits, provides for an insurance carrier to be reimbursed by the Subsequent Injury Fund for overpayment of benefits made under an interlocutory order, and provides for a hearing before the State Office of Administration Hearings when an order issued under this section is disputed.

§132.10. Payment of Death Benefits to the Subsequent Injury Fund.

(a) If a compensable death occurs and the carrier's investigation, as described in §124.3 of this title (relating to Investigation of a Claim and Notice of Denial), has confirmed that the deceased employee has no legal beneficiaries, or if a claim for death benefits is not made in a timely manner, the insurance carrier shall, without order from the Commission, pay to the administrator of the[~~subsequent injury fund~~] Subsequent Injury Fund (SIF) an amount equal to 364 weeks of death benefits for deposit in the SIF [~~fund~~].

(b) If, after a carrier has paid death benefits to all legal beneficiaries, all legal beneficiaries cease to be eligible to receive death benefits prior to the carrier paying a full 364 weeks of benefits, the carrier shall, without order from the Commission, pay the remainder of the 364 weeks of death benefits to the administrator of the Subsequent Injury Fund. The remainder to be paid to the Subsequent Injury Fund shall be computed by subtracting the total amount paid, including the remarriage payment, from the 364 weeks of death benefits that the carrier is required to pay. This payment shall be accompanied by the Employer's First Report of Injury, the Wage Statement, a detailed payment record showing the dates of payments, the amounts of the payments, the payees, the periods of benefits paid, and any other documentation required by the Subsequent Injury Fund administrator.

(c) The payments required by subsections (a) and (b) shall be made within seven days of the latter of:

(1) the day that a death has been finally adjudicated as being compensable;

(2) the day that the carrier is found liable for death benefits;

(3) the 60th day after the date the carrier received written notice of the injury if no claims of beneficiary entitlement have been made;

(4) the day that a dispute of beneficiary entitlement has been finally adjudicated that the claimant is not entitled and there being no additional claims of entitlement; or

(5) the day that all previously eligible beneficiaries are no longer eligible for death benefits.

(d) If a carrier has disputed compensability of or liability for a death pursuant to §124.2 of this title (relating to Carrier Reporting and Notifications Requirements) and §124.3, and no claim of entitlement has been filed by a potential beneficiary by the 60th day after the date the carrier received written notice of the injury, the carrier shall provide to the Subsequent Injury Fund administrator within 14 days, copies of all reports, notices, witness statements, investigation notes, the Employer's First Report of Injury and any other documentation required by the Subsequent Injury Fund administrator relating to the death, the carrier's good faith effort to identify legal beneficiaries and/or the carrier's claim of disputed compensability.

(e) If a carrier has disputed compensability of or liability for a death and no claim of entitlement has been filed by a potential beneficiary by the 60th day after the date the carrier received written notice of the injury, the Subsequent Injury Fund may pursue the issue of compensability or liability through dispute resolution.

(f) The carrier may elect to commute the amount to be paid under subsections (a) and (b) in a lump sum payment. If the carrier does not elect to commute benefits, the Commission may order that the death benefits payable to the Subsequent Injury Fund be commuted to a lump sum payment. The amount of a commuted payment shall be discounted at the rate established under §401.023 of the Act compounded annually.

[~~(b) The payment required by subsection (a) of this section shall be paid by the insurance carrier, in a lump sum, on the first payment due date after the date that the order was provided by the commission to the insurance carrier's representative, which finds that the deceased employee has no legal beneficiaries or that no timely claims for death benefits had been made.~~]

[~~(c) The order to pay benefits to the subsequent injury fund shall specify the amount that the carrier shall pay to the fund. The amount of a commuted payment shall be discounted at the rate established under the Act, §1.04, compounded annually.~~]

(g) [~~(d)~~] If, after the [~~insurance~~] carrier has paid the death benefits to the Subsequent Injury Fund [~~subsequent injury fund~~], a final award of the Commission [~~commission~~] or the final judgment of a court of competent jurisdiction determines that a legal beneficiary is entitled to the death benefits, the [~~insurance~~] carrier shall pay benefits in accordance with award or order and request reimbursement for the amount overpaid to the SIF [~~fund~~]. The request shall be made in writing [~~and accompanied by a certified copy of the final award or final judgment.~~] and include:

(1) a claim-specific summary of the reason the carrier is seeking reimbursement;

(2) the Employer's First Report of Injury, the Wage Statement, a detailed payment record showing the dates of payments, the amounts of the payments, the payees, and the periods of benefits paid, as well as documentation that shows that the overpayment was unrecoupable;

(3) the name, address, and federal employer identification number of the payee for any reimbursement that may be due;

(4) a certified copy of the final award or final judgment;

(5) any other documentation required by the Subsequent Injury Fund administrator.

(h) [~~(e)~~] The Commission [~~commission~~] shall order the SIF [~~fund~~] to reimburse the insurance carrier when the documentation shows that the conditions set out in subsection (g) [~~(d)~~] of this section and §403.007 of the Act,[~~§2.26(d),~~] have been met. The order shall specify the amount the Subsequent Injury Fund shall pay to the [~~to be paid by the subsequent injury fund to the insurance~~] carrier.

(i) [~~(f)~~] If no claim for death benefits is filed with the Commission [~~commission~~] on or before the first anniversary of the death of the employee and the carrier's investigation has confirmed that the deceased has no legal beneficiaries, it shall be presumed, for the purpose of this section [~~rule~~] and §403.007 of the Act[~~, §2.26(d),~~] only, that no legal beneficiary survived the deceased employee.

(j) [~~(g)~~] The presumption created under subsection (i) [~~(f)~~] of this section does not apply against a minor beneficiary, or an incompetent beneficiary for whom no guardian has been appointed.

(k) The Subsequent Injury Fund as a potential beneficiary in the case of any fatality may bring or enter into any dispute as a party.

§132.17. Dispute of Eligibility.

(a) If an insurance carrier receives a claim of entitlement to death benefits, and the carrier believes that the claimant is not eligible to receive death benefits, the carrier shall file the notice of dispute of eligibility (notice of dispute) in the form and manner required by §124.2 of this title (relating to Carrier Reporting and Notification Requirements).

(1) If a carrier receives a claim of entitlement to death benefits, the carrier shall within seven days of receipt of the notice, either begin payment of death benefits in the amount prescribed by this title or file the notice of dispute.

(2) If, after the seventh day after receipt of a claim of entitlement to death benefits, the carrier disputes the claimant's eligibility status, the carrier is liable for and shall pay all benefits that had accrued and were payable prior to the date the carrier files the notice of dispute and only then is the carrier permitted to suspend payment of benefits.

(b) Nothing in this section requires a carrier to begin payment of death benefits if the carrier has previously filed the notice of denial of a claim (notice of denial) as provided in this §124.2 and §124.3 of this title (relating to Investigation of a Claim and Notice of Denial) prior to receipt of a claim of entitlement from the claimant. If the carrier has filed a notice of denial prior to receipt of a claim of entitlement, the carrier shall provide a copy of the previously filed notice of denial to the claimant within seven days of receipt of the claim of entitlement.

This 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 13, 1999.

TRD-9905921

Susan Cory

Assistant General Counsel

Texas Workers' Compensation Commission

Earliest possible date of adoption: October 24, 1999

For further information, please call: (512) 707-5829

♦ ♦ ♦

Chapter 134. BENEFITS-GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

The Texas Workers' Compensation Commission (the Commission) proposes amendments to §§134.6 and 134.800-134.803, concerning medical billing and reimbursement, and the simultaneous repeal of §134.4, concerning the definition of a consulting doctor. The amendments are proposed to clarify and update the processes by which injured employees may be reimbursed for travel expenses, health care providers submit medical bills, and insurance carriers and health care providers pay interest on late payments.

The *Texas Register* published text shows words proposed to be added to and deleted from the current text, and should be read to determine all proposed changes.

Section 134.6: Proposed language sets out deadlines for an injured employee to bill for and an insurance carrier to pay for travel expenses an injured employee incurs in the course of obtaining medical treatment for a compensable injury, and sets out procedures to follow in the event the insurance carrier reduces or denies payment for these expenses. It also implements a form for the injured employee to use for billing for travel expenses.

This will standardize the process an injured employees uses to submit travel expenses to an insurance carrier, making the process easier for injured employees. It also clarifies the requirements an injured employee must meet in order to receive reimbursement for travel expenses and clarifies what is included within "travel" and the reimbursement rate. Clarification will decrease misunderstanding, thus decrease disputes based on those misunderstandings.

Section 134.800: Proposed language updates statutory references to reflect the recodification to the Texas Labor Code and the adoption of the UB-92 as the required hospital billing form. It also incorporates the concept of reconsideration of bills for which an insurance carrier has reduced or denied payment. The reconsideration process will clarify and delineate what has been a vague initial step in requesting medical dispute resolution, and make it a prerequisite to requesting medical dispute resolution (see §133.304 and §133.305).

Section 134.801: Proposed language updates statutory references to reflect the recodification to the Texas Labor Code and includes instructions for sending an information copy of a medical bill to an injured employee, the injured employee's representative, and the Commission upon request.

The major changes to this rule are subsections (g)-(i), which are additions to clarify the circumstances under which an entity may submit medical bills for treatments and/or services that entity did not perform. The proposed language allows billing agencies to perform the strictly administrative service of submitting medical bills and/or collecting payment for a health care provider. However, it prohibits the practice whereby one entity pays a reduced fee to the health care provider that provided the treatments and/or services, then bills the workers' compensation insurance carrier a higher fee. This practice increases cost to the system without adding value to the system. In addition, the proposed new §134.801(h) allows a health care provider to have someone else submit a bill on the health care provider's behalf if services are provided as part of an interdisciplineary program, the bill is submitted in accordance with the Commission's fee guidelines, or if the treatment and/or services were provided under the direct supervision of another health care provider. One mandate from the 76th Legislature was to reduce medical costs. These paragraphs will help accomplish that mandate without adversely affecting the quality of medical care delivered to injured employees.

Subsection (j) adds a prohibition against submitting a medical bill to an injured employee for all or part of a fee. The Texas Labor Code prohibits a health care provider from pursuing a private claim against an injured employee. However, a trend has developed in which health care providers bill an injured employee for payments the insurance carrier has reduced or denied. This paragraph clarifies that this practice is unacceptable.

Subsection (k) adds a prohibition against submitting a medical bill to an employer for charges an insurance carrier has reduced, denied, or disputed. At an employer's request, a health care provider may submit bills for medical treatments and/or services to the employer rather than to the insurance carrier, at the health care provider's discretion. However a health care provider may not bill the employer for charges an insurance carrier has reduced, denied, or disputed. The health care provider must resolve these charges through the appropriate dispute resolution channels.

Section 134.802: Proposed language changes the time frame for carrier submission of medical bills to the Commission. The current time frame is 15 days from the date the insurance carrier makes final payment on a medical bill. The proposed time frame is 30 days from the date the insurance carrier takes final action on a medical bill. The longer time frame will allow insurance carriers more time to ensure that the data they submit is accurate and will comply with Commission requirements.

Section 134.803: Proposed language instructs insurance carriers and health care providers as to when and how to pay interest on late payments. The proposed language includes health care providers in the instruction to pay interest on late payments, and ties interest payments to §133.304, which specifies time frames for insurance carriers and health care providers to pay medical bills and refund requests, respectively. The proposed language delineates interest payments more clearly than the current rule by clarifying existing statutory, rule, and procedure requirements.

Victor Rodriguez, Chief Financial Officer, has determined that the proposed rule will have no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed.

Mr. Rodriguez has also determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule will be:

Injured employees: Easier and more timely reimbursement of travel expenses.

Employers: Clarification of the circumstances under which a health care provider may and may not submit a bill for medical treatments and/or services to an employer.

Health care providers: Clarification of billing procedures and receipt of interest on late payments.

Insurance carriers: More timely collection of interest on late refund payments, more timely payment of interest to health care providers, and extended time frame for submitting medical bills to the Commission.

There will be minimal anticipated economic costs to persons who are required to comply with the rules as proposed. Insurance carriers may incur initial start-up costs to reconfigure their computer systems to comply with stronger accountability. Section 134.803 requires that health care providers pay interest on late refunds for overpayment; however, health care providers can avoid these charges by timely paying the refund if it is due.

There is expected to be no adverse economic impact to small businesses and micro-businesses.

Comments on the proposal must be received by 5:00 p.m., October 25, 1999. You may comment via the Internet by accessing the Commission's website at *http://www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to *RuleComments@twcc.state.tx.us* or by mailing or delivering your comments to Donna Davila at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas, 78704-7491.

Due to the large number of rules proposed by the Commission at its September meeting, commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The Commission may not be able to respond to comments which cannot be linked to a particular proposed rule. Along with your comment, it is suggested that the reasoning for the comment also be included for Commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon action by the commissioners at the public meeting, the rule(s) as adopted may be revised from the rule(s) as proposed in whole or in part. Persons in support of the rule(s) as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be scheduled for sometime in December, at the Austin central office of the Commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 440-5690 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the Commission's website at *http://www.twcc.state.tx.us*.

Subchapter A. MEDICAL POLICIES

28 TAC §134.4

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

The repeal is proposed under the Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; §401.023, relating to calculation of interest; §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; §402.042, which authorizes the executive director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmis-

sion of information to the Commission; §406.010 which authorizes the Commission to adopt rules necessary to specify the requirements for carriers to provide claims service and establishes that a person commits a violation if the person violates a rule adopted under this section; §408.021(a), which states that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; §408.025, which requires the Commission to specify by rule what reports a health care provider is required to file; §408.027, which prescribes the time frames for payment of medical bills; §409.021, which requires insurance carriers to timely initiate or dispute compensation; §409.022, which requires a notice of refusal to specify the insurance carrier's grounds for disputing a claim and requires the reason to be reasonable; §413.002, which requires the Commission to monitor health care providers and insurance carriers to ensure compliance with Commission rules relating to health care, including medical policies and fee guidelines; §413.007, which requires the Commission to maintain a statewide database of medical charges, actual payments, and treatment protocols; §413.011, which requires the Commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; §413.012, which requires the Commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; §413.013, which requires the Commission to establish a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent, or retrospective review under the medical policies of the Commission to ensure the medical policies and guidelines are not exceeded, and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services requested or performed if authorization is required by the medical policies of the Commission; §413.017, which establishes medical services to be presumed reasonable when provided consistent with Commission medical policies and fee guidelines and when subject to prospective, concurrent, and retrospective review and are authorized by the insurance carrier; §413.019, which instructs insurance carriers to pay interest on late payments and health care providers to pay interest on late refunds; §413.031, which entitles a party, including a health care provider, to a review of a medical service for which authorization for payment has been denied; §415.002, which establishes an administrative violation for an insurance carrier: to unreasonably dispute the reasonableness and necessity of health care, or to violate a Commission rule or to fail to comply with the Act; and §415.003, which establishes an administrative violation for a health care provider: to administer improper, unreasonable, or medically unnecessary treatment or services, to violate a Commission rule, or to fail to comply with the Act.

The proposed repeal affects the following statutes: Texas Labor Code: §401.023, relating to calculation of interest; §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; §402.042, which authorizes the executive director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the Commission; §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; §406.010 which authorizes the Commission to adopt rules necessary to specify the requirements for carriers to provide claims service and establishes that a person commits a violation if the person violates a rule adopted under this section; §408.021(a), which states that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; §408.025, which requires the Commission to specify by rule what reports a health care provider is required to file; §408.027, which prescribes the time frames for payment of medical bills; §409.021, which requires insurance carriers to timely initiate or dispute compensation; §409.022, which requires a notice of refusal to specify the insurance carrier's grounds for disputing a claim and requires the reason to be reasonable; §413.002, which requires the Commission to monitor health care providers and insurance carriers to ensure compliance with Commission rules relating to health care, including medical policies and fee guidelines; §413.007, which requires the Commission to maintain a statewide database of medical charges, actual payments, and treatment protocols; §413.011, which requires the Commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; §413.012, which requires the Commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; §413.013, which requires the Commission to establish a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent, or retrospective review under the medical policies of the Commission to ensure the medical policies and guidelines are not exceeded, and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services requested or performed if authorization is required by the medical policies of the Commission; §413.017, which establishes medical services to be presumed reasonable when provided consistent with Commission medical policies and fee guidelines and when subject to prospective, concurrent, and retrospective review and are authorized by the insurance carrier; §413.019, which instructs insurance carriers to pay interest on late payments and health care providers to pay interest on late refunds; §413.031, which entitles a party, including a health care provider, to a review of a medical service for which authorization for payment has been denied; §415.002, which establishes an administrative violation for an insurance carrier: to unreasonably dispute the reasonableness and necessity of health care, or to violate a Commission rule or to fail to comply with the Act; and §415.003, which establishes an administrative violation for a health care provider: to administer improper, unreasonable, or medically unnecessary treatment or services, to violate a Commission rule, or to fail to comply with the Act.

§134.4. Definition of Consulting Doctor.

This 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 13, 1999.

TRD-9905915
Susan Cory
Assistant General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 707-5829

♦ ♦ ♦

28 TAC §134.6

The amendments are proposed under the Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; §401.023, relating to calculation of interest; §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; §402.042, which authorizes the executive director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the Commission; §406.010 which authorizes the Commission to adopt rules necessary to specify the requirements for carriers to provide claims service and establishes that a person commits a violation if the person violates a rule adopted under this section; §408.021(a), which states that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; §408.025, which requires the Commission to specify by rule what reports a health care provider is required to file; §408.027, which prescribes the time frames for payment of medical bills; §409.021, which requires insurance carriers to timely initiate or dispute compensation; §409.022, which requires a notice of refusal to specify the insurance carrier's grounds for disputing a claim and requires the reason to be reasonable; §413.002, which requires the Commission to monitor health care providers and insurance carriers to ensure compliance with Commission rules relating to health care, including medical policies and fee guidelines; §413.007, which requires the Commission to maintain a statewide database of medical charges, actual payments, and treatment protocols; §413.011, which requires the Commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; §413.012, which requires the Commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; §413.013, which requires the Commission to establish a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent, or retrospective review under the medical policies of the Commission to ensure the medical policies and guidelines are not exceeded, and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services requested or performed if authorization is required by the medical policies of the Commission; §413.017, which establishes medical services to be presumed reasonable when provided consistent with Commission medical policies and fee guidelines and when subject to prospective, concurrent, and retrospective review and are authorized by the insurance carrier; §413.019, which instructs insurance carriers to pay interest on late payments and health care providers to pay interest on late refunds; §413.031, which entitles a party, including a health care provider, to a review of a medical service for which authorization for payment has been denied; §415.002, which establishes an administrative violation for an insurance carrier: to unreasonably dispute the reasonableness and necessity of health care, or to violate a Commission rule or to fail to comply with the Act; and §415.003, which establishes an administrative violation for a health care provider: to administer improper, unreasonable, or medically unnecessary treatment or services, to violate a Commission rule, or to fail to comply with the Act.

The proposed amendments affect the following statutes: Texas Labor Code: §401.023, relating to calculation of interest; §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; §402.042, which authorizes the executive director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the Commission; §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; §406.010 which authorizes the Commission to adopt rules necessary to specify the requirements for carriers to provide claims service and establishes that a person commits a violation if the person violates a rule adopted under this section; §408.021(a), which states that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; §408.025, which requires the Commission to specify by rule what reports a health care provider is required to file; §408.027, which prescribes the time frames for payment of medical bills; §409.021, which requires insurance carriers to timely initiate or dispute compensation; §409.022, which requires a notice of refusal to specify the insurance carrier's grounds for disputing a claim and requires the reason to be reasonable; §413.002, which requires the Commission to monitor health care providers and insurance carriers to ensure compliance with Commission rules relating to health care, including medical policies and fee guidelines; §413.007, which requires the Commission to maintain a statewide database of medical charges, actual payments, and treatment protocols; §413.011, which requires the Commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; §413.012, which requires the Commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; §413.013, which requires the Commission to establish a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent, or retrospective review under the medical policies of the Commission to ensure the medical policies and guidelines are not exceeded, and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services requested or performed if authorization is required by the medical policies of the Commission; §413.017, which establishes medical services to be presumed reasonable when provided consistent with Commission medical policies and fee guidelines and when subject to prospective, concurrent, and retrospective review and are authorized by the insurance carrier; §413.019, which instructs insurance carriers to pay interest on late payments and health care providers to pay interest on late refunds; §413.031, which entitles a party, including a health care provider, to a review of a medical service for which authorization for payment has been denied; §415.002, which establishes an administrative violation for an insurance carrier: to unreasonably dispute the reasonableness and necessity of health care, or to violate a Commission rule or to fail to comply with the Act; and §415.003, which establishes an administrative violation for a health care provider: to administer improper, unreasonable, or medically

unnecessary treatment or services, to violate a Commission rule, or to fail to comply with the Act.

§134.6. Travel Expenses Incurred by the Injured Employee.

(a) When it becomes reasonably necessary for an injured employee to travel in order to obtain appropriate and necessary medical care for the injured employee's compensable injury, the injured employee may request reimbursement from the insurance carrier by submitting a request to the carrier in the form, format, and manner required by the Commission. [~~reasonable cost shall be paid by the insurance carrier. The reimbursement shall be based on the following guidelines:~~]

[~~(1) the mileage shall be greater than 20 miles, one way, to entitle the injured employee to travel reimbursement;~~]

[~~(2) reimbursement shall also be paid based upon the current travel rate for state employees. The shortest route between two points shall be used; and~~]

[~~(3) when travel involves food and lodging, these items will be based upon the current rate for state employees.~~]

(b) An injured employee is entitled to reimbursement for travel expenses only if:

(1) medical treatment for the compensable injury is not reasonably available within 20 miles of the injured employee's residence;

(2) the distance traveled to secure medical treatment is greater than 20 miles, one-way; and

(3) the injured employee submits the request to the insurance carrier in the form and manner prescribed by the Commission within one year of the date the injured employee incurred the expenses.

(c) The insurance carrier shall reimburse the injured employee based on the current travel rate for state employees, using the shortest route between the injured employee's home and the health care provider. When travel expenses incurred by the injured employee reasonably include food and lodging, the carrier shall reimburse for the actual expenses not to exceed the current rate for state employees.

[~~(b) When emergency ambulance service is required, however, the insurance carrier shall pay at a fair and reasonable rate for ambulance service, until such time as fee guidelines are established by the commission.~~]

[~~(c) An injured employee seeking reimbursement for travel expenses shall submit to the carrier a written request itemizing the mileage traveled and the expenses incurred. All receipts pertinent to the travel shall be attached to the request.~~]

(d) The insurance carrier shall make appropriate payment to the injured employee, or notify the injured employee of a reduction or denial of the payment within 45 days of receipt of the request for reimbursement from the injured employee. If the insurance carrier does not reimburse the full amount requested, partial payment or denial of payment must include a full and complete explanation of the reason(s) the insurance carrier reduced or denied the payment and must inform the injured employee of his or her right to request a benefit review conference in accordance with §141.1 of this title (relating to Requesting and Setting a Benefit Review Conference). The statement must include sufficient claim-specific substantive information to enable the employee to understand the insurance carrier's position and/or action on the claim. A generic statement that simply states the carrier's position with a phrase such as "not entitled to reimbursement" or a similar phrase with no further description of the factual basis for the action does not satisfy the requirements of this section.

[~~(d) If the employee pays more for food and lodging than the current rate for state employees, the carrier may reduce the reimbursement to that allowed for state employees.~~]

[~~(e) Disputes relating to the expense of travel for medical care shall be resolved through benefit review conferences, benefit contested case hearings, appeals to the appeals panel and arbitration.~~]

This 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 13, 1999.

TRD-9905914
Susan Cory
Assistant General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 707-5829

♦ ♦ ♦

Subchapter I. PROVIDER BILLING PROCEDURES

28 TAC §§134.800-134.803

The amendments are proposed under the Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; §401.023, relating to calculation of interest; §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; §402.042, which authorizes the executive director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the Commission; §406.010 which authorizes the Commission to adopt rules necessary to specify the requirements for carriers to provide claims service and establishes that a person commits a violation if the person violates a rule adopted under this section; §408.021(a), which states that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; §408.025, which requires the Commission to specify by rule what reports a health care provider is required to file; §408.027, which prescribes the time frames for payment of medical bills; §409.021, which requires insurance carriers to timely initiate or dispute compensation; §409.022, which requires a notice of refusal to specify the insurance carrier's grounds for disputing a claim and requires the reason to be reasonable; §413.002, which requires the Commission to monitor health care providers and insurance carriers to ensure compliance with Commission rules relating to health care, including medical policies and fee guidelines; §413.007, which requires the Commission to maintain a statewide database of medical charges, actual payments, and treatment protocols; §413.011, which requires the Commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; §413.012, which requires the Commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; §413.013, which requires

the Commission to establish a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent, or retrospective review under the medical policies of the Commission to ensure the medical policies and guidelines are not exceeded, and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services requested or performed if authorization is required by the medical policies of the Commission; §413.017, which establishes medical services to be presumed reasonable when provided consistent with Commission medical policies and fee guidelines and when subject to prospective, concurrent, and retrospective review and are authorized by the insurance carrier; §413.019, which instructs insurance carriers to pay interest on late payments and health care providers to pay interest on late refunds; §413.031, which entitles a party, including a health care provider, to a review of a medical service for which authorization for payment has been denied; §415.002, which establishes an administrative violation for an insurance carrier: to unreasonably dispute the reasonableness and necessity of health care, or to violate a Commission rule or to fail to comply with the Act; and §415.003, which establishes an administrative violation for a health care provider: to administer improper, unreasonable, or medically unnecessary treatment or services, to violate a Commission rule, or to fail to comply with the Act.

The proposed amendments affect the following statutes: Texas Labor Code: §401.023, relating to calculation of interest; §401.024, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; §402.042, which authorizes the executive director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the Commission; §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; §406.010 which authorizes the Commission to adopt rules necessary to specify the requirements for carriers to provide claims service and establishes that a person commits a violation if the person violates a rule adopted under this section; §408.021(a), which states that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; §408.025, which requires the Commission to specify by rule what reports a health care provider is required to file; §408.027, which prescribes the time frames for payment of medical bills; §409.021, which requires insurance carriers to timely initiate or dispute compensation; §409.022, which requires a notice of refusal to specify the insurance carrier's grounds for disputing a claim and requires the reason to be reasonable; §413.002, which requires the Commission to monitor health care providers and insurance carriers to ensure compliance with Commission rules relating to health care, including medical policies and fee guidelines; §413.007, which requires the Commission to maintain a statewide database of medical charges, actual payments, and treatment protocols; §413.011, which requires the Commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control; §413.012, which requires the Commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; §413.013, which requires the Commission to establish a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent, or retrospective review under the medical policies of the Commission to ensure the medical policies and guidelines are not exceeded, and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services requested or performed if authorization is required by the medical policies of the Commission; §413.017, which establishes medical services to be presumed reasonable when provided consistent with Commission medical policies and fee guidelines and when subject to prospective, concurrent, and retrospective review and are authorized by the insurance carrier; §413.019, which instructs insurance carriers to pay interest on late payments and health care providers to pay interest on late refunds; §413.031, which entitles a party, including a health care provider, to a review of a medical service for which authorization for payment has been denied; §415.002, which establishes an administrative violation for an insurance carrier: to unreasonably dispute the reasonableness and necessity of health care, or to violate a Commission rule or to fail to comply with the Act; and §415.003, which establishes an administrative violation for a health care provider: to administer improper, unreasonable, or medically unnecessary treatment or services, to violate a Commission rule, or to fail to comply with the Act.

§134.800. Required Billing Forms and Information.

(a) Except as provided by subsection (f) of this section, [~~medical bills from all~~] health care providers shall submit medical bills [~~be submitted~~] for payment on the forms prescribed in this section[~~,~~] and prepared according to Commission-prescribed [~~the commission prescribed~~] instructions [~~accompanying each form~~].

(b) Except as provided in subsections (c) and (d) of this section, all health care providers, as defined in §401.011 of the Texas Labor Code [~~Workers' Compensation Act (the Act), Article 8308-1.03~~], shall submit medical bills using the national standard HCFA-1500 health insurance claim form, prepared according to Commission-prescribed [~~the commission prescribed~~] instructions [~~accompanying the form~~].

(c) Hospitals, including hospital-based emergency centers and ambulatory surgical centers, shall [~~include the revenue code and~~] submit bills using the UB-92 [~~UB-82~~] billing form for institution services and the national standard HCFA-1500 health insurance claim form for professional services, prepared according to Commission-prescribed [~~the commission prescribed~~] instructions [~~accompanying~~] for each form.

(d) Pharmacists shall submit bills using the Commission-prescribed[~~Forms~~] form TWCC-66a or TWCC-66c, Statement for Pharmacy Services, prepared according to Commission-prescribed [~~the commission prescribed~~] instructions [~~accompanying each form~~].

~~[(e) Rebilling by the health care provider shall include identical codes and charges as reflected on the original bill. The bill shall be clearly marked "rebill" and shall not include charges for new services.]~~

(e) [~~(f)~~] Health care providers not specifically noted in the preceding subsections of this section shall prepare and submit medical bills in a form and manner prescribed by the Commission [~~commission~~].

(f) Health care providers may submit medical bills by facsimile or mutually agreed upon electronic transmission unless the bill and/or supporting documentation cannot be sent by those media,

in which case the health care provider shall send the documentation by mail or personal delivery.

(g) The Medical Review Division may [division of medical review will] order the health care provider to reimburse a carrier when the carrier pays the health care provider [is paid] in excess of the amount allowed by the appropriate Commission [medical policies and] fee guideline.[guidelines established. A health care provider may request a review of those services and charges under the Act, §8.26, no later than 10 days after the division of medical review orders the reimbursement.]

§134.801. Submitting Medical Bills for Payment[: Information Copies].

(a) [Submitting bills for payment.] The health care provider shall submit all medical bills to the insurance carrier unless the injured employee's [. The provider may elect to submit bills to an] employer [who] has indicated a willingness to pay [them.] the medical bill(s), and the health care provider prefers to bill the employer. If the health care provider bills the employer the health care provider must submit[is billed,] a copy of the bill [submitted] to the carrier and shall state the following in bold type: "THIS IS ONLY AN INFORMATION COPY, IT IS NOT A REQUEST FOR PAYMENT."

(b) [Waiver of rights.] A health care provider who elects to submit medical bills to an employer waives, for the duration of the election period, the rights to:

(1) prompt payment, as provided by §408.027 of the Texas Labor Code [Workers' Compensation Commission Act (the Act), Article 8308-4.68];

(2) interest for delayed payment as provided by §413.019 of the Texas Labor Code [Act, Article 8308-8.27]; and

(3) Commission-provided [commission-provided] medical dispute resolution as provided by §413.031 of the Texas Labor Code [Act, Article 8308-8.26].

(c) [Time for submission - health care practitioners.] A health [Health] care practitioner[practitioners] (as defined in §401.011 of the Texas Labor Code [Act, §1.03(22)]) shall submit [to the carrier a properly completed bill] a complete medical bill as defined in §133.1 of this title (relating to Definitions for Chapter 133, Benefits-Medical Benefits) to the insurance carrier within 15 days after the initial service or treatment date. A health care practitioner shall submit subsequent medical bills [Subsequent billing shall be] at least monthly for subsequent services and treatments rendered.

(d) For inpatient services, a health care facility (as defined in §401.011 of the Texas Labor Code shall submit a complete medical bill as defined in §133.1 of this title (relating to Definitions for Chapter 133, Benefits-Medical Benefits) to the insurance carrier:

(1) within 10 days after discharge, if the length of stay is 30 days or less, or

(2) within 45 days of admission, if the length of stay is greater than 30 days, the facility shall submit an interim bill and shall submit subsequent bills at least every 30 days until the injured employee is discharged . The health care facility shall submit the final medical bill within 10 days of discharge.

[(d) Time for submission-health care facilities. For inpatient services, health care facilities (as defined in the Act, §1.03(21)) shall submit bills to the insurance carrier within 10 days after discharge, if the confinement is 30 days or less. If the confinement is greater than 30 days, the facilities shall submit an interim bill within 45 days of admission and then at least every 30 days until discharge. The final bill shall be submitted within 10 days of discharge. For outpatient services, bills shall be submitted at least monthly to the insurance carrier.]

(e) For outpatient services, the health care facility shall submit the complete medical bill(s) as defined in §133.1 of this title (relating to Definitions for Chapter 133, Benefits-Medical Benefits) to the insurance carrier at least monthly.

(f) A health care provider shall not submit a medical bill later than the first day of the eleventh month after the date the services are provided.

(g) [(e) Providing information copies of bills. Upon request, the provider shall send, at no cost, a copy of the bill, as submitted for payment, to the employee, the employee's representative, or the commission. Upon request the provider shall also submit a copy of the bill, as submitted for payment to the employer, and may charge the employer the fee for copies of reports as described in §133.106(f)(3) of this title (relating to Fair and Reasonable Fees for Required Reports and Records).] If the injured employee, the employee's representative, or the Commission requests an information copy of the medical bill, the health care provider shall send, at no cost, a copy of the medical bill indicating the identical codes and charges from the original medical bill. Information copies shall state the following in bold type: "THIS IS ONLY AN INFORMATION COPY, IT IS NOT A REQUEST FOR PAYMENT."

(h) The health care provider that provided the treatment(s) and/or service(s) must submit its own bill, unless:

(1) the health care provider employs a billing service to perform the solely administrative function of submitting bills for the health care provider,

(2) the health care provider is providing treatment(s) and/or service(s) as part of an interdisciplinary program, in accordance with the Commission fee guidelines in effect for the dates of service,

(3) the health care provider is submitting a bill in accordance with the pathology ground rules of Commission fee guidelines in effect for the dates of service, or

(4) the treatment(s) and/or service(s) was provided under the direct supervision of another health care provider, in which case the supervising health care provider shall bill.

(i) A health care provider or other entity, except as described in subsection (g) of this section, may not submit a bill for treatment(s) and/or service(s) the health care provider did not provide.

(j) Any entity, including a health care provider, that submits a bill for a health care provider must:

(1) submit the bill for an amount that does not exceed the health care provider's usual and customary charge for the treatment(s) and/or service(s) provided in accordance with §413.011 of the Texas Labor Code,

(2) submit the bill in the name and including the license number of the licensed health care provider that provided the treatment(s) and/or service(s) or that provided direct supervision of an unlicenced individual that provided the treatment(s) and/or service(s), and

(3) remit to the health care provider that provided the treatment(s) and/or service(s) the full amount that the insurance carrier reimburses for the treatment(s) and/or service(s).

(k) A health care provider shall not submit a medical bill to an injured employee for all or part of the charge for any treatment(s)

and/or service(s), except as an information copy, or in accordance with §413.042 of the Texas Labor Code. A health care provider shall be deemed to be pursuing a private claim against an injured employee if the health care provider sends a medical bill or account statement to the employee that:

(1) does not clearly state that it is an information copy by including the following in bold type: "THIS IS ONLY AN INFORMATION COPY, IT IS NOT A REQUEST FOR PAYMENT" ; and/or

(2) includes a statement that requests payment by asking for remittance of an amount, or that includes something similar to "amount due".

(l) An employer, other than a self-insured employer, is not liable for any part of the cost of medical benefits provided to an injured employee, even if a claim is finally adjudicated non-compensable, or the insurance carrier has denied, reduced, or disputed a medical bill. A health care provider shall not submit a medical bill to an employer for charges an insurance carrier has reduced, denied, or disputed. A health care provider shall be deemed to be pursuing a private claim against an injured employee if the health care provider sends a medical bill or account statement to the employee that:

(1) does not clearly state that it is an information copy by including the following in bold type: "THIS IS ONLY AN INFORMATION COPY, IT IS NOT A REQUEST FOR PAYMENT"; and/or

(2) includes a statement that requests payment by asking for remittance of an amount, or that includes something similar to "amount due".

§134.802. Insurance Carrier's Submission of Medical Bills to the Commission.

(a) Within 30[~~15~~] days after a carrier takes final action on a medical bill in accordance with §133.304 of this title (relating to Notice of Medical Payment Dispute), [~~final payment of an original bill from a health care provider, or reimbursement to any person who has paid a health care provider's bill, insurance~~] the carrier [~~carriers~~] shall, except for the Statement of Pharmacy Services, forms [~~Forms~~] TWCC-66a and TWCC-66c, submit medical billing data[~~a copy of the bill~~] to the Medical Review Division at the Commission's central office[~~commission~~] in Austin , Texas.

(b) [~~Effective January 1, 1993, each~~] Insurance carriers[~~insurance carrier~~] shall submit medical billing data[~~information~~] electronically in the form and format prescribed by the Commission [~~commission~~].

(c) The Commission [~~commission~~] shall prescribe the form, format, and content of the required medical billing data submission [~~using generally available instruction sheets~~].

§134.803. Calculating Interest for Late Payment on Medical Bills and Refunds.

(a) Insurance carriers shall pay interest on medical bills paid on or after the 60th day after the insurance carrier originally received the complete medical bill, in accordance with §133.304 of this title (relating to Medical Payments and Denials). Health care providers shall pay interest on insurance carrier requests for refunds paid later than the 60th day after the date the health care provider received the request for refund, in accordance with §133.304 of this title (relating to Medical Payments and Denials). The rate of interest will be set quarterly and will be calculated on a per annum basis according to the Texas Labor Code, §401.023.[~~Health care providers shall earn interest on a fee or charge which is consistent with the medical policies and fee guidelines as established by the commission. In order to earn interest on fees or charges, the health care provider shall submit bills consistent with the requirements described in §134.800 of this title (relating to Health Care Provider Billing). The rate will be set quarterly and will be calculated on a per annum basis according to the Texas Workers' Compensation Act (Act), §1.04.~~]

(b) The method used to calculate interest follows:

(1) multiply the rate of interest by the amount in question (to determine the [~~create~~] annual amount of interest);

(2) divide the annual amount of interest by 365 (to determine the [~~create~~] daily interest amount); then

(3) multiply the daily interest amount by the number of days of interest to which the recipient is entitled under §133.304 of this title (Relating to Payments and Denials of Medical Bills) [~~in excess of 60 days~~].

(c) If the period for which interest is required to be paid crosses more than one quarter and the interest rate changes from one quarter to the next, the payer shall apportion the number of days of interest owed for each quarter and shall pay interest on those days in accordance with the interest rate for the respective quarter.

(d) [~~(c) The rate of interest will be determined according to the rate established by the commission under the Act, §1.04, from the 60th day after the health care provider submits the bill to the insurance carrier until paid.~~] The percentage of interest for each quarter may be obtained by contacting the [~~financial division~~] central office of the Commission [~~of the commission~~] in Austin, Texas.

This 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 3, 1999.

TRD-9905913
Susan Cory
Assistant General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 707-5829

♦ ♦ ♦

Chapter 156. REPRESENTATION OF PARTIES BEFORE THE AGENCY–CARRIER'S AUSTIN REPRESENTATION

28 TAC §156.1

The Texas Workers' Compensation Commission (the Commission) proposes amendments to §156.1 concerning Carrier's Austin Representative. The amendments are proposed to address the issue of the delivery of the carrier's Austin representative designation to the Commission in accordance with House Bill 2511, 76th Texas Legislature, 1999.

The *Texas Register* published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

Proposed subsection (b) expands the options for providing information to the Commission regarding the designation of a carrier's Austin representative by removing the requirement for the notification be delivered to the Commission and allowing the

Commission to prescribe the form, manner, and/or procedure for notification. This will allow the use of electronic transmission and facsimile transmission when these methods are available.

It is proposed that subsection (e) be deleted to remove specific language regarding enforcement and violations. Removal of the enforcement language is not intended to limit the Commission's authority to take enforcement action for violations of this or any other rule. Rather, the existing language did not address all of the methods of enforcement that the Commission has at its disposal for these violations. The Commission's authority to enforce the statute and rules is granted in multiple provisions of the statute and duplicate language in rules is redundant.

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

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed.

Mr. Rodriquez has also determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule will be:

Compliance with the requirement of the Texas Labor Code, §401.024 as added by the 76th legislature.

Insurance carriers should benefit by being able to timely and efficiently provide notice of their designated Austin Carrier Representative to the Commission.

There will be no anticipated economic costs to persons who are required to comply with the rule as proposed because the requirements for insurance carriers to designate an Austin representative would not change only the manner in which the Commission is to receive the notice of the designation would be broadened.

There will be no adverse economic impact on small businesses or micro-businesses.

Comments on the proposal must be received by 5:00 p.m., October 25, 1999. You may comment via the Internet by accessing the Commission's website at *http://www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to RuleComments@twcc.state.tx.us or by mailing or delivering your comments to Donna Davila at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas, 78704-7491.

Due to the large number of rules proposed by the Commission at its September meeting, commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The Commission may not be able to respond to comments which cannot be linked to a particular proposed rule. Along with your comment, it is suggested that the reasoning for the comment also be included for Commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon action by the commissioners at the public meeting, the rule(s) as adopted may be revised from the rule(s) as proposed in whole or in part. Persons in support of the rule(s) as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be scheduled for sometime in December, at the Austin central office of the Commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 440-5690 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the Commission's website at *http://www.twcc.state.tx.us*.

The amendment is proposed under the Texas Labor Code, §401.024, as added by the 76th Texas Legislature, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; Texas Labor Code, §402.042(b)(11) which authorizes the Executive Director to prescribe the form, manner and/or procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; and Texas Labor Code, §406.011, which authorized the Commission by rule to require insurance carriers to designate a representative in Austin to act as the insurance carrier's agent before the Commission in Austin.

The proposed amendment affects the following statutes: Texas Labor Code, §401.024, as added by the 76th Texas Legislature, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; Texas Labor Code, §402.042(b)(11) which authorizes the Executive Director to prescribe the form, manner and/or procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; and Texas Labor Code, §406.009(c), as amended by the 76th Texas Legislature, which requires the Commission to collect and maintain the information required under this subchapter and monitor compliance with the requirements.

§156.1. Carrier's Austin Representative

(a) Each insurance carrier shall designate a person in Austin, Travis County, Texas as its representative to the commission, to act as agent for receiving notice from the commission.

(b) The designation required by this section shall be made in the form and manner prescribed by the Commission [~~in writing, delivered to the commission at its Austin office,~~] and contain the representative's name, address, [~~and~~] telephone number , facsimile number and e-mail address.

(c) Any notice from the commission, sent to the designated representative's Austin address, is notice from the commission to the insurance carrier.

(d) A person designated under this rule continues as agent for the insurance carrier until 30 days after the commission receives notice that the insurance carrier designates another representative.

[~~(e) An insurance carrier that fails to comply with this rule may be assessed an administrative penalty not to exceed $1,000 for each day of noncompliance.~~]

This 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 13, 1999.

TRD-9905922
Susan Cory
Assistant General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 707-5829

♦ ♦ ♦

Chapter 160. WORKERS' HEALTH AND SAFETY–GENERAL PROVISIONS

28 TAC §160.2

The Texas Workers' Compensation Commission (the Commission) proposes amendments to rule §160.2 concerning Non-Subscribing Employer's Report of Injury. The amendments are proposed to expand the methods of filing options for non-subscribing employers reporting injuries, illnesses and fatalities to the Commission in accordance with House Bill 2511 of the 76th Texas Legislature.

The *Texas Register* published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

Proposed amendments to §160.2(a) clarify where the non-subscribing employer's report of injury should be filed.

Proposed amendments to §160.2(b) provide consistent language with other rules regarding the form and manner for submission of reports of injuries, illness or fatalities to the Commission. This language will allow greater flexibility in the method of sending reports to the Commission.

Proposed amendments to §160.2(c) clarify where a report should be filed and when a report is considered filed with the Commission and deletes the requirement that the report be personally delivered or postmarked.

Section 160.2(d) is proposed to be deleted to remove specific language regarding enforcement and violations. Removal of the enforcement language is not intended to limit the Commission's authority to take enforcement action for violations of this or any other rule. Rather, the existing language did not address all of the methods of enforcement that the Commission has at its disposal for these violations. The Commission's authority to enforce the statute and rules is granted in multiple provisions of the statute and duplicate language in rules is redundant.

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

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed.

Mr. Rodriguez has also determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule will be:

Compliance with the requirement of the Texas Labor Code, §411.032.

More timely communication between non-subscribing employers and the Commission through the use of electronic methods of transmission when it becomes available.

Non-subscribing employers will be allowed greater flexibility to use of facsimile or other electronic means, as prescribed, to submit non-subscriber reports of injuries, illness or fatalities to the Commission. This should be faster and more convenient for employers.

There will be no anticipated economic costs to persons who are required to comply with the rule as proposed. The proposed amendments will have no adverse economic effect on small businesses or micro-businesses.

Comments on the proposal must be received by 5:00 p.m., October 25, 1999. You may comment via the Internet by accessing the Commission's website at *http://www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to RuleComments@twcc.state.tx.us or by mailing or delivering your comments to Donna Davila at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Due to the large number of rules proposed by the Commission at its September meeting, commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The Commission may not be able to respond to comments which cannot be linked to a particular proposed rule. Along with your comment, it is suggested that the reasoning for the comment also be included for Commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon action by the commissioners at the public meeting, the rule(s) as adopted may be revised from the rule(s) as proposed in whole or in part. Persons in support of the rule(s) as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be scheduled for sometime in December, at the Austin central office of the Commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 440-5690 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the Commission's website at *http://www.twcc.state.tx.us.*

The amendment is proposed under Texas Labor Code, §406.009(c), as amended by the 76th Texas Legislature, which requires the Commission to collect and maintain the information required under this subchapter and monitor compliance with the requirements; Texas Labor Code, §401.024, as amended by the 76th Texas Legislature, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; Texas Labor Code,§411.032 which requires employers to report on-the-job injuries and occupational diseases; Texas Labor Code, §402.042(b)(11) which authorizes the Executive

Director to prescribe the form, manner and/or procedure for transmission of information to the Commission; and Texas Labor Code, §402.061 which authorizes the Commission to adopt rules necessary to administer the Act.

The proposed amendment affects the following statutes: Texas Labor Code, §406.009(c), as amended by the 76th Texas Legislature, which requires the Commission to collect and maintain the information required under this subchapter and monitor compliance with the requirements; Texas Labor Code, §401.024, as amended by the 76th Texas Legislature, which provides the Commission the authority to require use of facsimile or other electronic means to transmit information in the system; Texas Labor Code §411.032, which requires employers to report on-the-job injuries and occupational diseases; Texas Labor Code, §402.042(b)(11), which authorizes the Executive Director to prescribe the form, manner and/or procedure for transmission of information to the Commission; Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act.

§160.2. Non-Subscribing Employer's Report of Injury.

(a) An employer, as defined by the Texas Labor Code, §411.001(2), who is a non-subscriber and employs five or more employees not exempt from workers' compensation insurance coverage, shall file with the Commission a written report for each death, each occupational disease, and each injury that results in more than one day's absence from work for the injured employee.

(b) The report of injury shall be filed in the form, format, and manner prescribed by the commission.

(c) A report of all injuries that have occurred during a calendar month shall be filed with the commission not later than the seventh day of the following month. For purposes of this section, a report is filed when received by [~~personally delivered or postmarked. All reports will be filed with~~] the commission at its central office in [~~Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35,~~] Austin, Texas [~~78704-7491~~].

~~[(d) Failure to file a report as required by this section, without good cause, is a class D administrative violation subject to a penalty not to exceed $500 under the Texas Labor Code, §411.023 or up to $10,000 pursuant to Texas Labor Code, §415.021, for repeated violations.]~~

This 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 13, 1999.

TRD-9905923
Susan Cory
Assistant General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 707-5829

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

Part 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Chapter 328. WASTE MINIMIZATION AND RECYCLING

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of the current §§328.21-328.30, concerning Used Oil Filter Collection, Management and Recycling, and proposes new §§328.21-328.28, concerning Used Oil Filter Management and Recycling.

EXPLANATION OF PROPOSED RULE

The purpose of this rulemaking is to implement House Bill (HB) 2619, 76th Legislature, 1999. This bill amended Chapter 371 of the Texas Health and Safety Code (H& SC) by adding a new Subchapter E, titled "Filter Storage, Transportation, or Processing," to provide state statutory authority for commission rules on used oil filters. Prior to this legislation, the commission already had rules concerning used oil filter collection, management, and recycling. HB 2619 reduces transporter/transfer facility, storage facility, and processor registration and reporting requirements from annual to biennial; increases storage time at a storage facility from 90 to 120 days; and authorizes the commission to grant two-year variances on on-site storage volume limits and storage period limits. To streamline the rules so as not to have more stringent or expansive requirements than the corresponding statutory provisions, the proposal would also repeal essentially all existing rule requirements not supported by the new statute, such as: the storage facility requirement to have secondary containment; the transporter requirement to have spill kits; the processing standards; the requirement for a processor to determine the environmental risk associated with the storage of materials resulting from the processing of used oil filters; all collection center requirements; and all container labeling requirements, except for those applying to processors. However, the allowance for a person to transport up to two 55-gallon containers of filters or the volumetric equivalent without registering as a transporter is proposed to be carried over into the new rule from repealed §328.25(b). Because HB 2619 changes existing used oil filter requirements extensively, the commission proposes to repeal the existing Chapter 328, Subchapter D and replace it with a new version of this subchapter.

Proposed new §328.21, relating to Definitions, contains the following terms defined in new H& SC, §371.101: "bill of lading," "bulk filter container," "component parts," "do-it-yourselfer," "generator," "process," "processor," "store," "storage facility," "transporter," and "used oil filter."

Proposed new §328.22, relating to Applicability, contains the same applicability as in new H& SC, §371.102, except that wording has been added that the filters first have to be determined to be nonhazardous or exempt from hazardous waste regulation per 40 Code of Federal Regulations (CFR) §261.4(b)(13) before the filters are subject to these nonhazardous waste requirements. H& SC, §371.102 and proposed new §328.22 state that the filter requirements are applicable to a used oil filter only if it has not been separated into its component parts or burned for steel or energy recovery; and that the requirements are not applicable to industrial generators registered with the commission as an industrial or hazardous waste facility or industrial generators under the waste management authority of another state agency.

Proposed new §328.23, relating to General Requirements, contains the same requirements as in new H& SC, §371.103. This new proposed section prohibits the storage, processing,

or disposal of a used oil filter in a manner that results in a discharge of oil into soil or water; prohibits placing a filter on land unless the filter is in a container; prohibits owners or operators of landfills permitted by the commission from intentionally or knowingly accepting used oil filters for disposal or placing used oil filters in their landfills; and specifies that a bulk filter container must not leak and must be securely closed, waterproof, and in good condition.

Proposed new 328.24, relating to Registration and Reporting, includes requirements from H& SC, §371.104, such as a requirement that a used oil filter transporter, storage facility, or processor must register with the commission, renew registration biennially, and report biennially. Also, storage volume is limited to six 55-gallon drums or one bulk filter container unless the person is registered with the commission as a storage facility. The following additional registration and reporting requirements are included in the proposed section that are not specifically included under H& SC, §371.104: the specific submission date; the need to request a commission form; the mailing address; a phone number to call for more information; and an Internet address where forms can be obtained. Also, the allowance for a person to transport up to two 55-gallon containers of filters or the volumetric equivalent without registering as a transporter is proposed to be added as subsection (d) and is carried over from repealed §328.25(b). In addition, subsection (e) contains the general financial responsibility language derived from repealed §328.4(c) that implements new H& SC, §371.109 on financial responsibility. This bill section requires a registrant to demonstrate financial responsibility. The commission's intent in this rule subsection is to implement the bill's financial responsibility requirement with rule language that is no more stringent than the current rules.

Proposed new §328.25, relating to Shipment Records, contains the same requirements as in new H& SC, §371.105, except that wording is carried over from repealed §328.25(a)(4) on the bill of lading content and processing. H& SC, §371.105 and proposed §328.25 require that a bill of lading accompany each shipment; a copy be maintained by the generator, transporter, storage facility, and processor for three years; and copies of the bills of lading be made available for commission inspection.

Proposed new §328.26, relating to Limitations on Storage, contains the same requirements as in new H& SC, §371.106. These requirements include a 120-day storage time limit on storage facilities, a ten-day storage time limit on transporters, a 30-day storage time limit on processors before filters are processed, and a processor requirement to label each storage container "Used Oil Filters."

Proposed new §328.27, relating to Variances, contains the same authorization for the commission to approve storage volume limit and storage period limit variances as in new H& SC, §371.106, except that subsection (b) adds more detail on factors to be considered, including the risk to human health and the environment, variance request content, and variance approval/ disapproval. H& SC, §371.106 and proposed §328.27(c) also limit the duration of a commission variance to no longer than two years.

Proposed new §328.28, relating to Spill Prevention and Control, contains the same requirement as in new H& SC, §371.108. That requirement is for each storage facility or processor to develop a plan to prevent and respond to spills in accordance with Title 40 CFR, Part 112.

FISCAL NOTE

Bob Orozco, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed rulemaking is in effect there will be no significant fiscal implications for units of state and local government as a result of administration or enforcement of the proposed rulemaking. The rulemaking would repeal the existing Chapter 328, Subchapter D, establish a new Subchapter D, and implement provisions contained in HB 2619, 76th Legislature, 1999, an act relating to the collection and management of used oil filters; providing civil and administrative penalties.

The proposed rulemaking would establish procedures for used oil filter collection, management, transport, storage, and processing. In addition, the proposed rulemaking would reduce registration and reporting requirements for transporter/transfer facilities, storage facilities, and processors; increase storage time at storage facilities from 90 to 120 days; and authorize the commission to grant two-year variances on storage volume and storage time limits. In addition, the proposed rulemaking repeals the existing requirements in Chapter 328, Subchapter D, such as: 1. storage facility requirements to have secondary containment; 2. transporter requirements to have spill kits; 3. processing standards; 4. the requirement for a processor to determine environmental risk associated with the storage of materials resulting from the processing of used oil filters; 5. all collection center requirements and; 6. all container labeling requirements, except for processors.

Non-household used oil generators, transporters, transfer facilities, storage facilities, and commercial processors will be affected by the proposed rulemaking as well as interested members of the general public.

PUBLIC BENEFIT

Mr. Orozco has also determined that for each year of the first five years the proposed rulemaking to Chapter 328 are in effect the public benefit anticipated from enforcement of and compliance with the proposed new sections will be reduced regulatory requirements, anticipated increased recycling of used oil filters, increased protection of the environment from oil contamination, and conservation of municipal landfill space.

The purpose of the proposed rulemaking is to establish procedures for the management, transport, storage, and processing of used oil filters as specified in HB 2619, to encourage used oil filter recycling, and to reduce oil filter handler costs by reducing certain existing regulatory requirements. Specifically, the proposed rulemaking would reduce registration and reporting requirements for transporter/transfer facilities, storage facilities, and processors; increase storage time at storage facilities from 90 to 120 days; and authorize the commission to grant two-year variances on storage volume and storage period limits. In addition, significant regulatory requirements would be repealed as noted in the FISCAL NOTE section of this preamble. Since the proposed rulemaking reduces or repeals some existing regulatory requirements, it is anticipated that there will be no adverse economic effects to any person required to comply with the proposed new sections in Chapter 328. Because significant existing regulatory requirements have been either reduced or repealed, the proposed rulemaking may be considered to have potentially postitive economic effects which may encourage increased recycling of used oil filters.

SMALL BUSINESS ANALYSIS

No significant additional costs are anticipated to small businesses as a result of complying with the proposed rulemaking. It will establish new procedures for the management, transport, storage, and processing of used oil filters while significantly reducing or eliminating existing regulatory requirements for this program. Specifically, registration and reporting frequency has been reduced from annually to biennially; storage time at a storage facility has been extended from 90 to 120 days; the commission is authorized to grant two-year variances on storage volume and storage period limits; and significant regulatory requirements have been repealed. The requirement for transporters, storage facilities, and processors to provide evidence of financial responsibility is continued in the proposed rulemaking as specified in HB 2619 but is not more stringent than current rules. Because significant existing regulatory requirements have been either reduced or repealed, the proposed rulemaking may be considered to have potentially postitive economic effects for 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 the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the proposed rulemaking either reduces or repeals significant regulatory requirements without adding to existing requirements, it is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. In addition, the proposed rulemaking is not a major environmental rule because it does not meet any of the four applicability requirements of a "major environmental rule." Specifically, the proposed changes will not impose any significant additional requirements not already required by state or federal law and the proposed rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, nor exceed a requirement of a delegation agreement. In addition, the proposed rulemaking is not proposed under the general powers of the agency but is proposed to comply with the requirements of HB 2619.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking is to implement HB 2619, 76th Legislature, 1999. This bill amended Chapter 371 of the H& SC by adding a new Subchapter E, titled Filter Storage, Transportation, or Processing, to provide state statutory authority for commission rules on used oil filter recycling and to reduce existing rule requirements. The rules will substantially advance this specific purpose by repealing the existing Chapter 328, Subchapter D, Used Oil Filter Collection, Management, and Recycling, §§328.21-328.30 and replacing it with new Chapter 328, Subchapter D, Used Oil Filter Management and Recycling, §§328.21-328.28. Promulgation and enforcement of these rules will not burden private real property because private real property is not the subject of these rules and the proposed rulemaking only reduces existing used oil filter rule requirements.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC 505.11. Therefore, the proposal is not subject to the Texas Coastal Management Program.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC-205, P.O. Box 13087, Austin, Texas 78711-3087; or by fax at (512) 239-4808. All comments must be received by October 25, 1999, and should reference Rule Log No. 99039-328- WS. Comments received by 5:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. For further information, please contact Jamie Robinson, Registration and Evaluation Division, at (512) 239-3619 or Hygie Reynolds, Policy and Regulations Division, at (512) 239-6825.

Subchapter D. USED OIL FILTER COLLECTION, MANAGEMENT, AND RECYCLING

30 TAC §§328.21-328.30

(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

The repeals are proposed under the authority of the Texas Water Code, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state, and in accordance with the Texas Solid Waste Disposal Act, H& SC, §361.024, which provides the commission with the authority to regulate municipal solid waste and adopt rules as necessary to regulate the operation, management, and control of solid waste under its jurisdiction. Additionally, H& SC, Chapter 371, Subchapter E, Filter Storage, Transportation, or Processing, provides the commission with the authority to adopt rules to govern used oil filters.

The proposed repeals implement H& SC, Chapter 371, Subchapter E.

§328.21. Applicability.

§328.22. Definitions.

§328.23. General Requirements.

§328.24. Storage Facilities.

§328.25. Transportation of Used Oil Filters.

§328.26. Processors.

§328.27. Public Used Oil Filter Collection Centers and Used Oil Filter Generators.

§328.28. Shipping Documentation.

§328.29. Penalties.

§328.30. Generators Regulated by the Railroad Commission of Texas.

This 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 9, 1999.

TRD-9905788
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: December 3, 1999
For further information, please call: (512) 239-0348

♦ ♦ ♦

Subchapter D. USED OIL FILTER MANAGEMENT AND RECYCLING

30 TAC §§328.21-328.28

STATUTORY AUTHORITY

The new sections are proposed under the authority of the Texas Water Code, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state, and in accordance with the Texas Solid Waste Disposal Act, Texas Health and Safety Code (H& SC), §361.024, which provides the commission with the authority to regulate municipal solid waste and adopt rules as necessary to regulate the operation, management, and control of solid waste under its jurisdiction. Additionally, H& SC, Chapter 371, Subchapter E, Filter Storage, Transportation, or Processing, provides the commission with the authority to adopt rules to govern used oil filters.

The proposed new sections implement H& SC, Chapter 371, Subchapter E.

§328.21. Definitions.

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

(1) Bill of lading - A shipping document that confirms receipt of a shipment.

(2) Bulk filter container - A portable device that:

(A) is part of an integrated delivery and retrieval system; and

(B) has a capacity greater than 330 gallons.

(3) Component parts - The severable parts of an oil filter and includes oil present in an oil filter.

(4) Do-it-yourselfer (DIY) - An individual who removes a used oil filter in the process of an oil change or automotive repair from the engine of a light duty motor vehicle, small utility engine, noncommercial motor vehicle, or farm equipment owned or operated by the individual.

(5) Generator - Person whose activities produce used oil filters. The term does not include do-it- yourselfers.

(6) Process - To prepare a used oil filter for recycling, steel recovery, energy recovery, or proper disposal.

(7) Processor - A person that processes used oil filters generated by another person. The term does not include a generator that consolidates, drains, or crushes used oil filters for off-site recycling or disposal.

(8) Store - To hold in a location for any period.

(9) Storage facility - A location that stores used oil filters before transportation, processing, recycling, or disposal of the filters. The term does not include the location of a generator.

(10) Transporter - A person that transports used oil filters to a location for storage, processing, recycling, or disposal.

(11) Used oil filter - Any device that is an integral part of an oil flow system, the primary purpose of which is to remove contaminants from flowing oil contained in the system, and that as a result of use has become contaminated and unsuitable for its original purpose, is removed from service, and contains entrapped used oil. The term does not include a filter attached to the equipment containing the oil flow system. This term continues to apply regardless of prior processing until, but not after, the filter has been burned for steel recovery or energy recovery or it is separated into its component parts.

§328.22. Applicability.

(a) This subchapter applies to a used oil filter only if the filter has been determined to be nonhazardous or exempt from being hazardous waste due to draining of used oil per Title 40 Code of Federal Regulations, §261.4(b)(13) (as amended through August 24, 1998), and the filter has not been:

(1) separated into its component parts; or

(2) burned for:

(A) steel recovery; or

(B) energy recovery.

(b) This subchapter does not apply to:

(1) an industrial generator that is:

(A) registered with the commission as an industrial or hazardous waste facility; or

(B) under the waste management authority of a state agency other than the commission.

(2) a do-it-yourselfer.

§328.23. General Requirements.

(a) A person may not store, process, or dispose of a used oil filter in a manner that results in the discharge of oil into soil or water.

(b) A person may not knowingly place on land a used oil filter that contains used oil unless the used oil filter is in a container.

(c) A bulk filter container used to store used oil filters:

(1) must not leak; and

(2) must be securely closed, waterproof, and in good condition.

(d) A used oil filter may not be intentionally or knowingly placed in or accepted for disposal in a landfill permitted by the commission.

§328.24. Registration and Reporting.

(a) A transporter, storage facility, or processor may not store, process, recycle, or dispose of used oil filters unless the person is registered with the commission. These persons must register using a commission form and have a valid registration prior to operation. Mail the form to the Texas Natural Resource Conservation Commission, Used Oil Filter Recycling Program, P. O. Box 13087, Austin, Texas 78711-3087. For further information, call 1-888-TX CRUDE or for forms and publications use Internet address: http://www.tnrcc.state.tx.us.

(b) Unless the person is registered with the commission as a storage facility, a person may not store used oil filters:

(1) that in the aggregate have a volume greater than six 55-gallon drums; or

(2) in more than one bulk filter container.

(c) A registered transporter, storage facility, or processor shall:

(1) renew the registration after each two-year period by January 25th of the following year. The information must be entered on a commission form.

(2) report to the commission after each two-year period by January 25th of the following year the number of used oil filters the person transported, stored, or processed in the preceding two years. The information must be entered on a commission form. Mail the report to the Texas Natural Resource Conservation Commission, Used Oil Filter Recycling Program, P. O. Box 13087, Austin, Texas 78711-3087. For further information, call 1-888-TX CRUDE or for forms and publications use Internet address: http://www.tnrcc.state.tx.us.

(d) Persons transporting used oil filters may transport up to two 55-gallon containers, or the volumetric equivalent, without registering as a transporter.

(e) A transporter, storage facility, or processor is required to provide evidence of financial responsibility with registration as the commission deems necessary to assure that the facility has sufficient assets to provide for proper closure. Financial assurance for closure may be demonstrated by using one or more of the following mechanisms: trust funds, surety bonds guaranteeing payment or performance, letters of credit, insurance, or financial test and corporate guarantee. These mechanisms shall be prepared on forms approved by the executive director.

§328.25. Shipment Records.

(a) Each shipment of used oil filters must be accompanied by a bill of lading. The bill of lading must demonstrate a transfer of custody of the used oil filters from the shipping facility to the registered transporter, and from the transporter to the registered storage facility or processor. The bill of lading must contain the date of such transfer, the name and physical address of the shipping facility, the name and address of the receiving facility, and the name and address of the transporter, the quantity of used oil filters removed and any other information which the commission may deem necessary to protect the environmental quality of the State of Texas. The shipping facility must verify the information within the bill of lading, and demonstrate concurrence by the signature of an authorized representative.

(b) A copy of the bill of lading for each shipment of used oil filters must be maintained by the generator of the filters, transporter of the filters, storage facility at which the filters were stored, and processor of the filters for at least three years after the date the filters were transported, stored, or processed.

(c) The copies of bills of lading must be made available for the commission to inspect at any reasonable time.

§328.26. Limitations on Storage.

(a) A storage facility may not store a used oil filter for more than 120 days.

(b) A transporter may not store a used oil filter for more than ten days.

(c) A processor may not store a used oil filter for more than 30 days before it is processed.

(d) A processor that stores used oil filters in a container shall label each container clearly with the phrase "Used Oil Filters."

§328.27. Variances.

(a) The commission may grant an individual variance to allow:

(1) a generator to store used oil filters in a greater aggregate volume than the volume prescribed in §328.24(b) of this title (relating to Registration and Reporting); or

(2) a person to store used oil filters for a period longer than the period prescribed for that person in §328.26 of this title (relating to Limitations on Storage).

(b) Factors to be considered in determining whether a variance should be granted include but are not limited to, the risk to human health and the environment that is posed by the requested variance. The burden of justifying the need for a variance is on the requestor, and the requestor must submit the information in writing to clearly indicate the issues involved, the reason(s) for the request, and both positive and negative impacts that may result from the granting of the variance. Prior approval of the variance must be obtained before any change is authorized. If a variance is denied, the commission will provide an explanation of the reason(s) for the denial in a written response to the requestor.

(c) The commission may not grant a variance under this section for a period longer than two years.

§328.28. Spill Prevention and Control.

Each registered storage facility and each facility of a registered processor shall develop a plan to prevent spills and respond to spills in accordance with the federal spill prevention, control, and countermeasure requirements provided by Title 40 Code of Federal Regulations, Part 112 (as amended through July 1, 1998).

This 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 9, 1999.

TRD-9905787
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: December 3, 1999
For further information, please call: (512) 239-0348

♦ ♦ ♦

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part 3. TEXAS YOUTH COMMISSION

Chapter 81. INTERACTION WITH THE PUBLIC

37 TAC §81.75

The Texas Youth Commission (TYC) proposes an amendment to §81.75, concerning Copying Costs. The amendments to §81.75 explain that TYC may require a deposit or bond for copies of requested public information that are anticipated to exceed $100.00. TYC will advise the requester, in a written estimate, if there are less costly methods of viewing the records and that the requester has ten days from the date of the estimate to respond.

Terry Graham, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Graham also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be greater efficiency in state government practices. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to Gail Graham, Policy and Manuals Manager, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765.

The amendment is proposed under the Human Resources Code, §61.0421, concerning Public Interest Information, which provides the Texas Youth Commission with the authority to information of public interest describing the functions of the commission and describing the procedures by which complaints are filed with and resolved by the commission. The commission shall make the information available to the general public and appropriate state agencies.

The proposed rule implements the Human Resource Code, §61.034.

§81.75. Copying Costs.

(a) Purpose. The purpose of this rule is to establish rates at which TYC charges the public for certain information.

(b) Applicability. Also see (GAP) §81.1 of this title (relating to Public Information Request).

(c) The agency may charge for copies of written information provided the public. The agency will not charge for copying records for other state agencies, court orders, or prosecuting attorneys.

(d) Costs for providing paper copies from any format are as follows:

(1) TYC may charge for copies at a rate of $.10 per page.

(2) TYC may charge for labor at a rate of $15.00 per hour prorated to 1/4 hour.

(3) For copying readily available information:

(A) There is no charge for the first 10 pages copied.

(B) A charge for labor will be added for more than 50 pages.

(4) For copying information not readily available (located in more than one building or in a remote storage facility ; a connection of two buildings by a covered or open sidewalk, an elevated or underground passageway or a similar facility is insufficient cause to consider the buildings to be separate buildings.):

(A) A charge for copies may be assessed.

(B) A charge for labor may be assessed.

(5) When labor charges are included, requester may request and in doing so will be provided by TYC staff a signed, written statement stating the amount of time required to produce the copy.

(e) Costs for providing fax copies are as follows:

(1) Local charges at $.10 per page.

(2) Long distance charges (same area code) at $.50 per page.

(3) Long distance charge (different area code) at $1.00 per page.

(f) Cost for postage/shipping will also be charged.

(g) TYC may not require a deposit or bond as a down payment for copies that the requester may request in the future. In addition, TYC may require a deposit or bond for copies of public information where the anticipated costs are estimated to exceed $100.00.

(h) TYC will comply with requests for detailed information from the General Services Commission regarding procedures for charging and collecting fees for providing copies of public information.

(i) Payment must be made to TYC before records are released.

(j) If a request for copies or inspection of records will result in a charge of more than $40.00, TYC will furnish, in writing, an itemized, detailed estimate of charges to the requester. The estimate will advise the requester:

(1) if any less costly method of viewing the records is available; and

(2) that the request will be considered withdrawn if no reply is received within ten days of the date the estimate is sent.

This 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 13, 1999

TRD-9905939
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 424-6244

♦ ♦ ♦

Chapter 99. GENERAL PROVISIONS

Subchapter A. YOUTH RECORDS

37 TAC §99.1

The Texas Youth Commission (TYC) proposes an amendment to §99.1, concerning Confidentiality Regarding Youth Alcohol

and Drug Abuse. The amendment to the section will correct a form number as listed in the rule.

Terry Graham, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Graham also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be efficiency in state government. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to Gail Graham, Policy and Manuals Manager, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765.

The amendment is proposed under the Human Resources Code, §61.034, concerning Policies and Rules, which provides the Texas Youth Commission with the authority to adopt policies and make rules appropriate to the proper accomplishment of its functions.

The proposed rule implements the Human Resource Code, §61.034.

§99.1. Confidentiality Regarding Youth Alcohol and Drug Abuse.

(a) Purpose. The purpose of this rule is to ensure that the Texas Youth Commission protects the privacy of youth in compliance with Federal rule 42 CFR part 2.

(b) Restrictions on disclosure shall apply to any information, whether or not recorded, which:

(1) would identify a youth as an alcohol or drug abuser (directly or through verification); and

(2) is drug abuse or alcohol abuse information obtained for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment.

(c) At the time of admission, youth diagnosed as alcohol or drug abusers must be informed that Federal laws protect the confidentiality of their alcohol and drug abuse records and shall be given a written copy of the summary of the Federal law and regulations, LS-021 [~~LS-21~~] Notice to Youth.

This 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 13, 1999

TRD-9905938
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 424-6244

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part 20. TEXAS WORKFORCE COMMISSION

Chapter 809. CHILD CARE AND DEVELOPMENT

Subchapter A. GENERAL PROVISIONS

40 TAC §809.1

The Texas Workforce Commission (Commission) proposes an amendment to §809.1, concerning child care services.

The purpose of the amendment is to modify the language in §809.1(c) to incorporate an implementation date of December 1, 1999 for §809.62(a)(1). The Commission's intent is that the new implementation date provides the local workforce development boards (boards) and their respective child care contractors (contractors) with the necessary time to fully implement the automation systems and related programmatic changes necessary to facilitate payments directly to self-arranged providers.

Background. On February 11, 1999, the Commission published the adopted child care rules in the *Texas Register* (24 TexReg 826). Specifically, §809.1 provided that the boards would be required to implement the new rules on September 1, 1999. The Child Care Development Fund (CCDF) regulations require that parents have the ability to select self-arranged providers pursuant to 45 CFR 98.30. The Commission firmly believes in parents exercising parental choice among the full range of child care providers, including self-arranged child care providers, and parent responsibility in the selection. Self-arranged providers are of two types: (1) certain relatives: grandparents, great-grandparents, aunts and uncles, and siblings if the sibling is over 18 and does not reside in the residence of the child and (2) certain entities: typically licensed centers and registered family homes that, in the past, chose not to engage in a contract directly with the contractor for the delivery of child care services, but chose to be paid directly by the parents. The self-arranged providers are typically sought by parents to meet the need for nontraditional hours of child care, including weekends, evenings and night shifts. The self-arranged providers are also typically sought by parents in rural or remote locations. In an effort to reduce fraud, the Commission adopted a change to the payment method for self-arranged care. In the past, parents were paid directly for the self-arranged care and the parents were charged with making the payment to the self-arranged providers for the child care services rendered. Effective February 11, 1999 for implementation on September 1, 1999, boards and contractors are required to pay all providers of child care directly, including self-arranged providers. Several boards and contractors have requested additional time to fully implement the automation and programmatic changes necessary to pay self-arranged providers directly as specified in §809.62(a)(1) for several reasons. As an example, one contractor in one board area has indicated that more than 1,400 self-arranged providers and 3,100 self-arranged children are impacted in that area alone. The boards and contractors also have indicated that it is anticipated that some families and providers will choose to stop utilizing self-arrangement because of concerns over the payment method. For these reasons, several contractors and boards expressed that they are not able to fully implement the necessary automation changes by September 1, 1999.

The boards are challenged with implementing extensive integration, automation, and program design changes that are needed. The boards have demonstrated good faith efforts in moving forward to design the seamless workforce delivery system to address the needs of working families. The Commission understands that all boards do not have the systems in place to implement this provision. The Commission believes that the requested short-term extension is necessary for the undisrupted and continuous delivery of child care services. If the September 1, 1999 implementation date is not modified, this situation could result in a disruption of services because there would be no authorized method of paying for services. In turn, parents engaged in employment would be forced to leave employment to care for their children or leave their children unsupervised or in unregulated or unsafe care situations in order to maintain employment. The endangerment of the children in unsupervised or unsafe care arrangements would present an imminent peril to the children of the state. For this reason, the amendment is necessary to authorize a method of paying providers. Without the amendment the breakdown in service delivery would present an imminent peril to the public health, safety or welfare of the children of the state.

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the amendments will be in effect the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rule as amended;

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule as amended;

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule as amended;

There are no foreseeable implications relating to costs or revenue of the state or local government as a result of enforcing or administering the rule as amended; and

There are no probable economic costs to persons required to comply with the rule as amended.

Mr. Townsend also determined that there is no anticipated adverse impact on small businesses as a result of enforcing or administering the amendment because the extension in time would not require small businesses to do anything in addition to the current requirements.

Jean Mitchell, Director of Workforce Development, has determined that for each year of the first five years that the amendment will be in effect, the public benefit expected as a result of the adoption of the amendment is that the amendment will help ensure that eligible children living below or near the poverty level have increased access to child care funding and that parent choice is supported for parents selecting child care providers for their children.

Mark Hughes, Director of Labor Market Information, has determined that, while the proposed rule could affect private sector or public sector employment under certain circumstances, there is no significant negative impact upon employment conditions in this state as a result of the proposed section.

The amendment is proposed under Texas Labor Code, §301.061 and §302.021, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The amendment affects Texas Labor Code Title 4, particularly Chapters 301 and 302.

§809.1. Short Title and Purpose.

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

(c) The effective date of the rules in this Chapter 809 relating to Child Care and Development shall be twenty days after the date of filing the adoption in the Office of the Secretary of State; however, until September 1, 1999, the Boards shall continue to comply with the rules in effect on January 1, 1999 with the following exception. If a Board is unable to implement the provisions of §809.62(a)(1) by September 1, 1999, due to inability to complete automation or programmatic changes as needed, the Board shall implement the provisions of §809.62(a)(1) as soon thereafter as possible but not later than December 1, 1999. Pending implementation of §809.62(a)(1), not later than December 1, 1999, the Board may continue to make payments for child care services directly to eligible parents who choose to self-arrange child care.

This 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 8, 1999.

TRD-9905763
J. Ferris Duhon
Assistant General Counsel
Texas Workforce Commission
Earliest possible date of adoption: October 24, 1999
For further information, please call: (512) 463-8812

♦ ♦ ♦

WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 16. ECONOMIC REGULATION

Part 6. TEXAS MOTOR VEHICLE BOARD

Chapter 107. WARRANTY PERFORMANCE OBLIGATIONS

16 TAC §§107.1-107.11

The Texas Motor Vehicle Board of the Texas Department of Transportation has withdrawn from consideration for permanent adoption the proposed amendments to §§107.1-107.11, Warranty Performance Obligations which appeared in the July 23, 1999 issue of the *Texas Register* (24 TexReg 5638) and simultaneously republishes the proposed amendments for consideration at its November 4, 1999 meeting.

Filed with the Office of the Secretary of State on September 13, 1999.

TRD-9905891
Brett Bray
Division Director
Texas Motor Vehicle Board
Effective date: September 13, 1999
Proposal publication date: July 23, 1999
For further information, please call: (512) 416-4899

♦ ♦ ♦

16 TAC §107.12

The Texas Motor Vehicle Board of the Texas Department of Transportation has withdrawn from consideration for permanent adoption the proposed repeal of §107.12, Contested Cases under General Warranty Provisions: Decisions and Final Orders, which appeared in the July 23, 1999 issue of the *Texas Register* (24 TexReg 5644) and simultaneously republishes the proposed repeal for consideration at its November 4, 1999 meeting.

Filed with the Office of the Secretary of State on September 13, 1999.

TRD-9905889
Brett Bray
Division Director
Texas Motor Vehicle Board
Effective date: September 13, 1999
Proposal publication date: July 23, 1999
For further information, please call: (512) 416-4899

♦ ♦ ♦

TITLE 30. Environmental Quality

Part 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Chapter 39. PUBLIC NOTICE

Subchapter F. PUBLIC NOTICE OF RADIOACTIVE MATERIAL LICENSE APPLICATIONS

30 TAC §39.301

The Texas Natural Resource Conservation Commission has withdrawn from consideration for permanent adoption the amendment to §39.301, which appeared in the July 16, 1999, issue of the *Texas Register* (24 TexReg 5321).

Filed with the Office of the Secretary of State on September 3, 1999.

TRD-9905706
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 3, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Chapter 80. CONTESTED CASE HEARINGS

Subchapter C. HEARINGS PROCEDURES

30 TAC §80.137

The Texas Natural Resource Conservation Commission has withdrawn from consideration for permanent adoption the amendment to §80.137, which appeared in the July 16, 1999, issue of the *Texas Register* (24 TexReg 5384).

Filed with the Office of the Secretary of State on September 3, 1999.

TRD-9905726
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 3, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Chapter 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

Subchapter B. NEW SOURCE REVIEW PERMITS

Division 3. PUBLIC NOTIFICATION AND COMMENT PROCEDURES

30 TAC §§116.130-116.134, 116.136, 116.137

The Texas Natural Resource Conservation Commission has withdrawn from consideration for permanent adoption the repeal of §§116.130-116.134, 116.136, 116.137, which appeared in the July 16, 1999, issue of the *Texas Register* (24 TexReg 5434).

Filed with the Office of the Secretary of State on September 3, 1999.

TRD-9905733
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 3, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

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 4. AGRICULTURE

Part 1. TEXAS DEPARTMENT OF AGRICULTURE

Chapter 26. TEXAS AGRICULTURAL FINANCE AUTHORITY: LINKED DEPOSIT PROGRAM

4 TAC §§26.1, 26.3, 26.5-26.10

The Board of Directors (the board) of the Texas Agricultural Finance Authority (the Authority) of the Texas Department of Agriculture adopts amendments to §§26.1, 26.3, and 26.5-26.10, concerning the Authority's Linked Deposit Program, without changes to the proposal published in the July 23, 1999 issue of the *Texas Register* (24 TexReg 5623).

The amendments are adopted in order to provide an expansion of the linked deposit program available through the Authority in accordance with statutory changes made to the Texas Agriculture Code, Chapter 44, by the enactment of House Bill 3050 by the 76th Texas Legislature, 1999. Other changes are also made throughout the sections to make them consistent with House Bill 3050. The Authority believes that the adoption of the amendments will allow the Authority to provide financial assistance to more agricultural businesses in the state and to provide more efficient financial assistance programs.

The amendments to §26.1 add a definition for alternative crops produced in the state; add a definition for the commissioner of agriculture; update from 1995 to 1997 the reference to the publication compiled by the Texas Agricultural Statistics Service providing information on customarily grown crops; clarify the linked deposit agreement between the state and the lender in regard to the maximum rate to be charged to the eligible borrower; and delete the definition of administrator. The amendment to §26.3 expands the purpose of the program to include the creation and enhancement of value-added businesses and providing assistance for disaster relief projects. The amendment to §26.5(b) clarifies that the eligible borrower is to notify the Authority's office in Austin upon the receipt of loan proceeds. The amendment to §26.6(5) changes the maximum interest rate to be charged to an eligible borrower by a lender from the current market rate plus four percent to the linked deposit rate plus four percent. The amendment to §26.6(6) clarifies that the application may be sent by facsimile transceiver to the Authority in Austin. The amendments to §26.7 (a) and (b) clarify the application review process by stating that the staff of the Authority will review the applications. New subsection (c) provides that the board will approve or deny any and all applications, provided that such authority may be delegated to the commissioner by the board. The amendments to §26.8(b) and (c) clarify the actions of the comptroller regarding an application. The amendment to §26.9(a) expands the use of loan proceeds for the program to include any agriculture-related operating expense, including the purchase or lease of land or fixed asset acquisition or improvement, as identified in the application and further provides that a loan under this program may be applied to existing debt for an eligible applicant. The amendment to §26.10(1) expands the program to $25 million from $15 million. The amendment to §26.10(3) expands the eligibility criteria to include the finance of crops declared eligible for natural disaster relief to $250,000. The amendments to §26.10(11) update the listing of customarily grown crops that are not eligible for participation in the program by adding broilers, green peppers, peaches, sunflowers, and fresh tomatoes, and deleting broccoli and oats. The amendments to §26.10(12) update the listing of alternative crops eligible for participation in the program by adding broccoli, farm chickens, and oats, deleting peaches, and sunflowers. The amendment to §26.10(13) provides criteria for projects eligible for natural disaster relief under the program and the term of eligible participation in the program by a disaster relief applicant.

No comments were received on the proposal.

The amendments are adopted under the Texas Agricultural Code (the Code), §44.007, which provides the Authority with the authority to promulgate rules for the loan portion of the linked deposit program; the Code, §58.022, which provides the Authority with authority to adopt rules and procedures necessary for the administration of its programs including the setting and collection of fees in connection with the program; and, the Code, §58.023, which provides the Authority with authority to adopt rules to establish criteria for eligibility of applicant and lenders under the financial assistance programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 8, 1999.

TRD-9905776
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 28, 1999
Proposal publication date: July 23, 1999

For further information, please call: (512) 463-4075

♦ ♦ ♦

Chapter 30. TEXAS AGRICULTURAL FINANCE AUTHORITY: YOUNG FARMER LOAN GUARANTEE PROGRAM

The Board of Directors (the board) of the Texas Agricultural Finance Authority (the Authority) of the Texas Department of Agriculture adopts amendments to §§30.1-30.14 of Chapter 30, Subchapter A, §§30.51-30.54 of Chapter 30, Subchapter B, and §§30.60, 30.62 and 30.63 of Chapter 30, Subchapter C, concerning the Authority's Young Farmer Loan Guarantee Program, without changes to the proposal published in the July 23, 1999 issue of the *Texas Register* (24 TexReg 5627).

The amendments are adopted in order to provide an expansion of the young farmer loan guarantee program available through the Authority in accordance with statutory changes made to the Texas Agriculture Code (the Code), Chapter 58, by the enactment of House Bill 3050 by the 76th Texas Legislature, 1999. The amendment to §30.1 expands authority for the program by adding the enhancement of a farming or ranching operation or an agricultural-related business and deleting references to a first independent operation. The amendment to §30.2 expands the purpose of the program to the enhancement of a farming or ranching operation and the establishment of an agricultural-related business. The amendments to §30.3 update the reference to the authority for the young farmer loan guarantee program from Chapter 253 of the Code to Chapter 58 of the Code; delete the definition of an agricultural science teacher, a county agent, a district based agricultural economist, a first farm or ranch operation, and a lender; add a definition for a commercial lender to include a chartered state of federal institution, a credit union, or a Farm Credit System institution, add a definition for the commissioner to be the commissioner of agriculture; clarify the definition of an eligible applicant to be a person applying who is at least 18 years of age but less than 40 years of age and who complies with the application procedures of the program rules; clarify the definition of interest rate; clarify the definition of loan as a loan made by a commercial lender and approved for guarantee by the board or the commissioner in accordance with the program rules; clarify a lender to be a commercial lender; change the loan guarantee amount for the program from the lesser of $100,000 or 90% of the total loan to the lesser of $250,000 or 90% of the total loan; change the definition of plan from a cash flow, production, or management plan to the documentation submitted to the lender in support of the application; and clarify the definition of project from a first farm or ranch operation, which would further the production of agricultural products, to an enterprise that establishes or enhances a farming or ranching operation or an agricultural-related business, which furthers Texas agriculture. The amendment to §30.4 clarifies the application process and criteria for the applicant to submit the application to the commercial lender for the program. The amendment to §30.5(a) expands the eligible cost under the program to include the provision of working capital for operating a farm or ranch, including the lease of facilities and the purchase of machinery and equipment, or for any agriculture-related business purpose, including the purchase of real estate for the agricultural- related business, as defined in the plan. The amendment to §30.5(b) clarifies those costs that are ineligible for the program to be any cost that is not identified in the plan and the purchase of real estate exclusively for agriculture production purposes. The amendment to §30.6(a) and (b) changes the term lender to commercial lender. The amendment to §30.6(c) clarifies the lender as a commercial lender and deletes the requirement of any comments from the county agent, agricultural science teacher, or district based agricultural economist who reviewed the plan. The amendments to §30.6(d) add the commissioner in the review and approval process, if such authority is delegated by the board; and change the reference to the Act from the Code, §253.004 to §58.054 regarding the application determination criteria used by the board or the commissioner. The amendment to §30.6(e) clarifies the notification of approval procedure and changes the term lender to commercial lender. The amendment to §30.6(f) clarifies the process for denial of an application and changes the term lender to commercial lender. The amendment to §30.6(h) clarifies the reporting requirement of staff to the board incorporating any applications approved by the commissioner, if approval authority is so delegated by the board. The amendment to §30.7 clarifies the information to be presented to a commercial lender by an applicant for the program to be the application form provided by the Authority, the plan submitted to the lender for the proposed operation, the completed application from a commercial lender which identifies how the proceeds of the loan will be used to implement the applicant's plan, and the signed statement of the commercial lender that a guarantee is required for approval of the application. The amendment to §30.8(a) clarifies that the board or the commissioner will consider the application upon completion of the review by staff. The amendment to §30.8(b) clarifies that the application approval is subject to the availability of funds in the young farmer loan guarantee account. The amendment to §30.9(a) changes the limitations for the program from the lessor of $100,000 or 90% of the total loan to $250,000 or 90% of the total loan. The amendment to §30.9(b) includes the commissioner, if delegated by the board, in the decision process. The amendment to §30.9(c) changes the lender to the commercial lender. The amendment to §30.9(e) changes the maximum amount of participation by the program to not exceed the lesser of 90% of the total loan or $100,000 to the lesser of 90% of the total loan or $250,000. The amendments to §30.9(g) and §30.10(a) change the term lender to commercial lender. The amendments to §30.10(b) change the term lender to commercial lender, add a requirement that the commercial lender notify the Authority of the payment of all personal property taxes by the borrower, and renumber the paragraph (3) to (4). The amendment to §30.11 changes the term lender to commercial lender. The amendment to §30.12(a) clarifies the approval criteria used by the board or the commissioner when approving an application for the program. The amendment to §30.12(b) changes the term lender to commercial lender and clarifies that the commissioner can decline an application. The amendment to §30.12(c) clarifies where copies of the credit policy and procedure document may be obtained. The amendments to §30.13 and §30.14 change the term lender to commercial lender.

The amendment to §30.51 clarifies that voluntary assessments will be remitted to the comptroller for deposit in the Texas agricultural fund for the purpose of making loan guarantees under the young farmer loan guarantee program. The amendments to §30.52 change the Fund to the Account identified as the Young Farmer Loan Guarantee Account within the Texas Agricultural Fund and correct the reference to the statutory authority for the assessments. The amendment to §30.53(c) corrects the identity of the state treasury to the comptroller. Other amendments to §30.53 correct the identity of the state trea-

sury to the comptroller, change the general revenue fund to the Texas agricultural fund, and correct the reference to the statutory authority for the assessments. The amendment to §30.54(c) deletes the subsection, as it is no longer needed. The amendments to §30.60 update the reference to the authority for the young farmer loan guarantee program from Chapter 253 of the Code to Chapter 58 of the Code, add the establishment of an agricultural-related business as criteria for assistance under the Young farmer program, and delete the first farm or ranch requirement. The amendment to §30.62 changes the definition of the young farmer loan guarantee account from an account in the general revenue of the state to an account within the Texas Agricultural Fund. The amendment to §30.63(a) clarifies that the interest rate established under the interest reduction program is to be fixed rate for the term of the guarantee. The amendment to §30.63(b) clarifies the calculation of the interest reduction payment to the borrower under the interest reduction program. The amendment to §30.63(d) changes the term lender to commercial lender for consistency with other sections. The amendments to §30.63(e) and (h) change the term lender to commercial lender for consistency with other sections.

Comments in support of the proposal were received from the Texas Farm Bureau and seven individuals. Comments from the Texas Farm Bureau stated that the rules will allow the Young Farmer Loan Guarantee Program to be used to its maximum benefit and will also result in a greater number of applications submitted to the TAFA Board under the program. In addition, individuals commenting stated that the proposed amendments will benefit young producers and Texas agriculture in general. The Authority agrees with the comments submitted by the Texas Farm Bureau and others in favor of the proposal and also believes that the amendments will provide financial assistance to more agricultural businesses in the state and provide more efficient financial assistance to young Texas farmers.

Comments on the proposal were also received from the Farm Credit Bank recommending changes to the proposal as well as other suggestions and comments that relate to the Young Farmer Loan Guarantee Program, but do not relate to amendments proposed by the proposal. The Farm Credit Bank recommends that interest rate charged by the lender fluctuate with the prime rate for the life of the loan. The Authority disagrees with a fluctuation of the interest rate because a fixed rate is required due to the calculations necessary for the payment or the interest reduction to the applicant by the Authority. Farm Credit Bank also commented, in regards to §30.5(a), that the Authority include living and interest costs as eligible costs. Section 30.5(a) provides that the funds may be used to provide working capital for operating a farm or ranch as defined in the plan. It does not preclude the use of living expenses and interest costs, as long as they are identified in the plan filed by the applicant when applying for the commitment.

Subchapter A. GENERAL PROCEDURES

4 TAC §§30.1-30.14

The amendments to §§30.1-30.14 are adopted under the Texas Agricultural Code (the Code), §58.022, which provides the Authority with authority to adopt rules and procedures necessary for the administration of its programs including the setting and collection of fees in connection with the program; and the Code, §58.023, which provides the Authority with authority to adopt rules to establish criteria for eligibility of applicants and lenders under the financial assistance programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 8, 1999.

TRD-9905777
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 28, 1999
Proposal publication date: July 23, 1999
For further information, please call: (512) 463-4075

♦ ♦ ♦

Subchapter B. RULES FOR DEPOSITIION AND REFUND OF ASSESSMENT FEES

4 TAC §§30.51-30.54

The amendments to §§3.51-3.54 are adopted under the Texas Agriculture Code (the Code), §58.022, which provides the Texas Agricultural Finance Authority with authority to adopt rules and procedures necessary for the administration of its programs including the setting and collection of fees in connection with the programs; the Code, §58.023, which provides the Authority with authority to adopt rules to establish criteria for eligibility for applicants and lenders under the financial assistance programs; and the Transportation Code, §502.174, as amended by House Bill 3050, 76th Legislature, 1999, which provides for a voluntary assessment for young farmer loan guarantees and provides the Authority with authority to establish procedures for the collection and refund of such assessments.

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 8, 1999.

TRD-9905778
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 28, 1999
Proposal publication date: July 23, 1999
For further information, please call: (512) 463-4075

♦ ♦ ♦

Subchapter C. INTEREST REDUCTION PROGRAM RULES

4 TAC §§30.60, 60.625, 30.63

The amendments to §§3.60 and 3.62-3.63 are adopted under the Texas Agriculture Code (the Code), §58.022, which provides the Texas Agricultural Finance Authority with authority to adopt rules and procedures necessary for the administration of its programs including the setting and collection of fees in connection with the programs; the Code, §58.023, which provides the Authority with authority to adopt rules to establish criteria for eligibility for applicants and lenders under the financial assistance programs; and the Code, §58.052, as enacted by the passage of House Bill 3050 by the 76th Texas Legislature, 1999,

which provides for a reduced interest rate for young farmer loan guarantees and provides the Authority with authority to adopt rules to implement an interest reduction program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 8, 1999.

TRD-9905779
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 28, 1999
Proposal publication date: July 23, 1999
For further information, please call: (512) 463-4075

♦ ♦ ♦

Part 3. TEXAS FEED AND FERTILIZER CONTROL SERVICE/OFFICE OF THE TEXAS STATE CHEMIST

Chapter 61. COMMERCIAL FEED RULES

Subchapter A. GENERAL PROVISIONS

4 TAC §61.1

The Feed and Fertilizer Control Service/Office of the Texas State Chemist adopts an amendment to §61.1 of the Commercial Feed Rules without change to the proposed text as published in the August 6, 1999, issue of the *Texas Register* (24 TexReg 5964).

The amendment adds a definition of wildlife to the section. This definition is necessary so that the Service can comply with §141.002(e) and §141.007 of the Texas Commercial Feed Control Act (Law).

No adverse comments were received regarding adoption of the amendment, although one comment observed that the redefining of "Service" and "Container" was not necessary. While the Service agrees, those were not proposed for deletion. The Service will move to delete them at a later date. The Texas Chapter of The Wildlife Society supported the amendment to the rule.

The amendment is adopted under §141.004 of the Texas Commercial Feed Control Act which provides the Service with the authority to promulgate rules as necessary for the enforcement of the Chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 10, 1999.

TRD-9905863
Dr. George W. Latimer, Jr.
Assistant to the Associate Vice Chancellor of Agriculture
Texas Feed and Fertilizer Control Service/ Office of the Texas State Chemist
Effective date: September 30, 1999
Proposal publication date: August 6, 1999
For further information, please call: (409) 845-1121 (ext. 124)

♦ ♦ ♦

4 TAC §61.2

The Feed and Fertilizer Control Service/Office of the Texas State Chemist adopts the repeal of §61.2 as proposed in the August 6, 1999 issue of the *Texas Register* (24 TexReg 5695).

The repeal is necessary to allow substitution of a section with a revised section.

There were no comments received regarding this repeall.

The repeal is adopted under the Texas Agriculture Code Chapter, 141, §141.004, which provides the Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist with the authority to promulgate rules as necessary for the enforcement of the Chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 10, 1999.

TRD-9905864
Dr. George W. Latimer, Jr.
Assistant to the Associate Vice Chancellor of Agriculture
Texas Feed and Ferilizer Control Service/Office of the Texas State Chemist
Effective date: September 30, 1999
Proposal publication date: August 6, 1999
For further information, please call: (409) 845-1121 (ext. 124)

♦ ♦ ♦

The Feed and Fertilizer Control Service/Office of the Texas State Chemist adopts new §61.2 of the Commercial Feed Rules without change to the proposed text as published in the August 6, 1999 issue of the *Texas Register* (24 TexReg 5965).

The new rule reflects the intent of the Legislature in enacting §141.002(e) of the Texas Commercial Feed Control Act (Law).

The Texas Chapter of The Wildlife Association supported the rule as published. No adverse comments were received regarding adoption of the new section.

The new section is adopted under §141.004 which provides the Feed and Fertilizer Control Service/Office of the Texas State Chemist the authority to promulgate rules necessary for the enforcement of the Chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 10, 1999.

TRD-9905865
Dr. George W. Latimer, Jr.
Assistant to the Associate Vice Chancellor of Agriculture
Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist
Effective date: September 30, 1999
Proposal publication date: August 6, 1999
For further information, please call: (409) 845-1121 (ext. 124)

♦ ♦ ♦

Subchapter C. LABELING

4 TAC §61.22

The Feed and Fertilizer Control Service/Office of the Texas State Chemist adopts an amendment to §61.22 with changes to the proposed text as published in the August 6, 1999 issue of the *Texas Register* (24 TexReg 5966).

The amendment is necessary for the manufacturers of wildlife feed to be able to provide labels which conform to the Law and the rules.

The following groups made comments on the rule as written: For–The Wildlife Society, the Texas Wildlife Association. Against (in part)–the Texas Grain & Feed Association; Farmland Industries, Mumme's, Inc.

A number of comments maintained that whole grain and seed offered for sale should be treated the same as and not different from commercial feeds. The Service agrees that whole grain and feed containing less than 20 ppb aflatoxin should not be treated differently from other commercial feeds; thus, it has revised that section of the rule to allow those selling wildlife products containing less than 20 ppb a variety of options including that of not declaring a level at all.

Another comment related to the necessity for providing guarantees for protein, fat and fiber on wildlife feeds. Wildlife feeds are commercial feeds; as noted above, the Service has no choice but to treat them the same and not differently from other commercial feeds. Commercial feeds must have a label with the following information listing a maximum or minimum quantity determinable by laboratory methods of protein, fat and fiber ..." (§141.051(a)(4)) of the Texas Commercial Feed Control Act (Law). The Service has provided at its website (otscweb.tamu.edu–choose *Compliance Policies*, then choose *Feed* under *Labeling Requirements*) suggestions for protein, fat and fiber based on considerable historical data which distributors may use in setting these levels. The Service believes this will minimize the burden of this labeling requirement. The subparagraphs, however, are redundant and are not included in the final rule.

The amendment is adopted under the Texas Agriculture Code, Chapter 141, §141.004, which provides the Texas Feed and Fertilizer Control Service with the authority to adopt rules relating to the distribution of commercial feeds.

§61.22. Labeling of Commercial Feed.

Commercial feed shall be labeled with the information prescribed in the Texas Commercial Feed Control Act (Act) and this chapter on the principal display panel of the product with the following general format, unless otherwise specifically provided.

(1) Purpose Statement

(A) A statement of purpose shall contain the specific species and animal class(es) for which the feed is intended. The purpose statement may be excluded from the label if the product name includes a description of the species and animal class(es) for which the product is intended.

(B) The manufacturer shall have flexibility in describing in more specific and common language the defined animal class, specie and purpose while being consistent with the category of animal class defined in this subparagraph which may include, but is not limited to including, the weight range(s), sex or ages of the animal(s) for which the feed is manufactured.

(i) Poultry.

(I) Layers–chickens that are grown to produce eggs for food, i.e., table eggs:

(-a-) Starting/Growing - from day of hatch to approximately ten weeks of age;

(-b-) Finisher–from approximately ten weeks of age to time first egg is produced. (Approximately 20 weeks of age);

(-c-) Laying–from time first egg is laid throughout the time of egg production;

(-d-) Breeders–chickens that produce fertile eggs for hatch replacement layers to produce eggs for food, table eggs, from time first egg is laid throughout their productive cycle.

(II) Broilers–chickens that are grown for human food:

(-a-) Starting/Growing–from day of hatch to approximately five weeks of age;

(-b-) Finisher–from approximately five weeks of age to market (42 to 52 days);

(-c-) Breeders–hybrid strains of chickens whose offspring are grown for human food (broilers), any age and either sex.

(III) Broilers, Breeders–chickens whose offspring are grown for human food (broilers):

(-a-) Starting/Growing–from day of hatch until approximately ten weeks of age;

(-b-) Finishing–from approximately ten weeks of age to time first egg is produced, approximately 20 weeks of age;

(-c-) Laying–fertile egg producing chickens (broilers/roasters) from day of first egg throughout the time fertile eggs are produced.

(IV) Turkeys:

(-a-) Starting/Growing–turkeys that are grown for human food from day of hatch to approximately 13 weeks of age (males);

(-b-) Finisher–turkeys that are grown for human food, females from approximately 17 weeks of age; males from 16 weeks of age to 20 weeks of age, (or desired market weight);

(-c-) Laying–female turkeys that are producing eggs; from time first egg is produced, throughout the time they are producing eggs;

(-d-) Breeder–turkeys that are grown to produce fertile eggs, from day of hatch to time first egg is produced (approximately 30 weeks of age), both sexes.

(V) Ducks:

(-a-) Starter–0 to 3 weeks of age;

(-b-) Grower–3 to 6 weeks of age;

(-c-) Finisher–6 weeks to market;

(-d-) Breeder Developer–8 to 19 weeks of age;

(-e-) Breeder–22 weeks to end of lay.

(VI) Geese:

(-a-) Starter–0 to 4 weeks of age;

(-b-) Grower–4 to 8 weeks of age;

(-c-) Finisher–8 weeks to market;

(-d-) Breeder Developer - 10 to 22 weeks of age;

(-e-) Breeder - 22 weeks to end of lay.

(ii) Swine.

(I) Pre-Starter–2 to 11 pounds;

(II) Starter–11 to 44 pounds;

(III) Grower–44 to 110 pounds;

(IV) Finisher–110 to 242 pounds (market);

(V) Gilts, Sows and Adult Boars;

(VI) Lactating Gilts and Sows.

(iii) Beef Cattle.

(I) Calves (birth to weaning);

(II) Cattle on Pasture (may be specific as to production stage, i.e., stocker, feeder, replacement heifers, brood cows, bulls, etc.);

(III) Feedlot Cattle.

(iv) Dairy Cattle.

(I) Veal Milk Replacer - milk replacer to be fed for veal production;

(II) Herd Milk Replacer - milk replacer to be fed for herd replacement;

(III) Starter - approximately 3 days to 3 months;

(IV) Growing Heifers, Bulls, and Dairy Beef:

(-a-) Grower 1–3 months to 12 months of age;

(-b-) Grower 2–more than 12 months of age;

(V) Lactating Dairy Cattle;

(VI) Non-Lactating Dairy Cattle.

(v) Fish (Species shall be declared in lieu of class).

(I) Trout;

(II) Catfish;

(III) Species other than trout or catfish.

(vi) Rabbit.

(I) Grower - 4 to 12 weeks of age;

(II) Breeder - 12 weeks of age and over.

(vii) Equine.

(I) Foal.

(II) Mare;

(III) Breeding;

(IV) Maintenance.

(viii) Goat and Sheep.

(I) Starter;

(II) Grower;

(III) Finisher;

(IV) Breeder;

(V) Lactating.

(C) The indication for animal class(es) and specie(s) is not required on single ingredient products if the ingredient is not intended, represented, or defined for a specific animal class(es) or specie(s).

(D) A purpose statement of a premix limited to use in the further manufacture of commercial feed may state "For the Manufacture of Commercial Feed" if the nutrients contained in the premix are guaranteed and sufficient for formulation into various animal species feeds.

(E) The purpose statement of single purpose ingredient blend limited to use in the further manufacture of commercial feed, such as a blend of animal protein products, milk products, fat products, roughage products or molasses products may state "For Further Manufacturing of Feed" if the label guarantees of the nutrients contained in the single purpose nutrient blend are sufficient to provide for formulation into various animal species feeds.

(2) Product name and brand name, if any.

(A) The brand and product name shall be appropriate for the intended use of the feed and must not be misleading. If the name indicates the feed is made for a specific use, the character of the feed must conform therewith.

(B) The word "protein" shall not be permitted in the product name of a feed that contains non-protein nitrogen.

(C) The word "vitamin," or a contraction thereof, or any word suggesting vitamin, shall be used only in the name of a feed which is represented to be a vitamin supplement and which is labeled with the minimum content of each vitamin declared, as specified in paragraph (9)(E) of this section.

(D) The term "mineralized" shall not be used in the name of a feed, except for when contained in the expression "trace mineralized salt." When this phrase is displayed on the label, the product must contain significant amounts of trace minerals which are recognized as essential for animal nutrition.

(E) The term "meat" or "meat by-products" shall be qualified on the label to designate the type of animal from which the meat or meat by-products are derived unless the meat or meat by-products are from cattle, swine, sheep, and goats.

(F) When the product name or brand name of a feed carries a percentage value, it shall be understood to signify the protein and/or equivalent protein of the feed content only, even though such percentage value is not explicitly modified by the word "protein." Other percentage values are permitted in the product name or brand name of a feed if such percentages are followed by a proper description and conform with good labeling practices.

(G) Digital numbers shall not be used in the product name or brand name of a feed in such a manner as to be misleading or confusing to a consumer.

(H) Unless otherwise specified, single ingredient feeds shall have a product name which comports with the ingredient name assigned to such product by the Association of American Feed Control Officials in its official publication, adopted by reference in 61.1 of this title (relating to Definitions), and shall meet the standard of identity and, where required, list the guarantees of that standard.

(3) Drug additives, when present.

(A) The word "medicated" shall be placed directly following and below the product name in type size no smaller than one-half the size of the product name.

(B) The purpose of the medication (claim statement) shall be stated.

(C) The label shall state any warning or cautionary statement relating to such drug additive required by paragraph (6) of this section, or reference to where such warning or cautionary statement may be found.

(D) The label shall display active drug ingredient statement listing:

(i) each drug ingredient by its common or usual name; and

(ii) the amount of each ingredient.

(4) Guarantees–Crude Protein, Non-Protein Nitrogen, Amino Acids, Crude Fat, Crude Fiber, Acid Detergent Fiber, Calcium, Phosphorus, Salt and Sodium shall be the sequence of nutritional guarantees when such guarantee is stated. Other required and voluntary guarantees should follow in a general format such that the units of measure used to express guarantees (percentage, parts per million, International Units, etc.) are listed in a sequence that provides a consistent grouping of the units of measure.

(A) Poultry:

(i) Chickens and Turkeys - complete feeds and supplements for all animal classes:

(I) Minimum percentage of crude protein;

(II) Minimum percentage of lysine;

(III) Minimum percentage of methionine;

(IV) Minimum percentage of crude fat;

(V) Maximum percentage of crude fiber;

(VI) Minimum and maximum percentage of calcium;

(VII) Minimum percentage of phosphorus;

(VIII) Minimum and maximum percentage of salt (if added);

(IX) Minimum and maximum percentage of total sodium shall be guaranteed only when total sodium exceeds that furnished by the maximum salt guarantee.

(ii) Ducks and Geese - complete feeds and supplements for all animal classes:

(I) Minimum percentage of crude protein;

(II) Minimum percentage of crude fat;

(III) Maximum percentage of crude fiber;

(IV) Minimum and maximum percentage of calcium;

(V) Minimum percentage of phosphorus;

(VI) Minimum and maximum percentage of salt (if added);

(VII) Minimum and maximum percentage of total sodium shall be guaranteed only when total sodium exceeds that furnished by the maximum salt guarantee.

(B) Swine - complete feeds and supplements for all animal classes:

(i) Minimum percentage of crude protein;

(ii) Minimum percentage of lysine;

(iii) Minimum percentage of crude fat;

(iv) Maximum percentage of crude fiber;

(v) Minimum and maximum percentage of calcium;

(vi) Minimum percentage of phosphorus;

(vii) Minimum and maximum percentage of salt (if added);

(viii) Minimum and maximum percentage of total sodium shall be guaranteed only when total sodium exceeds that furnished by the maximum salt guarantee;

(ix) Minimum selenium in parts per million (ppm);

(x) Minimum zinc in parts per million (ppm).

(C) Beef Cattle:

(i) Complete Feeds and Supplements - all animal classes:

(I) Minimum percentage of crude protein;

(II) Maximum percentage of equivalent crude protein from non-protein nitrogen (NPN) when added;

(III) Minimum percentage of crude fat;

(IV) Maximum percentage of crude fiber;

(V) Minimum and maximum percentage of calcium;

(VI) Minimum percentage of phosphorus;

(VII) Minimum and maximum percentage of salt (if added);

(VIII) Minimum and maximum percentage of total sodium shall be guaranteed only when total sodium exceeds that furnished by the maximum salt guarantee;

(IX) Minimum percentage of potassium;

(X) Minimum vitamin A, other than precursors of vitamin A, in international units per pound (if added).

(ii) Mineral Feeds (if added):

(I) Minimum and maximum percentage of calcium;

(II) Minimum percentage of phosphorus;

(III) Minimum and maximum percentage of salt;

(IV) Minimum and maximum percentage of total sodium shall be guaranteed only when total sodium exceeds that furnished by the maximum salt guarantee;

(V) Minimum percentage of magnesium;

(VI) Minimum percentage of potassium;

(VII) Minimum copper in parts per million (ppm);

(VIII) Minimum selenium in parts per million (ppm);

(IX) Minimum zinc in parts per million (ppm);

(X) Minimum vitamin A, other than precursors of vitamin A, in international units per pound.

(D) Dairy Cattle:

(i) Complete Feeds and Supplements - all animal classes:

(I) Minimum percentage of crude protein;

(II) Maximum percentage of equivalent crude protein from non-protein nitrogen (NPN) when added;

(III) Minimum percentage of crude fat;

(IV) Maximum percentage of crude fiber;

(V) Maximum percentage of acid detergent fiber (ADF);

(VI) Minimum and maximum percentage of calcium;

(VII) Minimum percentage of phosphorus;

(VIII) Minimum selenium in parts per million (ppm);

(IX) Minimum vitamin A, other than precursors of vitamin A, in international units per pound (if added).

(ii) Mixing and Pasture Mineral Feeds (if added):

(I) Minimum and maximum percentage of calcium;

(II) Minimum percentage of phosphorus;

(III) Minimum and maximum percentage of salt;

(IV) Minimum and maximum percentage of total sodium shall be guaranteed only when total sodium exceeds that furnished by the maximum salt guarantee;

(V) Minimum percentage of magnesium;

(VI) Minimum percentage of potassium;

(VII) Minimum selenium in parts per million (ppm);

(VIII) Minimum vitamin A, other than precursors of vitamin A, in international units per pound.

(E) Veal & Herd Replacement Milk Replacer:

(i) Minimum percentage of crude protein;

(ii) Minimum percentage of crude fat;

(iii) Maximum percentage of crude fiber;

(iv) Minimum and maximum percentage of calcium;

(v) Minimum percentage of phosphorus;

(vi) Minimum vitamin A, other than precursors of vitamin A, in international units per pound (if added).

(F) Fish Complete Feeds and Supplements:

(i) Minimum percentage of crude protein;

(ii) Minimum percentage of crude fat;

(iii) Maximum percentage of crude fiber;

(iv) Minimum percentage of phosphorus.

(G) Rabbit Complete Feeds and Supplements - all animal classes:

(i) Minimum percentage of crude protein;

(ii) Minimum percentage of crude fat;

(iii) Minimum and maximum percentage of crude fiber (the maximum crude fiber shall not exceed the minimum by more than 5.0 percentage units);

(iv) Minimum and maximum percentage of calcium;

(v) Minimum percentage of phosphorus;

(vi) Minimum and maximum percentage of salt (if added);

(vii) Minimum and maximum percentage of total sodium shall be guaranteed only when total sodium exceeds that furnished by the maximum salt guarantee;

(viii) Minimum vitamin A, other than precursors of vitamin A, in international units per pound (if added).

(H) Equine:

(i) Complete Feeds and Supplements - all animal classes:

(I) Minimum percentage of crude protein;

(II) Minimum percentage of crude fat;

(III) Maximum percentage of crude fiber;

(IV) Minimum and maximum percentage of calcium;

(V) Minimum percentage of phosphorus;

(VI) Minimum copper in parts per million (ppm);

(VII) Minimum selenium in parts per million (ppm);

(VIII) Minimum zinc in parts per million (ppm);

(IX) Minimum vitamin A, other than precursors of vitamin A, in international units per pound (if added).

(ii) Mineral - all animal classes:

(I) Minimum and maximum percentage of calcium;

(II) Minimum percentage of phosphorus;

(III) Minimum and maximum percentage of salt (if added);

(IV) Minimum and maximum percentage of sodium (guaranteed only when total sodium exceeds that furnished by the maximum salt guarantee);

(V) Minimum copper in parts per million (ppm);

(VI) Minimum selenium in parts per million (ppm);

(VII) Minimum zinc in parts per million (ppm);

(VIII) Minimum vitamin A, other than precursors of vitamin A, in international units per pound (if added).

(I) Goat and Sheep Complete Feeds and Supplements - all animal classes:

(i) Minimum percentage of crude protein;

(ii) Maximum percentage of equivalent crude protein from non-protein nitrogen (NPN) when added;

(iii) Minimum percentage of crude fat;

(iv) Maximum percentage of crude fiber;

(v) Minimum and maximum percentage of calcium;

(vi) Minimum percentage of phosphorus;

(vii) Minimum and maximum percentage of salt (if added);

(viii) Minimum and maximum percentage of total sodium shall be guaranteed only when total sodium exceeds that furnished by the maximum salt guarantee;

(ix) Minimum and maximum copper in parts per million (ppm) (if added, or if total copper exceeds 20 ppm);

(x) Minimum selenium in parts per million (ppm);

(xi) Minimum vitamin A, other than precursors of vitamin A, in international units per pound (if added).

(J) Feeds for Other Animal Classes and Species not specifically mentioned above:

(i) Minimum percentage of crude protein;

(ii) Maximum percentage of equivalent crude protein from non-protein nitrogen (NPN) when added;

(iii) Minimum percentage of crude fat;

(iv) Maximum percentage of crude fiber;

(v) Minimum and maximum percentage of calcium;

(vi) Minimum percentage of phosphorus;

(vii) Minimum and maximum percentage of salt (if added);

(viii) Minimum and maximum percentage of total sodium shall be guaranteed when total sodium exceeds that furnished by the maximum salt guarantee;

(ix) Other Minerals;

(x) Vitamins;

(xi) Total sugars as invert;

(xii) Microorganisms.

(K) Grain Mixtures with or without Molasses.

(i) Minimum percentage of crude protein;

(ii) Minimum percentage of crude fat;

(iii) Maximum percentage of crude fiber;

(iv) Total sugars as invert.

(L) A commercial feed (e.g., vitamin/mineral premix, base mix, etc.) intended to provide a specialized nutritional source for use in the manufacture of other feeds, must state its intended purpose and guarantee those nutrients relevant to such stated purpose.

(M) The label of a feed intended for wildlife which contains

(i) 20-50 ppb aflatoxin requires a prominent statement similar to, "WARNING: Product contains less than 50 ppb aflatoxin. Not for lactating dairy animals. Not for human use"; the distributor may choose to add a statement to the label similar to, "Meets the Texas Standard for Wildlife Feed" adjacent to the warning statement;

(ii) less than 20 ppb aflatoxin requires no warning statement nor any statement of aflatoxin content; the distributor may choose to add a statement to the label similar to, "Product contains less than 20 ppb aflatoxin" or "Meets the Texas Standard for Wildlife Feed."

(5) Feed ingredients.

(A) The feed ingredients statement for a commercial feed shall include the name of each ingredient in the feed or the collective term for each grouping of feed ingredients contained in the feed, unless exempted under subparagraph (I) of this paragraph.

(B) The name of each ingredient or grouping of ingredients listed shall be:

(i) the official term for the ingredient or grouping of ingredients adopted by the Association of American Feed Control Officials in its official publication, adopted by reference in 61.1 of this title (relating to Definitions);

(ii) the common or usual name for the ingredient; or

(iii) a name approved by the Service.

(C) When a collective term for a group of ingredients is used on the label of a feed:

(i) individual ingredients within that group shall not be listed on the label; and

(ii) the Service may require the manufacturer to provide a listing of the individual ingredients within the group that are or have been used in the product as distributed in this state.

(D) Tentative definitions for feed ingredients shall not be used until adopted as an official definition by the Association of American Feed Control Officials, unless no official definition exists or the ingredient has a commonly accepted name that requires no definition (e.g., sugar).

(E) The sources of added vitamins may be stated in the ingredients statement.

(F) No reference to quality or grade of an ingredient shall appear in the ingredients statement.

(G) The term "dehydrated" may precede the name of any product that has been artificially dried.

(H) When the term "iodized" is used in connection with a feed ingredient, the ingredient shall contain not less than 0.007% iodine uniformly distributed.

(I) Exemptions:

(i) Carrier ingredients in products used solely as drug and vitamin premixes need not be named in the ingredients statement if:

(I) any changes in the carrier will not affect the purposes of the premix;

(II) the carrier ingredient is recognized by the Service as being safe;

(III) the carrier will not affect the safety, potency or efficacy of the finished product.

(ii) Single ingredient feeds are not required to have an ingredient statement.

(6) Directions for use and cautionary statements.

(A) All feeds which contain additives which require restricted distribution to avoid violation of 141.148(a)(2) or (6) of the Texas Feed Control Act or have been ammoniated for the purpose of minimizing aflatoxin contamination shall have included on their label directions for use and cautionary statements which shall:

(i) be adequate to enable safe and effective use of the product for its intended purposes by users with no special knowledge of the purposes and use of such articles; and

(ii) include, but not limited to, all information prescribed by the Code of Federal Regulations, Title 21.

(B) All feeds supplying particular dietary needs or for supplementing or fortifying the diet or ration with any vitamin, mineral, or other dietary nutrient or compound shall have included on their label adequate directions for use and any cautionary statement necessary for their safe and effective use.

(i) All mixed feeds containing urea or other non-protein nitrogen products shall have included on their label:

(I) the statement "Warning: (or "Caution:") Use as Directed" followed by adequate directions for the safe use of the feed if the equivalent protein from non-protein nitrogen in the feed exceeds one-third of the total crude protein, or more than 8.75% of the equivalent protein is from non-protein nitrogen; and

(II) a separate maximum guarantee for non-protein nitrogen originating from the addition of a mineral.

(ii) All mixed feeds containing ammoniated corn, ammoniated cottonseed, or ammoniated cottonseed meal shall have included on their labels:

(I) the term "ammoniated corn," "ammoniated cottonseed," or "ammoniated cottonseed meal" as separate and distinct entities in the ingredient statement in the proper order of predominance;

(II) any warning statements which might be required by §61.22(6)(B)(i).

(iii) Premixes, concentrates or supplements containing more than 1.25% equivalent protein from all forms of non-protein nitrogen, added as such, must contain adequate directions for use and a prominent statement: "WARNING: This feed must be used only in accordance with directions furnished on the label."

(iv) All directions for use required by this subparagraph shall be printed in a size of type such that the directions will be read and understood by ordinary persons under customary conditions of purchase and use.

(v) This subparagraph shall apply to all commercial feeds.

(vi) Feeds, such as medicated feeds, which are required to be labeled with adequate feeding directions and cautionary statements irrespective of the provisions of this subparagraph, shall not be required to bear duplicate feeding directions or cautionary statements on their labels if such statements as are otherwise required are sufficient to ensure the safe and effective use of the product due to the presence of non-protein nitrogen.

(C) Fluorine bearing phosphatic materials shall have included on their label the statement: "Caution–Mix at the rate to not raise the fluorine content in a total ration (exclusive of roughage) above the following levels:

(i) 0.004% for breeding and dairy cattle;

(ii) 0.009% for slaughter cattle;

(iii) 0.006% for sheep;

(iv) 0.01% for lambs;

(v) 0.015% for swine; and

(vi) 0.03% for poultry."

(D) All feeds containing recycled animal waste products shall guarantee copper and if the guarantee exceeds 25 ppm (0.0025%) shall bear the legend "WARNING: CONTAINS MORE THAN 25 PPM COPPER. DO NOT FEED TO SHEEP OR GOATS."

(7) The name and principal mailing address of the person responsible for distributing the feed.

(A) The principal mailing address shall include the street address, city, state, and zip code; provided, however, that the street address may be omitted if the address is listed in a current city directory or telephone directory.

(B) The labeling may bear the name of the purchaser as well as the manufacturer, provided the product is for in-plant use and not for resale.

(C) The labeling may bear the name of the distributor as well as the manufacturer, provided that the guarantor of the product is specifically stated.

(8) Quantity Statement

(A) Net weight and/or net liquid volume must be expressed both in English and in SI units:

(i) when the quantity statement is expressed in net pounds, the corresponding SI units shall be in kilograms and vice-versa;

(ii) when the quantity statement is expressed in net quarts or gallons, the corresponding SI unit shall be in liters and vice-versa;

(iii) when the quantity statement is expressed in net avoirdupois ounces or net fluid ounces, the corresponding SI units shall be in grams and milliliters respectively and vice-versa;

(iv) any fractional number which arises expressing the net weight in both systems shall be limited to two decimal places and the number rounded down.

(B) All dry and liquid bulk shipments shall declare net weight only.

(C) Net contents other than net weight or net volume shall be expressed as the sum total of the smallest individual unit in the container going to the final customer.

(D) Measurement.

(i) Net weights of packages dry and liquid bulk shall be determined directly from scales or for bulk liquids only as calculated from volume and specific gravity/density.

(ii) Conformance to weight guarantee shall be judged solely by use of certified scale defined in accordance with Texas Department of Agriculture standards.

(iii) Dip-sticks, uncertified/uncalibrated meters or sight gauges shall not be used to estimate volume. Scales not certified in accordance with the Texas Department of Agriculture standards shall not be used for net weights.

(iv) Net weights shall meet both the English and SI statements on the label.

(v) Conformance to guarantee of number shall be judged by count of intact individual units.

(9) Expression of Guarantees.

(A) The guarantees for crude protein, amino acids and crude fat shall be in terms of minimum percentage.

(B) The guarantees for crude fiber and acid detergent fiber shall be in terms of maximum percentage.

(C) The percentage of equivalent protein from non-protein nitrogen shall be guaranteed as follows:

(i) In feeds designated for ruminants–

(I) Complete feeds, supplements, and concentrates containing more than 5.0% protein from natural sources shall bear the following statement of guarantee: "Crude protein, minimum __% (This includes not more than __% equivalent protein from non-protein nitrogen.)"

(II) Mixed feed concentrates and supplements containing less than 5.0% protein from natural sources may bear the following statement of guarantee: "Equivalent crude protein from non-protein nitrogen, minimum __%."

(III) Ingredient sources of non-protein nitrogen, such as urea, diammonium phosphate, ammonium polyphosphate solution, ammoniated rice hulls, or any other basic non-protein nitrogen ingredient shall bear the following statement of guarantee: "Nitrogen, minimum __%. Equivalent crude protein from non-protein nitrogen, minimum __%."

(IV) Liquid feed supplements shall bear the following statement of guarantee: "Crude protein not less than __% (This includes not more than __% equivalent protein from non-protein nitrogen.)"

(ii) Feeds distributed to non-ruminant animals as a source of nutrients other than equivalent crude protein containing urea or other non-protein nitrogen products shall be labeled as follows: Complete feeds, supplements and concentrates containing crude protein from all forms of non-protein nitrogen, added as such. Crude protein, minimum __%. (This includes not more than __% equivalent crude protein which is not nutritionally available to (species of animal for which feed is intended)).

(D) The guarantees for minerals shall be expressed as follows.

(i) Commercial feeds containing calcium, phosphorus and/or salt shall include a guaranteed analysis of the following minerals in the following order:

(I) minimum and maximum percentage of calcium (Ca);

(II) minimum percentage of phosphorus (P);

(III) minimum and maximum percentages of salt (NaCl), when required; and

(IV) such other minerals as may be required by clause (ii) in this subparagraph.

(ii) Other minerals shall be expressed as follows:

(I) If the quantity statement is by weight:

(-a-) guarantees for minimum potassium, magnesium and maximum fluoride when used shall be stated in terms of percentage.

(-b-) Other minimum mineral guarantees shall be stated in percentage when used when the concentration is 1.00% (10,000 ppm) or greater; below 10,000 ppm these guarantees shall be expressed in ppm.

(II) If the quantity statement is in tablet, capsules, granules, liquids or boluses, then the guarantee is in mg per unit consistent with quantity statement and directions for use.

(III) When calcium, salt and sodium guarantees are given in the guaranteed analysis, such guarantees shall conform to the following.

(-a-) When the minimum is 5.0% or less, the maximum shall not exceed the minimum by more than one percentage point.

(-b-) When the minimum is above 5.0%, the maximum shall not exceed the minimum by more than 20% and in no case shall the maximum exceed the minimum by more than five percentage points.

(IV) Naturally occurring mineral phosphatic materials for feeding purposes shall be labeled with a guaranteed analysis of the minimum and maximum percentage of calcium (when present), the minimum percentage of phosphorus, and the maximum percentage of fluorine.

(E) If made, the guarantees for vitamins shall be expressed as follows.

(i) The minimum vitamin content of commercial feeds and feed supplements shall be stated on the label in milligrams per pound or units consistent with the quantity statement and with the directions for use, except that:

(I) vitamin A, other than precursors of vitamin A, shall be stated in international units per pound;

(II) vitamin D3, in products offered for poultry feeding, shall be stated in international chick units per pound;

(III) vitamin D, for other uses, shall be stated in terms of international units per pound;

(IV) vitamin E shall be stated in international units per pound;

(V) vitamin B12 shall be stated in milligrams or micrograms per pound;

(VI) oils and premixes containing vitamins A, D and/or E may be labeled to show vitamin content in terms of units per gram.

(ii) Guarantees for vitamin content on the label of a commercial feed shall state the guarantees as menadione, riboflavin, d-pantothenic acid, thiamine, niacin, vitamin B6, folic acid, choline, biotin, inositol, p-amino benzoic acid, ascorbic acid and/or carotene.

(F) The guarantees for antibiotics shall be expressed in terms of percent by weight, except that:

(I) antibiotics present at less than 2,000 grams per ton (total) of commercial feed shall be stated in grams per ton (total) of commercial feed;

(ii) antibiotics present at more than 2,000 grams per ton (total) of commercial feed shall be stated in grams per pound of commercial feed;

(iii) labels for commercial feeds containing growth promotion and feed efficiency levels of antibiotics which are to be fed continuously as the sole ration are not required to make quantitative guarantees, except as specifically noted in the Code of Federal Regulations (CFR), Title 21;

(iv) the amount of a drug or antibiotic may be expressed in terms of milligrams per pound where the dosage given in the feeding directions is given in milligrams.

(G) The analysis shall include the minimum percentage total sugars as invert on products being sold for their molasses content or products containing more than 16% sugars.

(H) The analysis shall include the maximum percent moisture on liquid feed supplements and liquid ingredients containing more than 20% moisture.

(I) Microorganisms need not be guaranteed when the commercial feed is intended for a purpose other than to furnish these substances and no other specific label claims are made. When guaranteed, the units shall be colony forming units (CFU) per gram if directions for use are in grams or in CFU per pound when directions for use are in pounds. A parenthetical statement following the guarantee shall list each species in order of predominance.

(J) Other required and voluntary guarantees should follow in a general format such that the units of measure used to express guarantees (percentage, parts per million, international units, etc.) are listed in a sequence which provides a consistent grouping of the units of measure.

(K) The sliding scale method of expressing guarantees (e.g., "protein is 15-18%, etc.") is prohibited.

(L) Unless otherwise provided by this section, guarantees for crude protein, equivalent protein from non-protein nitrogen, crude fat, and crude fiber will be in terms of percentage by weight.

(M) Commercial, registered brand, or trade names are not permitted for use in a statement of guarantee, unless followed by a parenthetical statement giving the technical name of the ingredient.

(N) Exemptions are as follows.

(i) Guarantees for vitamins are not required for commercial feed which is neither formulated nor in any manner represented as a vitamin supplement.

(ii) Guarantees for crude protein, crude fat, and crude fiber are not required for commercial feed not intended to furnish these substances, or for feeds in which these substances are of minor significance to the primary purpose of the product (e.g., drug premixes, mineral or vitamin supplements, or molasses).

(iii) Liquid ingredients need not be guaranteed to show maximum moisture content when moisture is the difference between the guarantee element and 100% or when the moisture content of the ingredient is less than 20%.

(iv) Whole feed-grain, unprocessed in any manner save mechanical blending or mixing with other batches of the same whole kernel feed-grade grain, need not provide guarantees for protein, fat, and fiber.

(v) A mineral guarantee is not required:

(I) when the feed or feed ingredient is intended for non-food producing animals and contains less than 6.5% total minerals; and

(II) when the feed or feed ingredient is not represented nor does it serve as a principle source of that mineral to the animal.

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 13, 1999.

TRD-9905931

Dr. George W. Latimer, Jr.

Assistant to the Associate Vice Chancellor of Agriculture

Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist

Effective date: October 3, 1999

Proposal publication date: August 6, 1999

For further information, please call: (409) 845-1121 (ext. 124)

♦ ♦ ♦

Subchapter H. ADULTERANTS

4 TAC §61.61

The Feed and Fertilizer Control Service/Office of the Texas State Chemist adopts an amendment to §61.61 with changes to the proposed text as published in the August 6, 1999 issue of the *Texas Register* (24 TexReg 5967).

The changes to the text are necessary because numbers were dropped in the text after the less than (<) signs indicating levels of aflatoxin. A Correction of Error was published in the August 13, 1999 issue of the *Texas Register* (23 TexReg 6344). An additional change is editorial: the word "by" was left off the Correction of Error text in §61.61(a)(7) when referring to "as approved by the Service."

The amendment to the rule is necessary to specify levels of aflatoxin and fumonisin in feeds which can safely be fed to designated animal species.

The Texas Chapter of The Wildlife Society and the Texas Wildlife Association support the amendment to the rule. There were no adverse comments.

The amendment is adopted under the Texas Agriculture Code, Chapter 141, §141.004, which provides the Texas Feed and Fertilizer Control Service with the authority to adopt rules relating to the distribution of commercial feeds.

§61.61. Poisonous or Deleterious Substances.

(a) Poisonous or deleterious substances include, but are not limited to, the following:

(1) fluorine and any mineral or mineral mixture which is to be used directly for the feeding of domestic animals and in which the fluorine exceeds 0.20% for breeding and dairy cattle; 0.30% for slaughter cattle; 0.30% for sheep; 0.35% for lambs; 0.45% for swine; and 0.60% for poultry;

(2) fluorine-bearing ingredients when used in such amounts that they raise the fluorine content of the total ration (exclusive of roughage) above the following amounts: 0.04% for breeding and dairy cattle; 0.009% for slaughter cattle; 0.006% for sheep; 0.01% for lambs; 0.015% for swine; and 0.03% for poultry;

(3) soybean meal, flakes, or pellets or other vegetable meals, flakes, or pellets which have been extracted with trichlorethylene or other chlorinated solvents;

(4) sulfur dioxide, sulfurous acid, and salts of sulfurous acid when used in or on feeds or feed ingredients which are considered or reported to be a significant source of vitamin B1 (thiamine);

(5) artificial color that has not been cleared for safety for use in feeds. Evidence of safety must include a clearance for use of these color additives under the provisions of the Federal Food, Drug, and Cosmetic Act. No artificial color material shall be used to enhance the natural color of the feed or feed ingredient whereby inferiority would be concealed; and

(6) aflatoxin B_1, B_2, G_1, G_2 above 20 parts per billion (ppb) individually or total except that with proper labeling as approved by the Service <50ppb may be distributed when destined for wildlife; <100ppb may be distributed when destined for breeding cattle and breeding goats not used in production of milk for human consumption, breeding swine, mature poultry, and sheep; <200ppb may be distributed when destined for finishing swine (more than 100 lbs. body weight); <300ppb may be distributed when destined for feedlot cattle;

(7) fumonisin above 5 parts per million (ppm) except that with proper labeling as approved by the Service <15ppm may be distributed when destined for finishing swine (more than 100 lbs. body weight); <50ppm may be distributed when destined for feedlot cattle.

(b) Urea and other non-protein nitrogen products defined by the Association of American Feed Control Officials are acceptable ingredients in proprietary cattle, sheep, and goat feeds only, provided that the product's label complies in all respects with the requirements of §61.22(9) of this title (relating to Commercial Feed). These materials shall be considered adulterants in proprietary feeds for other animals and birds at any level.

(c) All screenings or by-products of grains and seeds containing weed seeds, when used in commercial feed or sold as such to the ultimate consumer, shall be ground fine enough or otherwise treated to destroy viability of such weed seeds so that the finished product contains no viable prohibited noxious weed seeds and not more than 50 viable restricted weed seeds per pound, and not more than 100 of other weed seeds per pound.

(d) The Service may require evidence satisfactory to the Service of:

(1) the safety of any commercial feed if such feed includes ingredients not approved either by the FDA or AAFCO (the Association of American Feed Control Officials); or

(2) the efficacy of any commercial feed when such feeds do not meet minimum standards of nutrition for the targeted animal as set forth by recognized authorities on animal nutrition.

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 10, 1999.

TRD-9905866

Dr. George W. Latimer, Jr.

Assistant to the Associate Vice Chancellor of Agriculture

Texas Feed and Fertilizer Control Service/Office of the Texas State Chemist

Effective date: September 30, 1999

Proposal publication date: August 6, 1999

For further information, please call: (409) 845-1121 (ext. 124)

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

Part 5. TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT

Chapter 180. INDUSTRIAL PROJECTS

10 TAC §180.1, §180.2

The Texas Department of Economic Development (department) adopts the amendments to Title 10 Texas Administrative Code, Chapter 180, Sections 180.1 and 180.2, relating to Industrial Projects, without changes to the proposed text as published in the May 7, 1999, issue of the *Texas Register* (24 TexReg 3436). The text will not be republished.

The justification for this section is to give the department the authority to give approval of a lease, sale, loan agreement or bond for blighted areas or areas needing development which the city finds and determines substantially impair or arrest the sound growth of the city or constitute an economic or social liability and/or a menace to the public health, safety, or welfare in their present condition and use, pursuant to Texas Civil Statutes, Article 5190.6, §24(c). Upon review of these rules the department finds that the reason for adoption continues to exist.

No comments were received regarding the amendments to Title 10, T.A.C., Chapter 180, Sections 180.1 and 180.2.

The amendments are adopted pursuant to Government Code §481.0044(a), which directs the governing board of the department to adopt rules for administration of department programs, and Government Code, Chapter 2001, Subchapter B which prescribes the standards for rulemaking by state agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 9, 1999.

TRD-9905791

Gary Rosenquest

Chief Administrative Officer

Texas Department of Economic Development

Effective date: September 29, 1999

Proposal publication date: May 7, 1999

For further information, please call: (512) 936-0181

♦ ♦ ♦

Chapter 197. PRIVATE DONATIONS

10 TAC §§197.1, 197.2, 197.4, 197.6

The Texas Department of Economic Development (department) adopts amendments to Title 10 Texas Administrative Code, Chapter 197, §§197.1, 197.2, 197.4, and 197.6, relating to Private Donations. Section 197.1 is adopted with changes to

the proposed text as published in the May 7, 1999, issue of the *Texas Register* (24 TexReg 3437). Sections 197.2, 197.4, and 197.6 are adopted without changes and will not be republished.

The department has the authority to accept private donations pursuant to Government Code, §481.021(a)(3). These donations can have a significant impact on the department's success in stimulating economic development for the State of Texas. The rules as amended clarify the acceptance process and make it consistent with the law governing acceptance of gifts by state agencies set out in Government Code, Chapter 575. Upon review of these rules the department finds that the reason for adoption continues to exist.

One comment was received from the Texas Hotel and Motel Association regarding the omission of the corrected dollar value of gifts affected from $250 to $500 in §197.1. The omission of a symbol in the text as submitted to the *Texas Register* caused the corrected dollar amount to not appear in rule as amended. The department agrees with this comment and has made the appropriate correction.

The amendments are adopted pursuant to Government Code, §481.0044(a), which directs the governing board of the department to adopt rules necessary for the administration of the department, and Government Code, Chapter 2001, Subchapter B, which prescribes the standards for rulemaking by state agencies.

§197.1. General Provisions.

(a) Introduction. Private sector donations to the Texas Department of Economic Development can have a significant impact on the agency's success in stimulating economic development for the State of Texas. The Department of Economic Development is statutorily authorized to accept donations pursuant to the Texas Government Code, §481.021(a)(3). It shall be the policy of the department to accept only those donations that advance the purpose of the agency.

(b) Purpose. The purpose of this section is to establish procedures for the acceptance of private donations made to the department and to create standards of conduct to govern the relationship between the agency and the donors.

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

(1) Corporation–Texas Economic Development Corporation.

(2) Department–Texas Department of Economic Development.

(3) Donation–The conveyance of a property interest or service the value of which is $500 or more. Donations may include, among other things, transfers of cash gifts, services, real property, leasehold estates, loaned employees, and grants, as well as in-kind personal gifts such as equipment, books, art, or memorabilia.

(4) Donation agreement–The document which identifies the donated property and outlines any special conditions of the donation.

(5) Donor–One or more individuals or organizations that offer to give or give a donation to the department.

(6) Employee–An individual employed by the department in a full or part-time capacity or a volunteer of the department.

(7) Executive director–The executive director of the department or his or her designee.

(8) Officer–The executive director, governing board members, and advisory board members who serve the department.

(d) Examination of records. Any party requesting the examination of records pursuant to the Public Information Act, Texas Government Code, Chapter 552, shall indicate in writing the specific nature of the document to be viewed, and if photocopying is desired, agree to pay the appropriate fee. The department may seek a determination from the attorney general regarding the confidentiality of information relating to a donation before releasing requested information if the department determines an exception to the Public Information Act is applicable.

(e) Written communication with the department. Communications to the department regarding donations should be addressed to the Executive Director, Texas Department of Economic Development, P.O. Box 12728, Austin, Texas 78711.

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 9, 1999.

TRD-9905793
Gary Rosenquest
Chief Administrative Officer
Texas Department of Economic Development
Effective date: September 29, 1999
Proposal publication date: May 7, 1999
For further information, please call: (512) 936-0181

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

Part 2. PUBLIC UTILITY COMMISSION OF TEXAS

Chapter 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts amendments to §25.192 relating to Transmission Service Pricing, and §25.236 relating to Recovery of Fuel Costs, with changes to the proposed text as published in the July 30, 1999 *Texas Register* (24 TexReg 5826). The amendments are necessary to permit the independent system operator (ISO) for the Electric Reliability Council of Texas (ERCOT) to begin funding the additional functions that will be required to implement competition in the retail sale of electricity. These amendments are adopted under Project Number 21066.

Senate Bill 7 (SB 7) was enacted by the 76th Legislature, Regular Session (1999) to introduce competition in the retail sale of electricity in Texas, beginning in 2002. The bill requires the establishment of an independent organization to carry out certain functions that are essential to the operation of a competitive retail electric market. The ERCOT ISO will have significantly greater responsibilities and workload as the independent organization for ERCOT than it has today. It has begun planning for its additional manpower and other resource needs, so that the additional personnel and systems

are in place and operational by the summer of 2001 for the pilot project in retail competition that is required by SB 7. The amendment to §25.192 will require utilities to make payments to the ISO, providing it current funding to assume its additional responsibilities without undue financial burden. The amendment to §25.236 will permit utilities to recover from their customers as fuel costs the new fees they pay the ISO.

A public hearing on the amendments was held at the commission offices on September 2, 1999 at 9:00 a.m. Representatives from TXU Electric, Reliant Energy, Texas Industrial Energy Consumers, and Consumers Union attended the hearing and provided comments. To the extent that these comments differ from the written statements they submitted, such comments are summarized below.

The commission received written comments on the proposed amendments from Central Power & Light Company and West Texas Utilities Company (CSW Companies), the Office of Public Counsel (Public Counsel), Texas-New Mexico Power Company (TNMP), the City Public Service Board of the City of San Antonio (San Antonio), TXU Electric, Reliant Energy, and Texas Industrial Energy Consumers (TIEC).

None of the parties that commented on the amendments opposed the adoption of the amendment to §25.192, which would impose an ISO fee on wholesale power transactions that are scheduled using planned transmission service. The CSW Companies and TNMP supported the concept of adequate funding for the ISO. Several parties proposed modifications or clarifications of this section. The utilities that filed comments also supported the amendment to §25.236, which permits the recovery of the ISO fees from retail customers through the fuel expenses. Several other parties opposed this amendment, arguing that the commission should not permit utilities to recover the new ISO fee through fuel charges. TIEC and the Public Counsel also argued that the cost allocation that would result from the inclusion of the ISO fee in fuel charges would be inappropriate. The commission concludes that additional funding of the ERCOT ISO to permit it to prepare for retail competition will facilitate the achievement of an important public policy, the timely introduction of effective retail competition, and that assuring utilities' recovery of the new fees they pay the ISO also supports this policy. The commission is adopting the rule without substantive changes to the proposal that was published in the *Texas Register* but is adopting clarifications of the proposed rules, as suggested by some of the parties.

San Antonio argued that the proposed funding mechanism is not competitively neutral. The amended Public Utility Regulatory Act (PURA), in §39.151(e), authorizes the commission to prescribe a fee to recover the costs of an independent organization, but it requires that the fee be reasonable and competitively neutral. San Antonio argued that under the fee in the proposed amended §25.192, the majority of the independent organization's start up costs will be paid by existing load-serving entities, and that new market entrants will be able to avoid payment of the bulk of the initial costs of the ISO. San Antonio proposed that (1) the funding mechanism in the proposed rule should be in effect until January 1, 2002; and (2) upon the implementation of full retail competition in ERCOT, the ISO funding rate for those load-serving entities that contributed to increased ISO funding prior to 2002 should be set at a level lower than the rate for new companies entering the marketplace, until the new entrants have paid fees equal to the amount contributed by the pre-2002 entities. As San Antonio recognizes, there is a fairness issue in requiring funding today, when the new competitive companies are not operating in Texas to any significant degree. This would be a particularly significant problem if the current retailers of electricity were not permitted to pass the ISO fees on to their customers. The proposed amendment of §25.236, however, will permit regulated utilities to recover these costs from their customers, and unregulated municipal utilities and cooperatives have the right to recover these costs from their retail customers, without any action by the commission. In short, the retailers of electricity will be able to pass these costs on to their customers in the period before retail competition begins, so there should be little or no competitive impact from permitting the ISO to impose these fees. The more important issue will be how to recover the ISO's costs after competition begins. The solution proposed by San Antonio raises more difficult competitive issues than it resolves, because it would have two competitors in the same market paying a different level of fees. There are legitimate issues about how the ERCOT ISO should recover its costs, but the commission does not intend that the mechanism being adopted in this rule be permanent. As is discussed below, subsequent proceedings will afford the commission a better opportunity to resolve these issues in the context of a broader public discussion of the organization and funding of the ERCOT ISO.

The CSW Companies, TXU Electric, and TNMP urged the commission to clarify that the ISO fee applies to annual, monthly, weekly, and daily planned service. These parties suggested modifications to §25.192(a) and (f) to make this point clear. The commission is adopting modifications to the rule to make this point clear. TXU Electric also suggested that the third sentence of §25.192(a) be amended to reflect the current practice of assessing loss compensation charges for transmission customers that take weekly and daily transmission service. The commission is adopting a clarification on this point.

TNMP recommended that the commission adopt the postage-stamp transmission pricing required by SB 7 and that the commission establish a procedure for the review of the budget of the ISO. It also recommended that the costs of the ERCOT administrative office not be recovered through the fee established in §25.192. The proposal relating to postage-stamp pricing is beyond the scope of the proposed rule, and it would be unfair to adopt this change in this proceeding without more specific notice of the commission's intention to do so. With regard to budget review, the current §25.192(f) requires commission approval prior to a change in the ISO fee. In addition, the ERCOT ISO is expected to make a filing in October to request certification as the independent organization for ERCOT under PURA §39.151. That filing should cover the organization and funding of the ISO, and the commission's review of that filing or the adoption of rules to implement PURA §39.151 is a more appropriate mechanism to address the issues raised by TNMP. These issues should be discussed within ERCOT before it makes the October filing, affording interested persons an opportunity for a fuller airing of the issue and possibly a consensual resolution. Accordingly, the commission is not adopting TNMP's suggestions in this rulemaking proceeding.

A number of parties argued that the funding mechanism in the proposed rule should be limited to the period before the introduction of retail competition. Public Counsel, for example, argued that both the level of required funding and the volume of transactions are likely to change once the infrastructure for the retail market is in place and competition begins. The

commission agrees with these comments. In the preamble to the proposed rule, the commission noted that the purpose of the rule was to "to permit the ISO to begin funding the additional functions that will be required to implement competition in the retail sale of electricity." The level of funding certainly will change over time, and the funding mechanism that is appropriate for a competitive market is likely to be different than the mechanism that is being adopted for the transition period. The commission is not revising the text of the rule on this point, but it is committed to a resolution of this issue for the period when competition begins that includes a fuller discussion of the costs involved and how they will be recovered in a competitive market.

The Public Counsel, Consumers Union, and TIEC challenged the commission's proposal to permit utilities to recover fees paid to the ISO through fuel charges. Consumers Union noted that the amended PURA includes a freeze on the base rates of investor-owned utilities and argued that the fuel charges, which are not subject to the freeze, should not be used to increase rates for customers. Public Counsel noted that §39.004(d) permits utilities to adjust their wholesale transmission rates during the rate freeze or report transmission costs in excess of transmission revenues as expenses for the annual reports required in §39.052. Public Counsel argued that the amended law contemplates that transmission expenses be included in the annual report, not included in fuel expenses. TIEC argued that in other areas utility costs are going down, so that permitting the recovery of this new expense may lead to over-recoveries of base rates by utilities. In response, Reliant Energy argued that including the ISO charges in fuel costs does not imply that rates will change. It simply means that the charges will be recorded as fuel expenses that will be subject to a future reconciliation of fuel revenues and expenses. Reliant Energy also argued that ISO fees for unplanned transmission service are treated as fuel expenses under the current §25.236, and that the same treatment is appropriate for ISO fees for planned service. Reliant Energy also challenged TIEC's assertion that utility costs are going down.

The commission agrees with the position of Reliant Energy concerning the effect of the rate freeze in SB 7. The freeze does not preclude the commission from treating the ISO fees as fuel expenses. Under the current §25.236, some transmission-related costs are included in eligible fuel expenses and some are excluded. The commission recently amended §25.236 and clarified the treatment of transmission-related costs. One of its conclusions was to not include payments of transmission facilities charges to other utilities as fuel expenses. It reached its conclusion on this issue based on policy considerations, primarily that it would not be appropriate for large increases in transmission costs to be passed through to customers by means of the utilities' fuel charges, when the ERCOT utilities had had an opportunity to file rate cases to reflect the increases in transmission costs in their rates. The magnitude of the ISO fees that will be paid under this rule is smaller than the transmission-cost increases at issue in the prior amendment of §25.236, and base rates are now frozen, in accordance with the recent amendments to PURA. Nevertheless, the costs at issue here are important to meeting the new statutory requirement to introduce retail competition in January 2002. TIEC made the point in its comments that the commission should not implement a retail pass-through of the costs unless there are important policy reasons for doing so. The commission agrees with this position but concludes that funding the ISO is sufficiently important that investor-owned utilities should be permitted to pass the costs through to their retail customers. The competitive issue raised by San Antonio also supports this outcome. If investor-owned utilities are not able to pass these costs through to their retail customers, they may be at a competitive disadvantage with respect to new market entrants, who will not bear this cost during the 2000-2001 period, and municipal utilities and cooperatives, who do not need commission approval to recover these costs from their customers.

Public Counsel and TIEC also argued that the inclusion of ISO fees in fuel expenses is inappropriate on cost-allocation grounds. TIEC argued that the costs should not be allocated among customers based on energy consumption. It argued that the costs are demand-related and should be recovered through a mechanism that will permit them to be allocated to customers on the basis of demand for energy. In response, Reliant and TXU Electric argued that it is appropriate to include the costs in fuel. TXU Electric argued that the commission precedent on fuel expenses provides sufficient latitude to include these costs in fuel expenses. Reliant argued that for administrative efficiency and to permit future review of the expenses, the commission should include the costs in fuel expenses. The commission notes that including the costs in fuel expenses is administratively efficient. It will give utilities assurance of recovery of the amounts paid to the ISO, while preserving them for future review in a fuel reconciliation proceeding. If they were treated as base-rate expenses, they would have to be recorded as an expense on a current basis. At the same time, the expense caps in PURA §39.258 might not permit a utility to include the costs in its annual report of revenues and expenses. As is noted above, the commission concludes that the payment of these fees to the ISO to permit it to prepare for retail competition is an important public policy, and that assurance of recovery of the costs by utilities supports this policy. In addition, it is not clear that the costs at issue should be allocated on the basis of demand, as TIEC asserted. Transmission facilities have historically been allocated on the basis of demand, but where the fee is assessed to the utility on an energy basis, it is appropriate for the utility to recover it on that same basis.

TXU Electric argued that the commission should clarify the amendment to §25.236, adding a phrase that would state that the ISO fees are presumed to be reasonable. The commission concludes that this addition is not necessary. It is difficult to see how expenses paid by a utility to the ISO pursuant to a commission rule could be challenged in a fuel reconciliation proceeding.

All comments, including any not specifically summarized in this document, were fully considered by the commission.

Subchapter I. TRANSMISSION AND DISTRIBUTION

Division 1. OPEN-ACCESS COMPARABLE TRANSMISSION SERVICE FOR ELECTRIC UTILITIES IN THE ELECTRIC RELIABILITY COUNCIL OF TEXAS

16 TAC §25.192

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated, as amended by Senate Bill 7, Act of May 27, 1999, 76th Legislature, Regular Session,

chapter 405, 1999 Texas Session Law Service 2543 (Vernon) (PURA), §14.002 which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §31.001, 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; §35.004, which requires utilities to provide comparable wholesale transmission service, directs the commission to ensure that 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; and §39.151, which requires that an independent organization be established in each power region and authorizes the commission to adopt a reasonable and competitively-neutral fee to cover the costs of an independent organization.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 31.001, 35.004, 35.005, 35.006, and 39.151.

§25.192. Transmission Service Rates.

(a) Charges for transmission service. Transmission service customers shall incur facilities charges, loss compensation charges, and an independent system operator (ISO) fee for all planned transmission service. Transmission service customers shall incur loss compensation charges and an ISO fee for unplanned transmission service. The facilities charge for annual and monthly planned transmission service 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 1999 facilities charge equal to 70% of the difference between the 1997 facilities charge incurred by an electric utility and its annual transmission cost of service for calendar year 1997.

(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.

(5) The facilities charge for the short-term planned service described in §25.198 of this title (relating to Initiating Transmission Service) will be based on a prorated portion of seven-tenths of the annual cost of transmission service for each transmission service provider and will be charged on the basis of the megawatts of transmission service that are reserved. A transmission service customer will be obligated to pay all transmission service providers for this service upon making a request, whether the customer uses the service or not. Transmission service providers shall file tariffs for this service for commission approval.

(b) Transmission cost of service. The annual transmission cost of 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 a protective device associated with the 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;

(C) the portion of the direct-current (DC) interconnections with the Southwest Power Pool that are owned by a transmission service provider in ERCOT; and

(D) capacitors that are operated at a voltage of 60 kilovolts or below, if they are located in a distribution substation, the load at the substation has a power factor in excess of 0.95 without the capacitors, and the capacitors are controlled by an operator or automatically switched in response to transmission voltage.

(2) In determining the annual transmission cost of service 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 municipal utilities, river authorities, and electric cooperatives, 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 a municipal utility, and an alternative method for determining the utility's return, as permitted in paragraph (4) of this subsection.

(4) For municipal utilities, river authorities, and electric cooperatives, the return may be determined based on 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 transmission service 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, August, and September 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 and resources, 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 for planned transmission service and unplanned transmission service, payable to the independent system operator. Changes in the fee are subject to approval by the commission.

(g) Inadvertent energy. Control-area utilities shall compensate each other for inadvertent energy flows under a tariff requiring monetary payments. 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 service 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 service 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 service 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, August, and September. The impact charge will be calculated in accordance with this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 10, 1999.

TRD-9905858
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: September 30, 1999
Proposal publication date: July 30, 1999
For further information, please call: (512) 936-7308

♦ ♦ ♦

Subchapter J. COSTS, RATES AND TARIFFS

16 TAC §25.236

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated, as amended by Senate Bill 7, Act of May 27, 1999, 76th Legislature, Regular Session, chapter 405, 1999 Texas Session Law Service 2543 (Vernon) (PURA), §14.002 which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §31.001, 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; §35.004, which requires utilities to provide comparable wholesale transmission service, directs the commission to ensure that 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; and §39.151, which requires that an independent organization be established in each power region and authorizes the commission to adopt a reasonable and competitively-neutral fee to cover the costs of an independent organization.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 31.001, 35.004, 35.005, 35.006, and 39.151.

§25.236. Recovery of Fuel Costs.

(a) Eligible fuel expenses. Eligible fuel expenses include expenses properly recorded in the Federal Energy Regulatory Commission Uniform System of Accounts, numbers 501, 503, 518, 536, 547, 555, and 565, as modified in this subsection, as of April 1, 1997, and the items specified in paragraph (7) of this subsection. Any later amendments to the System of Accounts are not incorporated into this subsection. Subject to the commission finding special circumstances under paragraph (6) of this subsection, eligible fuel expenses are limited to:

(1) For any account, the electric utility may not recover, as part of eligible fuel expense, costs incurred after fuel is delivered to the generating plant site, for example, but not limited to, operation and maintenance expenses at generating plants, costs of maintaining and storing inventories of fuel at the generating plant site, unloading and fuel handling costs at the generating plant, and expenses associated with the disposal of fuel combustion residuals. Further, the electric utility may not recover maintenance expenses and taxes on rail cars owned or leased by the electric utility, regardless of whether the expenses and taxes are incurred or charged before or after the fuel is delivered to the generating plant site. The electric utility may not recover an equity return or profit for an affiliate of the electric utility, regardless of whether the affiliate incurs or charges the equity return or profit before or after the fuel is delivered to the generating plant site. In addition, all affiliate payments must satisfy the Public Utility Regulatory Act (PURA) §36.058.

(2) For Accounts 501 and 547, the only eligible fuel expenses are the delivered cost of fuel to the generating plant site excluding fuel brokerage fees. For Account 501, revenues associated with the disposal of fuel combustion residuals will also be excluded.

(3) For Accounts 518 and 536, the only eligible fuel expenses are the expenses properly recorded in the Account excluding brokerage fees. For Account 503, the only eligible fuel expenses are the expenses properly recorded in the Account, excluding brokerage fees, return, non-fuel operation and maintenance expenses, depreciation costs and taxes.

(4) For Account 555, the electric utility may not recover demand or capacity costs.

(5) For Account 565, an electric utility may not recover transmission expenses paid to affiliated companies for the purpose of equalizing or balancing the financial responsibility of differing levels of investment and operating costs associated with transmission assets. A non-ERCOT electric utility may not recover expenses for wheeling transactions. An ERCOT electric utility may recover only the expenses properly recorded in Account 565 for ISO fees related to planned and unplanned transmission service and for payments to parties related to unplanned transmission service, such as losses and re-dispatch fees.

(6) Upon demonstration that such treatment is justified by special circumstances, an electric utility may recover as eligible fuel expenses fuel or fuel related expenses otherwise excluded in paragraphs (1) - (5) of this subsection. In determining whether special circumstances exist, the commission shall consider, in addition to other factors developed in the record of the reconciliation proceeding, whether the fuel expense or transaction giving rise to the ineligible fuel expense resulted in, or is reasonably expected to result in, increased reliability of supply or lower fuel expenses than would otherwise be the case, and that such benefits received or expected to be received by ratepayers exceed the costs that ratepayers otherwise would have paid or otherwise would reasonably expect to pay.

(7) Eligible fuel expenses shall not be offset by revenues by affiliated companies for the purpose of equalizing or balancing the financial responsibility of differing levels of investment and operation costs associated with transmission assets. In addition to the expenses designated in paragraphs (1) - (6) of this subsection, unless otherwise specified by the commission, eligible fuel expenses shall be offset by:

(A) revenues from steam sales included in Accounts 504 and 456 to the extent expenses incurred to produce that steam are included in Account 503; and

(B) revenues from wheeling transactions except for non-ERCOT electric utilities; and

(C) revenues from off-system sales in their entirety, except as permitted in paragraph (8) of this subsection.

(D) For electric utilities in ERCOT, revenues from third parties for unplanned transmission service, such as ISO fees, losses, and re-dispatch fees.

(8) Shared margins from off-system sales. An electric utility may retain 10% of the margins from an off-system energy sales transaction if the following criteria are met:

(A) the electric utility participates in a transmission region governed by an independent system operator or a functionally equivalent independent organization;

(B) a generally-applicable tariff for firm and non-firm transmission service is offered in the transmission region in which the electric utility operates; and

(C) the transaction is not found to be to the detriment of its retail customers.

(b) Reconciliation of fuel expenses. Electric utilities shall file petitions for reconciliation on a periodic basis so that any petition for reconciliation shall contain a maximum of three years and a minimum of one year of reconcilable data and will be filed no

later than six months after the end of the period to be reconciled. However, notwithstanding the previous sentence, a reconciliation shall be requested in any general rate proceeding under the PURA, Chapter 36, Subchapters C and E and may be performed in any general rate proceeding under the PURA, Chapter 36, Subchapter D. Upon motion and showing of good cause, a fuel reconciliation proceeding may be severed from or consolidated with other proceedings.

(c) Petitions to reconcile fuel expenses. In addition to the commission prescribed reconciliation application, a fuel reconciliation petition filed by an electric utility must be accompanied by a summary and supporting testimony that includes the following information:

(1) a summary of significant, atypical events that occurred during the reconciliation period that affected the economic dispatch of the electric utility's generating units, including but not limited to transmission line constraints, fuel use or deliverability constraints, unit operational constraints, and system reliability constraints;

(2) a general description of typical constraints that limit the economic dispatch of the electric utility's generating units, including but not limited to transmission line constraints, fuel use or deliverability constraints, unit operational constraints, and system reliability constraints;

(3) the reasonableness and necessity of the electric utility's eligible fuel expenses and its mix of fuel used during the reconciliation period;

(4) a summary table that lists all the fuel cost elements which are covered in the electric utility's fuel cost recovery request, the dollars associated with each item, and where to find the item in the prefiled testimony;

(5) tables and graphs which show generation (MWh), capacity factor, fuel cost (cents per kWh and cents per MMBtu), variable cost and heat rate by plant and fuel type, on a monthly basis; and

(6) a summary and narrative of the next-day and intra-day surveys of the electricity markets and a comparison of those surveys to the electric utility's marginal generating costs.

(d) Fuel reconciliation proceedings. Burden of proof and scope of proceeding are as follows:

(1) In a proceeding to reconcile fuel factor revenues and expenses, an electric utility has the burden of showing that:

(A) its eligible fuel expenses during the reconciliation period were reasonable and necessary expenses incurred to provide reliable electric service to retail customers;

(B) if its eligible fuel expenses for the reconciliation period included an item or class of items supplied by an affiliate of the electric utility, the prices charged by the supplying affiliate to the electric utility were reasonable and necessary and no higher than the prices charged by the supplying affiliate to its other affiliates or divisions or to unaffiliated persons or corporations for the same item or class of items; and

(C) it has properly accounted for the amount of fuel-related revenues collected pursuant to the fuel factor during the reconciliation period.

(2) The scope of a fuel reconciliation proceeding includes any issue related to determining the reasonableness of the electric utility's fuel expenses during the reconciliation period and whether the electric utility has over- or under-recovered its reasonable fuel expenses.

(e) Refunds. All fuel refunds and surcharges shall be made using the following methods.

(1) Interest shall be calculated on the cumulative monthly ending under- or over-recovery balance at the rate established annually by the commission for overbilling and underbilling in §25.28 (c) and (d) of this title (relating to Bill Payment and Adjustments). Interest shall be calculated based on principles set out in subparagraphs (A) - (E) of this paragraph.

(A) Interest shall be compounded annually by using an effective monthly interest factor.

(B) The effective monthly interest factor shall be determined by using the algebraic calculation $x = (1 + i)\ (1/12) - 1$; where i = commission-approved annual interest rate, and x = effective monthly interest factor.

(C) Interest shall accrue monthly. The monthly interest amount shall be calculated by applying the effective monthly interest factor to the previous month's ending cumulative under/over recovery fuel and interest balance.

(D) The monthly interest amount shall be added to the cumulative principal and interest under/over recovery balance.

(E) Interest shall be calculated through the end of the month of the refund or surcharge.

(2) Rate class as used in this subparagraph shall mean all customers taking service under the same tariffed rate schedule, or a group of seasonal agricultural customers as identified by the electric utility.

(3) Interclass allocations of refunds and surcharges, including associated interest, shall be developed on a month-by-month basis and shall be based on the historical kilowatt-hour usage of each rate class for each month during the period in which the cumulative under- or over-recovery occurred, adjusted for line losses using the same commission-approved loss factors that were used in the electric utility's applicable fixed or interim fuel factor.

(4) Intraclass allocations of refunds and surcharges shall depend on the voltage level at which the customer receives service from the electric utility. Retail customers who receive service at transmission voltage levels, all wholesale customers, and any groups of seasonal agricultural customers as identified by the electric utility shall be given refunds or assessed surcharges based on their individual actual historical usage recorded during each month of the period in which the cumulative under- or over-recovery occurred, adjusted for line losses if necessary. All other customers shall be given refunds or assessed surcharges based on the historical kilowatt-hour usage of their rate class.

(5) Unless otherwise ordered by the commission, all refunds shall be made through a one-time bill credit and all surcharges shall be made on a monthly basis over a period not to exceed 12 months through a bill charge. However, refunds may be made by check to municipally-owned electric utility systems if so requested. Retail customers who receive service at transmission voltage levels, all wholesale customers, and any groups of seasonal agricultural customers as identified by the electric utility shall be given a one-time credit or assessed a surcharge made on a monthly basis over a period not to exceed 12 months through a bill charge. All other customers shall be given a credit or assessed a surcharge based on a factor which will be applied to their kilowatt-hour usage over the

refund or surcharge period. This factor will be determined by dividing the amount of refund or surcharge allocated to each rate class by forecasted kilowatt-hour usage for the class during the period in which the refund or surcharge will be made.

(6) A petition to surcharge or refund a fuel under- or over-recovery balance not associated with a proceeding under subsection (d) of this section shall be processed in accordance with the filing schedules in §25.237(d) of this title (relating to Fuel factors) and the deadlines in §25.237(e) of this title.

(f) Procedural schedule. Upon the filing of a petition to reconcile fuel expenses in a separate proceeding, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding within one year after a materially complete petition was filed. However, if the deadlines result in a number of electric utilities filing cases within 45 days of each other, the presiding officers shall schedule the cases in a manner to allow the commission to accommodate the workload of the cases irrespective of whether such procedural schedule enables the commission to issue a final order in each of the cases within one year after a materially complete petition is filed.

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 10, 1999.

TRD-9905859
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: September 30, 1999
Proposal publication date: July 30, 1999
For further information, please call: (512) 936-7308

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

Part 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

Chapter 463. APPLICATIONS

22 TAC §§463.1-463.3, 463.6-463.11, 463.13-463.18, 463.20- 463.28, 463.31, 463.32

The Texas State Board of Examiners of Psychologists adopts the repeal of §§463.1-463.3, 463.6-463.11, 463.13-463.18, 463.20-463.28, 463.31, 463.32, concerning Applications, without changes to the proposed text published in the May 28, 1999, issue of the *Texas Register* (24 TexReg 3977) and will not be republished.

These rules are being repealed in order to reorganize and clarify the rules of the Board.

The repeals of these rules will make the rules easier for licensees and the general public to follow and understand.

No comments were received regarding repeal of the rules.

The repeal is adopted under Texas Revised Civil Statutes, 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to promulgate rules consistent with the Statute.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 13, 1999.

TRD-9905903
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: October 3, 1999
Proposal publication date: May 28, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

Chapter 463. APPLICATIONS AND EXAMINATIONS

22 TAC §§463.1-463.3, 463.6, 463.8-463.12, 463.14-463.19, 463.21, 463.23, 463.25, 463.27, 463.32

The Texas State Board of Examiners of Psychologists adopts new §§463.1- 463.3, 463.6, 463.8-463.12, 463.14-463.19, 463.21, 463.23, 463.25, 463.27 and 463.32, concerning Applications and Examinations, without changes to the proposed text as published in the May 28, 1999, issue of the *Texas Register* (24 TexReg 3977) and will not be republished.

The rules are being adopted to reorganize and clarify the rules of the Board.

The new rules will make the rules easier for licensees and the general public to follow and understand.

No comments were received regarding the adoption of the new rules.

The new rules are adopted under Texas Civil Statutes, 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to promulgate rules consistent with the Statute.

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

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 13, 1999.

TRD-9905904
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: October 3, 1999
Proposal publication date: May 28, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §463.5, §463.29

The Texas State Board of Examiners of Psychologists adopts amendments to §463.5 and §463.29, concerning Applications and Examinations, without changes to the proposed text as

published in the May 28, 1999, issue of the *Texas Register* (24 TexReg 3984) and will not be republished.

The rules are being amended to reorganize and clarify the rules of the Board.

The amended rules will make the rules easier for licensees and the general public to follow and understand.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Civil Statutes, 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to promulgate rules consistent with the Statute.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 13, 1999.

TRD-9905905
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: October 3, 1999
Proposal publication date: May 28, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

Chapter 465. RULES OF PRACTICE

22 TAC §465.36

The Texas State Board of Examiners of Psychologists adopts new §465.36, concerning Code of Ethics, without changes to the proposed text as published in the May 28, 1999, issue of the *Texas Register* (24 TexReg 3987) and will not be republished.

The rule is being adopted to reorganize and clarify the rules of the Board.

The new rule will make the rules easier for licensees and the general public to follow and understand.

No comments were received regarding the adoption of the new rule.

The new rule is adopted under Texas Civil Statutes, 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to promulgate rules consistent with the Statute.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 13, 1999.

TRD-9905906
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: October 3, 1999
Proposal publication date: May 28, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

22 TAC §465.38

The Texas State Board of Examiners of Psychologists adopts an amendment to §465.38, concerning Psychological Services in the Schools, without changes to the proposed text as published in the May 28, 1999, issue of the *Texas Register* (24 TexReg 3987) and will not be republished.

The rules are being amended to reorganize and clarify the rules of the Board.

The amended rules will make the rules easier for licensees and the general public to follow and understand.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Civil Statutes, 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to promulgate rules consistent with the Statute.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 13, 1999.

TRD-9905907
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Effective date: October 3, 1999
Proposal publication date: May 28, 1999
For further information, please call: (512) 305-7700

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

Part 1. TEXAS DEPARTMENT OF HEALTH

Chapter 5. GRANTS AND CONTRACTS

Subchapter B. POISON CONTROL CENTERS

25 TAC §5.51

The Texas Department of Health (department) adopts an amendment to §5.51 concerning the Poison Control Coordinating Committee (committee) with changes to the proposed text as published in the July 9, 1999, issue of the *Texas Register* (24 TexReg 5137). The committee provides advice to the Texas Board of Health (board) and the Advisory Commission on State Emergency Communications (commission) in the area of poison control and the operation of the Texas Poison Control Network. The committee is governed by the Health and Safety Code, §777.008.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules on advisory committees. The rules must state the purpose and tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of

the agency affirmatively votes to continue the committee's existence.

In 1995, the board established a rule relating to the Poison Control Coordinating Committee. The rule states that the committee will automatically be abolished on November 1, 1999. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until November 1, 2003.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to reference the Health and Safety Code and the Government Code; to continue the committee until November 1, 2003; to clarify who appoints members; to clarify that members holdover until their replacement is appointed; to allow the appointment of nonvoting alternates; to change the expiration of members' terms to coincide with the state fiscal year; to state that the presiding and assistant presiding officers shall be jointly appointed by the chairmans of the board and the commission for a term of two years from September 1 of each odd-numbered year; to allow a temporary vacancy in the office of assistant presiding officer to be filled by vote of the committee until appointment by the chairmans of the commission and board occurs; to prohibit officers from serving more than two terms; to require committee meetings at least twice a year; to clarify that the committee is prohibited from holding an executive session (closed meeting) for any reason; to allow subcommittee chairpersons to be individuals who are not members of the committee; to clarify that the committee and its members may not participate in legislative activity in the name of the board, the department, the commission or the committee except with certain approval; to require the committee's annual report in November; to reference reimbursement for a committee member's expenses if authorized by the General Appropriations Act or budget execution process; and to address meetings, attendance, staff, procedures of the meetings, subcommittees, statement by members, and reporting procedures. Other minor language changes were made for clarification. These changes will clarify procedures for the committee and emphasize the advisory nature of the committee.

The department is making the following changes due to concerns raised by the commission during its review of the proposed rule.

Change: Concerning §5.51(h)(1)(A), although each entity hosting a poison control center appoints one committee member, the rules did not clearly state this responsibility. The language has been revised to state that the chief executive officer of each entity appoints a member. The entities are listed in the Health and Safety Code, §777.008(b)(1)-(6).

Change: Concerning §5.51(h)(2), language was added to allow the appointing authorities to select a nonvoting alternate for members who cannot attend meetings.

Change: Concerning §5.51(i)(1), the language was revised so that the expiration of members' terms will coincide with the state fiscal year. The terms of current committee members will be extended from January 1 to August 31 of the year currently listed for expiration of the member's term.

Change: Concerning §5.51(j), the language was revised so that the officers' terms will coincide with the start of the state fiscal year. The proposed language stated that officers' terms begin on September 1 of each odd-numbered year; however, language was added to clarify that officers' term are two years.

Change: Concerning §5.51(j)(5), since officers' terms will now be for two years, rather than one year, the language was revised to limit officers to two terms, rather than two consecutive terms which would allow multiple nonconsecutive terms.

Change: Concerning §5.51(k), language was added to require the committee to meet at least twice each year to ensure periodic input from the committee to the department and the commission.

Change: Concerning §5.51(o)(1), the language was revised to allow subcommittee chairpersons to be committee members or nonmembers.

Change: Concerning §5.51(p)(2), although the language does not prohibit members from representing themselves or other entities in the legislative process, language was added to clarify that this includes representing the member's poison control center.

The amendment is adopted under the Health and Safety Code, §777.008, which governs the committee; the Health and Safety Code, §11.016, which allows the board to establish advisory committees; the Government Code, Chapter 2110, which sets standards for the evaluation of advisory committees by the agencies for which they function; and the Health and Safety Code, §12.001, which provides the board with authority to adopt rules for the performance of every duty imposed by law upon the board, the department, and commissioner of health.

§5.51. General Program Information.

(a) Authority. Health and Safety Code, Chapter 777, provides the Texas Department of Health (department) and the Advisory Commission on State Emergency Communications (commission) with the authority to establish a program to award grants to fund a network of regional poison control centers.

(b) The committee. An advisory committee shall be appointed under and governed by this section.

(1) The name of the committee shall be the Poison Control Coordinating Committee (committee).

(2) The committee is established under the Health and Safety Code, §777.008, which requires the committee to be established and §11.016, which allows the Texas Board of Health (board) to establish advisory committees.

(c) Applicable law. The committee is subject to the Government Code, Chapter 2110, concerning state agency advisory committees.

(d) Purpose. The purpose of the committee is to provide advice to the board and the commission in the area of poison control and the operation of the Texas Poison Control Network in accordance with the poison control provisions of the Health and Safety Code, Chapters 771 and 777. The advice and recommendations of the committee regarding such matters shall be provided to the department and commission in writing, in the following fashion.

(1) In accordance with departmental organization, advice and recommendations to the department shall be referred to the board through the Health and Clinical Services Committee, or any similar committee officially established for such purposes by the board.

(2) In accordance with commission organization, advice and recommendations to the commission shall be referred to the

commission through the commission's poison control committee, or any similar committee officially established for such purposes by the commission.

(e) Tasks.

(1) The committee shall advise the board and commission concerning rules relating to poison control.

(2) The committee shall carry out any other tasks given to the committee by the board or the commission.

(f) Objectives. The objectives of the program described in this section are to:

(1) promote public safety and injury prevention through well coordinated poison control activities within the state of Texas;

(2) provide information and educational programs for communities and health care professionals;

(3) provide poison prevention education;

(4) provide technical assistance to state agencies requesting toxicology assistance; and

(5) provide consultation services concerning medical toxicology.

(g) Review and duration. By November 1, 2003, the board and commission will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(h) Composition.

(1) The committee shall be composed of eight members as follows:

(A) one member each appointed by the chief executive officer of the six entities described in Health and Safety Code, §777.008(b)(1)-(6); and

(B) one member each from the department and commission, appointed by the executive director of each agency.

(2) Each appointing authority may select an alternate who may attend committee meetings in the place of the appointed member but may not vote.

(i) Terms of office. The term of office of each member shall be six years. Members shall serve after expiration of their term until a replacement is appointed.

(1) Members shall be appointed for staggered terms so that the terms of a substantially equivalent number of members will expire August 31 of each odd-numbered year. The terms of members serving on the committee as of September 1, 1999, shall be automatically extended from January 1 to August 31 of the year currently listed for expiration of the member's term.

(2) If a vacancy occurs, a person shall be appointed to serve the unexpired portion of that term.

(j) Officers. The chairmans of the board and the commission shall appoint a presiding officer and an assistant presiding officer to begin serving on September 1 of each odd-numbered year for a two year term.

(1) Each officer shall serve until the next regular appointment of officers.

(2) The presiding officer shall preside at all committee meetings at which he or she is in attendance, call meetings in accordance with this section, appoint subcommittees of the committee as necessary, and cause proper reports to be made to the board and commission. The presiding officer may serve as an ex-officio member of any subcommittee of the committee.

(3) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. In case the office of presiding officer becomes vacant, the assistant presiding officer will serve until a successor is appointed to complete the unexpired portion of the term of the office of presiding officer.

(4) If the office of assistant presiding officer becomes vacant, it may be filled temporarily by vote of the committee until a successor is appointed by the chairmans of the board and the commission.

(5) A member shall serve no more than two terms as presiding officer and/or assistant presiding officer.

(6) The committee may reference its officers by other terms, such as chairperson and vice-chairperson.

(7) The presiding officer and assistant presiding officer serving on October 1, 1999, will continue to serve until the chairmans of the board and the commission appoint their successors.

(k) Meetings. The committee shall meet at least twice each year and other times as necessary to conduct committee business.

(1) A meeting may be called by agreement of commission staff and either the presiding officer or at least three members of the committee.

(2) Meeting arrangements shall be made by commission staff. Commission staff shall contact committee members to determine availability for a meeting date and place.

(3) The committee is not a "governmental body" as defined in the Open Meetings Act. However, in order to promote public participation, each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551, with the exception that the provisions allowing executive sessions shall not apply.

(4) Each member of the committee shall be informed of a committee meeting at least five working days before the meeting.

(5) A simple majority of the members of the committee shall constitute a quorum for the purpose of transacting official business.

(6) The committee is authorized to transact official business only when in a legally constituted meeting with quorum present.

(7) The agenda for each committee meeting shall include an item entitled public comment under which any person will be allowed to address the committee on matters relating to committee business. The presiding officer may establish procedures for public comment, including a time limit on each comment.

(l) Attendance. Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which the member is assigned.

(1) A member shall notify the presiding officer or appropriate commission staff if he or she is unable to attend a scheduled meeting.

(2) It is grounds for removal from the committee if a member cannot discharge the member's duties for a substantial part of the term for which the member is appointed because of illness or disability, is absent from more than half of the committee and subcommittee meetings during a calendar year, or is absent from at least three consecutive committee meetings.

(3) The validity of an action of the committee is not affected by the fact that it is taken when a ground for removal of a member exists.

(m) Staff. Staff support for the committee shall be provided by the commission.

(n) Procedures. Roberts Rules of Order, Newly Revised, shall be the basis of parliamentary decisions except where otherwise provided by law or rule.

(1) Any action taken by the committee must be approved by a majority vote of the members present once quorum is established.

(2) Each member shall have one vote.

(3) A member may not authorize another individual to represent the member by proxy.

(4) The committee shall make decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.

(5) Minutes of each committee meeting shall be taken by commission staff.

(A) A summary of the meeting shall be provided to the board, the commission, and each member of the committee within 30 days of each meeting.

(B) After approval by the committee, the minutes shall be signed by the presiding officer.

(o) Subcommittees. The committee may establish subcommittees as necessary to assist the committee in carrying out its duties.

(1) The presiding officer shall appoint members of the committee to serve on subcommittees. The presiding officer may also appoint nonmembers of the committee to serve on subcommittees. The presiding officer shall appoint members or nonmembers to act as subcommittee chairpersons.

(2) Subcommittees shall meet when called by the subcommittee chairperson or when so directed by the committee.

(3) A subcommittee chairperson shall make regular reports to the committee at each committee meeting or in interim written reports as needed. The reports shall include an executive summary or minutes of each subcommittee meeting.

(p) Statement by members.

(1) The board, the department, the commission, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the board, department, commission or committee.

(2) The committee and its members may not participate in legislative activity in the name of the board, the department, the commission or the committee except with approval through the department's or commission's legislative process. Committee members are not prohibited from representing themselves, their poison control center, or other entities in the legislative process.

(q) Reports to board. The committee shall file an annual written report with the board and the commission.

(1) The report shall list the meeting dates of the committee and any subcommittees, the attendance records of its members, a brief description of actions taken by the committee, a description of how the committee has accomplished the tasks given to the committee by the board and the commission, the status of any rules which were recommended by the committee to the board or the commission, and anticipated activities of the committee for the next year.

(2) The report shall identify the costs related to the committee's existence, including the cost of department staff time spent in support of the committee's activities.

(3) The report shall cover the meetings and activities in the immediate preceding 12 months and shall be filed with the board and the commission each November. It shall be signed by the presiding officer and appropriate commission staff.

(r) Reimbursement for expenses. In accordance with the requirements set forth in the Government Code, Chapter 2110, a committee member may receive reimbursement for the member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or budget execution process.

(1) No compensatory per diem shall be paid to committee members unless required by law.

(2) A committee member who is an employee of a state agency, other than the department or the commission, may not receive reimbursement for expenses from the department or the commission.

(3) A nonmember of the committee who is appointed to serve on a subcommittee may not receive reimbursement for expenses from the department or the commission.

(4) Each member who is to be reimbursed for expenses shall submit to staff the member's receipts for expenses and any required official forms no later than 14 days after each committee meeting.

(5) Requests for reimbursement of expenses shall be made on official state travel vouchers prepared by commission staff.

(s) Definitions of terms and abbreviations. The following words, terms, and abbreviations, when used in this chapter have the following meanings, unless the context clearly indicates otherwise.

(1) AAPCC–American Association of Poison Control Centers.

(2) PCAP–Poison Control Answering Point; also referred to as Designated Regional Poison Control Center for the State of Texas.

(3) PSAP–Public Safety Answering Point.

(4) State fiscal year–A period of time which begins September 1 of a given year and ends August 31 of the following year.

(5) UGCMS–Uniform Grant and Contract Management Standards, consisting of a set of rules set forth in 1 Texas Administrative Code, Chapter 5, Subchapter A, promulgated pursuant to the Uniform Grant and Contract Management Act, Government Code, Chapter 783.

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 13, 1999.

TRD-9905909
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: October 3, 1999
Proposal publication date: July 9, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

Chapter 38. CHRONICALLY ILL AND DISABLED CHILDREN'S SERVICES PROGRAM

25 TAC §§38.2, 38.3, 38.6, 38.13

The Texas Department of Health (department) adopts amendments to §§38.2, 38.3, 38.6, and 38.13 concerning definitions, eligibility for client services, providers, and payment for services in the Chronically Ill and Disabled Children's Services (CIDC) Program. Sections 38.2, 38.3, and 38.6 are adopted with changes to the proposed text as published in the May 7, 1999, issue of the *Texas Register* (24 TexReg 3444). Section 38.13 is adopted without changes, and therefore will not be republished.

Section 38.2 is amended by defining retroactive eligibility as 15 days preceding the date of receipt of a complete application, by further defining newborns, and by adding definitions of eligibility dates for clients who are comatose, clients who are born prematurely, clients who must meet spenddown eligibility requirements, and clients who must provide additional documentation to make their applications complete. A definition of "spenddown@ has been added, and all the definitions have been numbered in *Texas Register* format, as required by 1 Texas Administrative Code (TAC) §91.1.

Section 38.3(3)(A) is amended to clarify the 12-month eligibility period for clients who meet spenddown eligibility requirements and to delete criteria for provisional eligibility. Section 38.3(3)(A)(v) is amended to clarify program policy and to specify the 60-day time limit allowed for clients to submit an eligibility determination made by Medicaid or by the Supplemental Security Income Program (SSI). Section 38.3(7)(B)(ii) as amended provides that an application for CIDC eligibility which lacks any data or documents required to process the application, specifically including a determination of Medicaid eligibility, shall be considered incomplete.

Section 38.6(a) is amended to include "dietitians@ as CIDC providers, and in §38.6(a)(5), to correct grammar concerning overpayments made on behalf of clients to CIDC Program providers. Section 38.6(b)(2) as amended authorizes denial or suspension of approved provider status based on disciplinary action taken by the licensing board of any provider or by the Texas Medicaid Program. The amendment to §38.6(d)(4) corrects grammar in the sentence concerning podiatrists accepting responsibility for actions of staff members. The amendment to §38.6(e) adds provisions for approval of licensed dietitians as providers in the CIDC Program, as authorized by Senate Bill 1313, 75th Legislature, 1997. Dietitians were added as providers in policy effective September 1, 1997. This amendment names dietitians as providers in rule.

Section 38.13(3)(A)(iv) is amended to designate the current edition of the Drug Topics Red Book as the source of price reimbursement information for nutritional supplements rather than the 1996 edition of the Drug Topics Red Book. This change reflects program and provider practice. The amendment to §38.13(3)(B)(v) corrects the methodology used to determine reimbursement for ambulatory surgical centers.

The department received no public comments during the comment period for these amendments. However, the department is making the following minor changes due to staff comments to clarify the intent and improve the accuracy of the sections.

Change: Concerning §§38.2(17)(B), 38.2(17)(C), 38.2(17)(D), and 38.2(17)(E), the 15-day limit for retroactive eligibility determinations has been added to each definition. In addition, a more complete definition of the medical bills which may be used to meet spenddown requirements has been added to §38.2(17)(E).

Change: Concerning §38.2(24)(D) and §38.2(24)(E), a CIDC applicant's "spouse" and "guardian" have been included among the persons considered to be members of the applicant's household.

Change: Concerning §§38.2(31)(D), 38.2(31)(E), 38.2(31)(F), and 38.2(31)(G), syntax has been changed for clarity and accuracy.

Change: Concerning §38.3(3)(A)(v), the sentence has been rearranged to correct grammar.

Change: Concerning §38.3(4)(A), the verb "will" has been changed to "may" for accuracy.

Change: Concerning §§38.3(7)(D), 38.3(8)(A), and 38.3(8)(C), the sections have been amended for clarity.

Change: Concerning §38.6(f), since the subject of the sentence, "criteria", is plural, the verbs "include" and "are" are required.

Change: Concerning §38.6(f)(4), the adjectives "qualified" and "specified" have been deleted for clarity and accuracy.

The amendments are adopted under Health and Safety Code, §§35.004-35.005, which authorize the Texas Board of Health (board) to adopt rules necessary to administer the CIDC Program; and Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health.

§38.2. 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 Chronically Ill and Disabled Children's Services Act, Health and Safety Code, Chapter 35.

(2) Advisory committee–Those individuals appointed by the Texas Board of Health to serve in an advisory capacity to the Chronically Ill and Disabled Children's Services (CIDC) Program staff.

(3) Applicant–An individual making application for CIDC Program services, but not currently determined eligible.

(4) Board–Texas Board of Health.

(5) Bona fide–In or with good faith; honestly, openly, and sincerely; without deceit or fraud.

(6) Case management–The assessment of a client's overall service needs and the development and implementation of a course of action or plan for meeting those needs, which is family centered, community-based, culturally sensitive, comprehensive, and is intended to assist those clients who need a variety of services.

(7) Chronically ill and disabled child–An individual whose physical function, condition, movement, or sense of hearing is impaired to the extent that the individual is or may be expected to be partially or totally incapacitated for educational purposes or for acquiring remunerative occupation and who is under 21 years of age and has one or more of the following conditions, in accordance with §38.3(1)(B) of this title (relating to Eligibility for Client Services):

(A) a joint, bone, ossicular chain, muscle, or neurological defect or deformity, including craniofacial anomaly, neurofibromatosis, and spina bifida;

(B) cancer as defined by the Health and Safety Code, §35.002;

(C) a disease or condition referenced in this chapter;

(D) AIDS or HIV infection; or

(E) cystic fibrosis, regardless of the individual's age.

(8) CIDC Program–The Chronically Ill and Disabled Children's Services Program, as described in §38.1 of this title (relating to Purpose).

(9) Claim form–The CIDC Program approved document for submitting the unpaid claim for processing and payment.

(10) Client–An individual who meets all CIDC Program requirements for eligibility for specified services to be provided.

(11) Commissioner–The commissioner of health.

(12) Date of service–The actual date the service was initiated or provided.

(13) Dentist–An individual licensed by the State Board of Dental Examiners to practice dentistry in the state.

(14) Department–The Texas Department of Health.

(15) Diagnosis and evaluation–The process of performing specialized examinations, tests, and/or procedures in order to determine whether the individual has a condition (diagnosis) covered by the CIDC Program.

(16) Early identification–The process of performing initial or screening examinations on those individuals thought to be at risk, or who are suspected of having chronic illness or handicapping conditions, in order to identify such conditions as early as possible after their onset. The purpose of early identification is to enable early definitive diagnosis and evaluation and, thus, early health care intervention.

(17) Eligibility date–The effective date of eligibility for the CIDC Program is 15 days prior to the date of receipt of the complete application, except in the following circumstances.

(A) The effective date of eligibility for newborns who are not born prematurely will be the date of birth. Newborn means a child 30 days old or younger.

(B) The effective date of eligibility based upon traumatic injury will be the day after the acute phase of treatment ends, but no further back than 15 days from the date of receipt of the complete application.

(C) The effective date of eligibility for applicants who are comatose at the time of application will be the day the applicant is no longer comatose, but no further back than 15 days from the date of receipt of the complete application.

(D) The effective date of eligibility for an applicant that is born premature will be the day after the applicant has been out of the hospital for 14 consecutive days, but no further back than 15 days from the date of receipt of the complete application.

(E) The effective date of eligibility for applicants with spenddown is the day after the earliest Date of Service (DOS) on which the cumulative bills are sufficient to meet the spenddown amount, but no further back than 15 days from the date of receipt of the complete application. The only medical bills that will be used to meet spenddown are bills with a date of service within 12 months from the date of receipt of the complete application. Medical bills may be for any member of the household that the parents, guardian or managing conservator of the CIDC client have a legal responsibility to pay. Medical bills used to meet spenddown cannot be paid by the CIDC Program.

(F) If the application is received without a Medicaid determination or other data/documents needed to process the application, it will be considered incomplete. The applicant will be notified that the application is incomplete and given 60 days to submit the Medicaid determination or other missing data/documents to CIDC. If the application is made complete within the 60-day time limit, the client's eligibility effective date will be established as 15 days retroactive from the date when the application was first received. If the application is made complete after the 60 days, the eligibility effective date will be established as 15 days retroactive from the date the application is made complete.

(18) Emergency–A medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in: placing the individual's health in serious jeopardy; serious impairment to bodily functions; or serious dysfunction to any bodily organ or part.

(19) Expectation of improvement–The reasonable determination that as a result of treatment the problem will be corrected or controlled or that increased function will be gained.

(20) Family–The nuclear family, which consists of the mother, father, and children, including stepparents.

(21) Facility–A hospital, ambulatory surgical center, specialty center, and/or outpatient clinic.

(22) Financial independence–The individual currently files his or her own personal U.S. income tax return and is not claimed as a dependent by any other person on his or her U.S. income tax return.

(23) Health insurance–A policy or plan, either individual, group, or government sponsored, that an individual purchases or in which an individual participates that provides benefits when medical and/or dental costs are or would be incurred. Health insurance includes, but is not limited to, health insurance policies, health maintenance organizations, preferred provider organizations, employee health welfare plans, union health welfare plans, medical expense reimbursement plans, CHAMPUS, CHAMPVA, Medicaid, and Medicare. Benefits may be in any form, including, but not limited to, reimbursement based cost, cash payment based upon a schedule,

or access without charge or at minimal charge to providers of medical and/or dental care. Benefits from a municipal or county hospital, joint municipal-county hospital, county hospital authority, hospital district, county indigent health care programs, or the facilities of a medical school are not health insurance.

(24) Household–The living unit in which the applicant resides and which also may include one or more of the following:

(A) mother;

(B) father;

(C) stepparent;

(D) spouse;

(E) managing conservator or guardian;

(F) siblings;

(G) stepbrother(s); or

(H) stepsister(s).

(25) Increase in functional independence–An improvement in the ability of an individual to perform the basic activities of daily living, with or without assistive devices, based on progress in relation to age appropriate tasks or developmental milestones.

(26) Other benefits–Any other resources (other than what is specified under health insurance definition) available to the client or the parent/guardian/conservator or other adult caretaker if the client is a minor, for the costs of CIDC Program covered early identification services, diagnostic and evaluation services, rehabilitation services, and case management services, including, but not limited to, health insurance, liability insurance, casualty insurance, workers' compensation benefits, personal financial resources, available trust funds, government- sponsored compensation or reimbursement programs, or a legal cause of action, agreed settlement, or judgment in behalf of the client if such relates to CIDC Program covered services. Excluded from this definition are benefits made available through state law containing specific language to the effect that the payor of such benefits is secondary payor to the CIDC Program.

(27) Person–An individual, corporation, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity.

(28) Physician–An individual licensed by the Texas State Board of Medical Examiners to practice medicine in the state.

(29) Provider–A person and/or facility approved by the board that delivers services which are purchased by the CIDC Program for the purposes of implementing the Act.

(30) Rehabilitation–The process of physically restoring the functions of the body destroyed or impaired by congenital defect, disease, or injury.

(31) Resident–A bona fide resident means a person who:

(A) is physically present within the geographic boundaries of the state;

(B) has an intent to remain within the state;

(C) actually maintains an abode within the state (i.e., house or apartment, not merely a post office box);

(D) does not claim residency in any other state or country; and

(E) is a minor child residing in Texas whose parent(s), managing conservator, or guardian of the child's person is a bona fide resident; or

(F) is an individual residing in Texas who is the legal dependent spouse of a bona fide resident; or

(G) is an adult residing in Texas whose legal guardian is a bona fide resident.

(32) Social service organization–A for-profit or nonprofit corporation or other entity, not including individual persons, that provides travel, meal, and/or lodging expenses in advance to enable CIDC clients to obtain medical care.

(33) Specialty center–A facility and staff which meets the CIDC Program requirements in this chapter and is designated by the board for CIDC Program use for comprehensive diagnostic and treatment services for a specific medical condition.

(34) Spenddown–Financial eligibility achieved when household income exceeds 200% of the federal poverty guidelines if it can be shown that the applicant is responsible for household medical bills equal to or greater than the amount in excess of the 200% level.

(35) State–The State of Texas.

(36) Support–The contribution of money or services necessary for an individual's maintenance, including, but not limited to, funds, food, clothing, shelter, transportation, and health care.

(37) Treatment plan–The plan of care for the client (time and treatment specific) as certified by and implemented under the supervision of a CIDC Program approved physician.

(38) United States Public Health Service (USPHS) price–The average manufacturer price for a drug in the preceding calendar quarter under Title XIX of the Social Security Act, reduced by the rebate percentage, as authorized by the Veterans Health Care Act of 1992 (Public Law 102-585, November 4, 1992).

(39) Usual and customary–The least of the following:

(A) the customary charge, based on the provider's own historical charges;

(B) the prevailing charge, based on the customary charges of all providers in the same geographical locality with the same medical specialty; or

(C) the provider's actual charge.

§38.3. Eligibility for Client Services.

In order for an individual to be eligible for the Chronically Ill and Disabled Children's Services (CIDC) Program, the individual must meet the medical, financial, and other criteria in this section.

(1) Medical criteria.

(A) Basic requirements. To be medically eligible for CIDC Program services, the individual must have a coverable condition as described in subparagraph (B) of this paragraph, and there must be an expectation of improvement or increase in functional independence as described in paragraph (2) of this section. The CIDC Program must receive a physician's medical diagnosis on each condition to determine eligibility for services for each condition.

(B) Coverable conditions. The Texas Department of Health, with approval by the Texas Board of Health, shall use the following medical criteria to determine CIDC Program eligibility.
Figure: 25 TAC §38.3(1)(B)

(C) Conditions not covered. Examples of conditions not covered include, but are not limited to:

(i) prematurity;

(ii) hyaline membrane disease and respiratory distress syndrome;

(iii) failure to thrive;

(iv) apnea;

(v) most acute infectious diseases;

(vi) most digestive, metabolic, or endocrine disorders;

(vii) conditions requiring life support systems without potential for rehabilitation;

(viii) emotional and psychological conditions;

(ix) comatose conditions; and

(x) acute care for most fractures.

(2) Expectation of improvement/increase in functional independence. An individual is not eligible to receive services from the CIDC Program unless there is expectation of improvement of the condition, or an increase in functional independence. Covered terminal conditions may be exceptions to this criteria. Expectation of improvement and increase in functional independence is determined by the physician.

(3) Financial criteria. Financial need is established on the basis of household income and assets which are legally available to the family.

(A) Household income.

(i) The household income used to determine eligibility is the combined gross income (or the adjusted gross income if self-employed) of all persons who:

(I) reside in the household; and

(II) have a legal obligation to support the child.

(ii) Income includes earned wages, pensions or allotments, child support payments, alimony, or any monies received on a regular basis for support purposes. Supplemental security income (SSI) for the disabled child is not included as income. Verification of income will be required as set out in paragraph (8) of this section. If the applicant is over the age of 18, not in school, gainfully employed, and is financially independent, eligibility will be determined by the applicant's gross income.

(iii) The income level for eligibility currently is established at 200% of the federal poverty guidelines. If the household income exceeds this level and it can be shown that the applicant is responsible for medical bills equal to or greater than the amount in excess of the 200% level, the client may be financially eligible for 12 months from the eligibility date.

(iv) The income level for eligibility is established as a percentage of the current federal poverty guidelines and may be adjusted by the Texas Board of Health to meet budgetary limitations. The following income levels are used for adjustments: Level 1–130% and below; Level 2–160% and below; Level 3–200% and below; Level 4–230% and below; Level 5–250% and below.

(v) If actual or projected CIDC program expenditures for a client exceed $2,000 per year, the client may be required to apply periodically for Medicaid, specifically including the Medically Needy Program and, if eligible, to participate in those programs in order to remain eligible for further CIDC program benefits. CIDC also may require a client for whom actual or projected expenditures exceed $2,000 per year to apply for the Supplemental Security Income Program (SSI), and, if eligible, to participate in that program in order to remain eligible for further CIDC program benefits. Within 60 days of the date of the notification letter, the client must submit to the CIDC program documentation of an eligibility determination based upon a timely and complete Medicaid or SSI application. During this 60-day period, CIDC program coverage will continue. If the client does not provide an eligibility determination within the 60-day time limit, program coverage shall be terminated and may not be reinstated unless an eligibility determination is received. The program may grant the client a 30-day extension to obtain the determination.

(B) Assets. Assets legally owned or available to the household must be considered as a source of support to provide services for the applicant. Assets include such items as savings, real property other than a homestead, stocks, bonds, mutual or trust funds, IRAs, etc. Exemptions include a homestead (or a farm homestead of not over 200 acres); one automobile for an individual/two for a two-parent family. Total assets are currently limited to 200% of the amounts established for supplemental security income (SSI) eligibility, as determined by the federal government.

(4) Health insurance.

(A) All health insurance coverage insuring the applicant and/or family must be listed on the application. If insurance coverage was effective prior to CIDC Program eligibility, such coverage must be kept in force. Noncompliance with this requirement may result in the termination of CIDC Program benefits. If insurance cannot be maintained, the applicant or parent/guardian/conservator must, upon request, provide to the CIDC Program proof of:

(i) cancellation from the insurer or plan sponsor;

(ii) discontinuation of the insurance plan by the insurer or plan sponsor;

(iii) exhaustion of the right to continue group insurance coverage as provided under federal and/or state law; or

(iv) financial inability to continue paying the cost of the health insurance.

(B) If the family does not have health insurance at the time of application but coverage may be available, the family must apply for coverage as soon as possible. Such insurance must be kept in force as though it were effective prior to CIDC Program eligibility. The CIDC Program will assist families in determining possible eligibility for insurance and will provide CIDC Program assistance during insurance application, nonenrollment, and/or limited or excluded coverage periods.

(C) Before canceling, terminating, or discontinuing existing health insurance, or electing not to enroll the applicant in available health insurance, the parent/guardian/conservator must notify the CIDC Program 30 days prior to cancellation, termination, discontinuance, or end of the enrollment period. When the CIDC Program provides assistance in keeping or acquiring the health insurance, the parent/guardian/conservator must maintain or enroll in the health insurance.

(5) Age. The applicant, other than one with cystic fibrosis, must be under the age of 21.

(6) Residency. The applicant must be a bona fide resident of the State of Texas.

(7) Application.

(A) Applications are available to anyone seeking assistance from the CIDC Program. To be considered by the CIDC Program, the application must be made on department forms currently in use.

(B) An individual is considered to be an applicant from the time that the CIDC Program receives an application. The CIDC Program will respond in writing regarding eligibility status within 30 working days after the completed application is received. Applications will be considered:

(i) denied if eligibility requirements are not met;

(ii) incomplete if required information that includes a Medicaid determination or any other data/document needed to process the application is not provided or if an outdated form is submitted; or

(iii) approved if all criteria are met.

(C) The denial of any application to the CIDC Program shall be in writing and shall include the reason(s) for such denial. The applicant has the right of administrative review and a due process hearing as set out in §38.16 of this title (relating to Right of Appeal).

(D) Any individual has the right to reapply for CIDC Program coverage at any time or whenever the individual experiences a change of situation or condition.

(8) Verification of information.

(A) The CIDC Program shall make the final determination on an individual's eligibility using the information provided with the application. The CIDC Program may request verification of any information given to establish eligibility.

(B) The CIDC Program shall verify selected information given on the application. Documentation of residency and income will be required. The CIDC Program shall notify the applicant/family in writing when specific documentation is required. It is the applicant's/family's responsibility to provide the required information.

(C) Those clients eligible for Medicaid, or other programs for the indigent which meet the financial and residency requirements of the CIDC Program will be considered eligible from a financial and residential standpoint. The client/family must notify the CIDC Program if the individual is no longer eligible for such programs.

(9) Determination of continuing eligibility.

(A) Once a client is medically eligible for the CIDC Program, the client does not have to submit medical information for continuing eligibility, unless the client's condition changes to the point that the client may no longer have a coverable condition or the client develops a new condition. A new medical application must be submitted for each new condition.

(B) Financial eligibility must be re-established at least annually.

§38.6. Providers.

(a) General requirements for participation. The Chronically Ill and Disabled Children's Services (CIDC) Act, Health and Safety Code, §35.004 provides the Texas Board of Health (board) with the authority to approve the physicians, dentists, podiatrists, dietitians, facilities, specialty centers, and other providers to participate in the CIDC Program according to criteria and procedures adopted by the Texas Board of Health.

(1) To be approved for CIDC Program participation, providers must submit a fully completed application to the CIDC Program and attach the documents as requested on the application.

(2) All approved CIDC Program providers must agree to abide by CIDC Program rules and regulations, and to not discriminate against clients on the basis of source of payment.

(3) The CIDC Act requires that all CIDC Program approved providers accept CIDC Program payment as payment in full for services.

(4) The CIDC Act specifies that the CIDC Program is the payor of last resort. CIDC Program approved providers must agree to utilize all other benefits available to the client, including Medicaid or Medicare, prior to requesting payment CIDC Program approved providers must agree to attempt to collect payment from the payor of other benefits. The CIDC Program may pay for certain CIDC Program services for which other benefits may be available but such availability has not been definitively determined. If after paying for such services the availability of other benefits is determined, the CIDC Program shall recover its costs directly from the payor of other benefits or shall request the provider of CIDC Program services to collect payment and reimburse the CIDC Program for its costs.

(5) Overpayments made on behalf of clients to CIDC Program approved providers must be reimbursed to the CIDC Program refund account by lump sum payment or, at the discretion of the Texas Department of Health, in monthly installments or out of current claims due to be paid the provider.

(6) All types of providers who are qualified to enroll in the Title XIX Medicaid Program must participate as Medicaid providers in order for the client to utilize Medicaid coverage. The CIDC Program will not pay a provider for any service that could have been reimbursed by Medicaid.

(7) Any provider may withdraw from the CIDC Program participation at any time by notifying the CIDC Program in writing of its desire to do so.

(b) Denial, modification, suspension, and termination of provider approval.

(1) The CIDC Program may deny, modify, suspend, or terminate the approval of providers for the following reasons:

(A) submitting false or fraudulent claims;

(B) failing to provide and maintain quality services or medically acceptable standards;

(C) not adhering to the provider agreement signed at the time of application or renewal for CIDC Program participation; or

(D) violation of the standards of this chapter.

(2) The CIDC Program may deny or suspend approved provider status based on the CIDC Program's knowledge of disciplinary action taken against the provider by the licensing authority under which the provider practices in the State of Texas or by the Texas Medicaid Program.

(3) Prior to taking an action to deny, modify, suspend, or terminate the approval of a provider, the CIDC Program shall give the provider written notice of an opportunity of appeal in accordance with § 38.16 of this title (relating to Right of Appeal). In addition, a

due process hearing is available to any provider for the resolution of conflict between the CIDC Program and the provider.

(c) Physicians and dentists. To be approved for CIDC Program participation, an individual must:

(1) have a Texas medical or dental practice license;

(2) be an active provider with the Texas Medicaid Program;

(3) agree to allow on-site visits and/or audit privileges to the CIDC Program staff; and

(4) accept responsibility for actions of his or her staff performed in behalf of the provider.

(d) Podiatrists. The CIDC Program approves for CIDC Program participation podiatrists who are working under a treatment plan prescribed by a CIDC Program approved physician. To be approved for CIDC Program participation, a podiatrist must:

(1) have a Texas podiatric practice license;

(2) be an active provider with the Texas Medicaid Program;

(3) agree to allow on-site visits and/or audit privileges to the CIDC Program staff; and

(4) accept responsibility for actions of his or her staff performed on behalf of the provider.

(e) Dietitians. To be approved for CIDC Program participation, an individual must:

(1) have a Texas dietitian practice license;

(2) be an active provider with the Texas Medicaid Program;

(3) agree to allow on-site visits and/or audit privileges to the CIDC Program staff; and

(4) accept responsibility for actions of his or her staff performed on behalf of the provider.

(f) Hospitals. The criteria for hospital approval include, but are not limited to, the following. Hospitals must:

(1) have current approval by the Joint Commission on Accreditation of Health Care Organizations or the American Osteopathic Association;

(2) be located within Texas, except in those situations that develop in Texas where it is a financial hardship or clearly a great medical risk for a client to be transported to an adequate medical facility within Texas when an out-of-state facility within 50 miles of the Texas border is closer. Under these circumstances, all CIDC Program policies and procedures will apply, including the legal requirement that physicians, dentists, and podiatrists who are licensed to practice in Texas and who are active Texas Medicaid providers be utilized;

(3) allow on-site visits and/or audits; and

(4) pediatric hospitals must have a definable pediatric unit or facilities, equipment, and qualified staff necessary to meet the special needs of CIDC Program eligible clients, in accordance with CIDC Program criteria.

(g) Other CIDC Program approved providers and facilities. Examples of other approved providers and facilities are:

(1) pharmacists;

(2) private therapists;

(3) medical supply and/or equipment companies;

(4) meal and lodging facilities;

(5) transportation companies or providers; and

(6) funeral homes.

(h) Out-of-state coverage. The commissioner of health may allow CIDC payment to out-of-state providers in unique circumstances in which a CIDC provider (Texas physician) and the patient, parent or guardian and the CIDC medical director agree that an out-of-state provider is the provider of choice for quality care, the same treatment or another treatment of equal benefit or cost is not available through Texas CIDC providers, and the treatment results in a decrease in the patient's cost of treatment to the CIDC program. The medical literature must indicate that the out-of-state treatment is accepted medical practice and is anticipated to improve the patient's quality of life. The cost of transportation, meals and lodging may be reimbursed for the CIDC- approved out-of-state treatment. Travel costs will be negotiated, with approval based on overall cost effectiveness.

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 13, 1999.

TRD-9905912
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: October 3, 1999
Proposal publication date: May 7, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

Chapter 123. RESPIRATORY CARE PRACTITIONER CERTIFICATION

25 TAC §123.3

The Texas Department of Health (department) adopts an amendment to §123.3 concerning the Respiratory Care Practitioners Advisory Committee (committee) without changes to the proposed text as published in the July 9, 1999, issue of the *Texas Register* (24 TexReg 5139); therefore, the section will not be republished. The committee provides advice to the Texas Board of Health (board) on rules relating to the certification of respiratory care practitioners.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules on advisory committees. The rules must state the purpose and tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1995, the board established a rule relating to the Respiratory Care Practitioners Advisory Committee. The rule states that the committee will automatically be abolished on November 1, 1999. The board has now reviewed and evaluated the

committee and has determined that the committee should continue in existence until November 1, 2003.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to reference the Government Code; to continue the committee until November 1, 2003; to change the composition of the committee; to clarify that members holdover until their replacement is appointed; to state that the presiding and assistant presiding officers shall be appointed by the chairman of the board for a term of two years; to allow a temporary vacancy in the office of assistant presiding officer to be filled by vote of the committee until appointment by the chairman of the board occurs; to clarify that the committee is prohibited from holding an executive session (closed meeting) for any reason; to clarify that the committee and its members may not participate in legislative activity in the name of the board, the department, or the committee except with certain approval; to require the committee's annual report in November rather than January; and to reference reimbursement for a committee member's expenses if authorized by the General Appropriations Act or budget execution process. Other minor language changes were made for clarification. These changes will clarify procedures for the committee and emphasize the advisory nature of the committee.

The following comment was received concerning the proposed amendment. Following the comment is the department's response and any resulting change.

Comment: Concerning §123.3(f)(3), a commenter suggested referring to "credentialed" respiratory care practitioners, rather than "certified" ones, so that practitioners certified or registered by the National Board for Respiratory Care could serve as members.

Response: The department disagrees with the commenter. The Texas Civil Statutes, Article 45121 uses the term "certified" to reference practitioners authorized by the department to practice respiratory care. That term is the appropriate term to use in the section. No change was made as a result of this comment.

The commenter was an individual who offered one suggestion for a change.

The amendment is adopted under the Health and Safety Code, §11.016, which allows the board to establish advisory committees; the Government Code, Chapter 2110, which sets standards for the evaluation of advisory committees by the agencies for which they function; and the Health and Safety Code, §12.001, which provides the board with authority to adopt rules for the performance of every duty imposed by law upon the board, the department, and commissioner of health.

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 13, 1999.

TRD-9905910
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: October 3, 1999
Proposal publication date: July 9, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

Chapter 129. OPTICIANS' REGISTRY

25 TAC §129.3

The Texas Department of Health (department) adopts an amendment to §129.3 concerning the Opticians' Registry Advisory Committee (committee) without changes to the proposed text as published in the July 9, 1999, issue of the *Texas Register* (24 TexReg 5141); therefore, the section will not be republished. The committee provides advice to the Texas Board of Health (board) concerning rules relating to opticians.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules on advisory committees. The rules must state the purpose and tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1995, the board established a rule relating to the Opticians' Registry Advisory Committee. The rule states that the committee will automatically be abolished on November 1, 1999. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until November 1, 2003.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to reference the Health and Safety Code, §11.016 and the Government Code; to continue the committee until November 1, 2003; to change the composition of the committee; to clarify that members holdover until their replacement is appointed; to state that the presiding and assistant presiding officers shall be appointed by the chairman of the board for a term of two years; to allow a temporary vacancy in the office of assistant presiding officer to be filled by vote of the committee until appointment by the chairman of the board occurs; to clarify that the committee is prohibited from holding an executive session (closed meeting) for any reason; to require a summary of each meeting to be provided to the board; to clarify that the committee and its members may not participate in legislative activity in the name of the board, the department, or the committee except with certain approval; to require the committee's annual report in November rather than September; and to reference reimbursement for a committee member's expenses if authorized by the General Appropriations Act or budget execution process. Other minor language changes were made for clarification. These changes will clarify procedures for the committee and emphasize the advisory nature of the committee.

No comments were received during the comment period on the proposed amendment.

The amendment is adopted under the Health and Safety Code, §11.016, which allows the board to establish advisory committees; the Government Code, Chapter 2110, which sets standards for the evaluation of advisory committees by the agencies for which they function; and the Health and Safety Code, §12.001, which provides the board with authority to adopt rules for the performance of every duty imposed by law upon the board, the department, and commissioner of health.

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 13, 1999.

TRD-9905911
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: October 3, 1999
Proposal publication date: July 9, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

Chapter 143. MEDICAL RADIOLOGIC TECHNOLOGISTS

25 TAC §143.3

The Texas Department of Health (department) adopts an amendment to §143.3 concerning the Medical Radiologic Technologist Advisory Committee (committee) without changes to the proposed text as published in the July 9, 1999, issue of the *Texas Register* (24 TexReg 5143); therefore, the section will not be republished. The committee provides advice to the Texas Board of Health (board) concerning the regulation of persons performing radiologic procedures.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules on advisory committees. The rules must state the purpose and tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1995, the board established a rule relating to the Medical Radiologic Technologist Advisory Committee. The rule states that the committee will automatically be abolished on November 1, 1999. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until November 1, 2003.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to reference the Government Code; to continue the committee until November 1, 2003; to revise the composition of the committee; to clarify that members holdover until their replacement is appointed; to state that the presiding and assistant presiding officers shall be appointed by the chairman of the board for a term of two years; to allow a temporary vacancy in the office of assistant presiding officer to be filled by vote of the committee until appointment by the chairman of the board occurs; to clarify that the committee is prohibited from holding an executive session (closed meeting) for any reason; to clarify that the committee and its members may not participate in legislative activity in the name of the board, the department, or the committee except with certain approval; to require the committee's annual report in November rather than January; and to reference reimbursement for a committee member's expenses if authorized by the General Appropriations Act or budget execution process. Other minor language changes were made for clarification. These changes will clarify procedures for the committee and emphasize the advisory nature of the committee.

No comments were received during the comment period on the proposed amendment.

The amendment is adopted under the Health and Safety Code, §11.016, which allows the board to establish advisory committees; the Government Code, Chapter 2110, which sets standards for the evaluation of advisory committees by the agencies for which they function; and the Health and Safety Code, §12.001, which provides the board with authority to adopt rules for the performance of every duty imposed by law upon the board, the department, and commissioner of health.

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 13, 1999.

TRD-9905908
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: October 3, 1999
Proposal publication date: July 9, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

Chapter 205. PRODUCT SAFETY

Subchapter A. BEDDING RULES

The Texas Department of Health (department) adopts the repeal of §205.11, amendments to §§205.1-205.6 and §§205.8-205.10; and new §§205.11-205.17 concerning the regulation of manufacturers, renovators, importers, wholesalers, distributors, processors and business establishments that sanitize and rent or sell mattresses and other sleep products. Sections 205.2, 205.3, 205.5, 205.11, 205.12 are adopted with changes to the proposed text as published in the April 2, 1999 issue of the *Texas Register* (24 TexReg 2599). The repeal of §205.11; amendments to §205.1, §205.4, §205.6, §§205.8-205.10 and new §§205.13-205.17 are adopted without changes, and therefore the sections will not be republished.

Government Code §2001.039 (formally known as Rider 167), requires each state agency to review and consider for readoption each rule adopted by the agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 205.1-205.11 have been reviewed and the department has determined that the reasons for adopting the sections continue to exist in that the rules are being revised, and §205.11 is being repealed and proposed as a new rule.

The amendment to §205.1 is for clarification. The amendment to §205.2 adds definitions from Chapter 345, Health and Safety Code, as amended by Senate Bill 1284, 75th Legislature, 1997; and other definitions. The amendment to §205.3 clarifies applicability of the regulations; exempts from labeling requirements custom upholstery businesses that do not repair or renovate bedding for resale; prohibits removal of required labels; prohibits the co-mingling of new and secondhand bedding articles; and requires that all mattresses and mattress pads sold in the state meet federal flammability standards. The amendment to

§205.4 imposes new labeling requirements for secondhand bedding articles and authorizes the use of languages other than English when used on separate labels. The amendment to §205.5 adds three new filling material definitions. The amendments to §205.6 bring the regulations into conformity with the *Texas Register* format.

The amendment to §205.8 clarifies current regulations concerning germicidal treatment of secondhand and renovated bedding; requires the germicidal treatment of sofa beds and studio couches; requires removal and prohibits the use or reuse of contaminated filling materials; requires removal and prohibits reuse of outer covers on renovated mattresses; requires that the chemical method of germicidal treatment be applied prior to the installation of new covers; increases the heating duration of bedding germicidally treated by the dry heat method; authorizes the expanded use of the commercial laundry method as an approved treatment method for certain bedding articles; and clarifies current record keeping requirements. The amendment to §205.9 clarifies current regulations concerning sanitary premises and requires that articles of bedding and materials be securely housed and protected from the elements. The amendment to §205.10 is for clarification.

New §205.11 replaces the repealed §205.11. Stamp Exemption and Reporting, which was deleted by Senate Bill 1284, 75th Legislature, 1997, and establishes general permit requirements for engaging in the business of selling bedding or filling materials in the state; exempts custom upholstery businesses who do not repair or renovate bedding for resale; describes specific types of permits, permit fees and permit application procedures and requirements; and conditions for permit issuance, denial, suspension or revocation. The new permit requirements will be implemented as new permits are issued and expiring permits are renewed. New §205.12 clarifies the department's authority to impose administrative penalties for violations. New §205.13 clarifies the department's authority to detain or embargo bedding for violations. New §205.14 clarifies the department's authority to issue a removal order to secure detained or embargoed bedding for violations. New §205.15 clarifies the department's authority to seek condemnation of bedding for violations. New §205.16 clarifies the department's authority to order bedding to be recalled from commerce for violations. New §205.17 clarifies the department's authority to inspect business establishments and to take samples for inspection, analysis or evidence.

The department published a Notice of Intention to Review §§205.1-205.11, as required by Rider 167 in the *Texas Register* on February 5, 1999, (24 TexReg 831). The department received no public comments during the comment period following publication of the notice.

The department is making the following minor changes to clarify the intent and improve the accuracy of the sections.

Change: Concerning §205.2(a)(13), the word "manufacturer" was changed to "manufacture".

Change: Concerning §205.2(a)(14), the letter "y" was omitted from the word "any". The error was corrected.

Change: Concerning §205.11(c)(4)(A), the letter "s" was omitted from the word "states". The error was corrected.

Change: Concerning §205.12(f)(1), the words "written" and "after" were transposed. The error was corrected so that the section reads "after written" instead of "written after".

The following comments were received concerning the proposed sections. Following each comment is the department's response and any resulting change(s):

Comment: Concerning §205.3 and §205.5, one commenter recommended that the department and the other member states of the Association of Bedding and Furniture Law Officials (ABFLO) develop nationally uniform regulations for the labeling of feather and down products to replace regulations recently repealed by the Federal Trade Commission.

Response: The department agrees with the commenter and is withdrawing amendments to the sections relating to the labeling of feather and down products in order to work with ABFLO, affected businesses and testing laboratories to develop nationally uniform regulations for adoption by the states that regulate bedding and sleep products.

Comment: Concerning §205.8(a)(2)(C), one commenter suggested that it should not be necessary to germicidally treat renovated mattresses since all covers and dirty filling materials are required to be removed and replaced with clean materials.

Response: The department disagrees with the commenter. Removal of contaminated materials during the mattress renovation process is not considered adequate because not all contamination is easily detectable. Germicidal treatment provides additional public health protection against pathogenic organisms. Furthermore, Health and Safety Code Chapter 345, §345.024(a), prohibits a renovator from selling renovated mattresses unless the bedding has been germicidally treated and cleaned by a method approved by the department. No change was made as a result of this comment.

Comment: Concerning §205.8(a)(1)(A)-(C), one commenter recommended that businesses that sell, lease or rent renovated mattresses should be required to germicidally treat the mattresses instead of the renovator.

Response: The department disagrees with the commenter. Chemical spray is the predominant method of germicidal treatment in Texas. The most effective time to apply the spray is during the rebuilding process when the old cover is removed and the filling materials are exposed for direct application of the approved chemical. Requiring businesses that sell, lease or rent renovated mattresses to apply the chemical would not allow for the direct application of the chemical to the used filling materials because the mattresses would have new covers installed when purchased from the renovator. In addition, Health and Safety Code Chapter 345, §345.024(a), prohibits a renovator from selling a renovated mattress to businesses that sell, lease or rent mattresses unless the mattress has been germicidally treated. No change was made as a result of the comment.

The commenters were Association of Bedding and Furniture Law Officials, Cantwell Mattress Company, Cowboy Comfort, Mattress World and Mayo Manufacturing. Two commenters were in favor of the rules. One commenter raised questions and two commenters made recommendations.

25 TAC §§205.1-205.6, 205.8-205.17

The amendments and new sections are adopted under Health and Safety Code, Chapter 345, §345.082, which provides the department with the authority to adopt necessary rules to implement and enforce Chapter 345; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of

every duty imposed by law on the board, the department, and the commissioner of health; and Government Code §2001.039.

§205.2. Definitions.

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

(1) Act–Texas Bedding Act, Health and Safety Code, Chapter 345.

(2) Authorized agent–An employee of the department who is designated by the commissioner of health to enforce the provisions of the Act.

(3) Bedding–A mattress, mattress pad, mattress protector, box spring, sofa bed studio couch, chair bed, convertible bed, convertible lounge, pillow, bolster, quilt, quilted spread, comforter, cot pad, sleeping bag, lounge chair pad, utility or all-purpose pad, crib pad, playpen pad, crib bumper pad, car bed pad, infant carrier pad, convertible stroller pad, bassinet pad, bed rest and lounge-type cushion, or a stuffed or filled article that can be used by a human for sleeping or reclining.

(4) Commissioner–The Commissioner of Health.

(5) Department–Texas Department of Health

(6) Detained or embargoed bedding–Bedding that has been detained or embargoed under the Act.

(7) Distributor–A person located in this state who on his own account sells or distributes in this state bedding, or filling material to be used in bedding. The term does not include an affiliate or subsidiary if the ownership and the name of the affiliate or subsidiary are the same as the manufacturer, and the affiliate or subsidiary is the exclusive sales outlet for the manufacturer.

(8) Filling materials–Materials used as filling in the manufacture, repair, or renovation of bedding and shall include materials used as filling in quilted borders and quilted ticking. Stiffening materials such as fiberboard, corrugated fiberboard, paper, etc., shall be considered to be filling material.

(9) Germicidal Treatment Operator–A person who sanitizes used bedding articles or filling materials by a method or process that has been approved by the department.

(10) Importer–A person who on his own account sells or distributes in this state bedding, or filling material to be used in bedding that was manufactured or processed in a country other than the United States. The term does not include an affiliate or subsidiary if the ownership and name of the affiliate or subsidiary are the same as the manufacturer, and the affiliate or subsidiary is the exclusive sales outlet for the manufacturer.

(11) Label, law label, labeled, tag and tagged–May be used interchangeably and means any label or tag required to be on or affixed to finished bedding products and processed filling material and on which the information required is to appear.

(12) Manufacturer–A person whose principal business is the manufacture of bedding from new materials for the purpose of resale in this state by a distributor, wholesaler, importer, or retail outlet or subsidiary outlet if the ownership and name are the same as the manufacturer, or if it is an exclusive sales outlet for the manufacturer, or both.

(13) Material–An article, substance, or part of an article or substance, used in the manufacture, repair, or renovation of bedding.

(14) New–Bedding or filling material that has had no previous use for any purpose.

(15) Pillows and cushions–Any bag, case, or covering which has been stuffed or filled and which is not an integral part of another item of bedding or furniture but which can be used by human beings for sleeping, resting, or reclining purposes. The terms do not apply to pillows or cushions which do not exceed 10 inches in their greatest dimension or have permanently affixed figurines, statuettes, dolls, etc.

(16) Processed filling material–Felt, batting, pad, foam product, quilted product, or any other filling material which has been prepared, manufactured, or processed into a form in which it can be used in articles of bedding.

(17) Processor–A person who manufacturers or processes, and sells in this state or for delivery in this state any filling materials, including felt, batting, pads, or foam, to be used or that could be used in bedding, other than frames or metal springs.

(18) Recycled material–Material that:

(A) is composed of recyclable material or that is derived from post consumer waste; and

(B) may be used in place of raw or virgin filling material in manufacturing, repairing, or renovating bedding.

(19) Renovate–To restore to a former condition or to place in a good state of repair.

(20) Secondhand–Bedding or filling material with previous use in any manner.

(21) Sell–Offer, or expose for sale, include in a sale, barter, trade, deliver, consign, lease, possess with intent to sell or dispose of in any commercial manner. For purposes of these sections, lease shall also include the term "rent" when used for commercial purposes.

(22) Wholesaler–A person located outside this state who on his own account sells, distributes, or jobs into this state to another for the purpose of resale bedding or filling material to be used in bedding. This does not include an affiliate or subsidiary if the ownership and the name of the affiliate or subsidiary are the same as the manufacturer, and the affiliate or subsidiary is the exclusive sales outlet for the manufacturer.

(b) Other definitions are listed in § 205.5 and § 205.6 of this title (relating to Definitions and Designations of Filling Materials and Adjunctive Terms) rather than in this section because the definitions are a necessary part of those sections.

§205.3. General Requirements.

(a) The Act and these sections shall apply to all persons, partnerships, corporations, and associations engaged in the business of manufacturing, renovating, wholesaling, distributing, importing, processing, germicidally treating, and selling items of bedding or processed filling materials. These regulations do not apply to persons who make, renovate, or germicidally treat bedding for their own use.

(b) These regulations shall apply to each separate manufacturing plant facility or business location regardless of name or ownership.

(c) Each item of bedding and processed filling material shall be labeled in conformity with the requirements of the Act and these regulations. This requirement does not apply to a customupholstery business that does not repair or renovate bedding for resale.

(d) No person shall remove the label or position, arrange or display an article of bedding in such a manner as to obstruct the view of the label from the purchaser and/or department representatives.

(e) To allow for unintentional variations, a tolerance or variation not in excess of 10% by weight from the amount stated on the label shall be allowed. A tolerance not to exceed 20% shall be allowed for feather and down except when the species is stated, in which case the 10% tolerance applies.

(f) The terms "all," "pure," "100%," or terms of similar import are permitted only if the material is as stated. No tolerance is allowed where such terms are used.

(g) If an article of bedding contains more than one kind of material, the percentage, by weight, of each material shall be clearly stated on the label in descending order. Wood frames, metal parts, and springs shall be excluded when calculating percentages. Burlap, muslin, webbing, and tape, when less than 10% of the filling material, need not be stated on the label.

(h) The presence of a metal spring unit in an article of bedding must be stated as the last item in the statement of content section. Stating the number of coils is not required, but if stated it must be true and correct.

(i) Any filling material containing more than 5.0% oil shall be designated on the label as oily.

(j) The presence of silicates in excess of 5.0% in any filling material shall be designated on the label as clay and the actual percentage thereof shall be stated.

(k) Identification and storage of secondhand bedding articles and filling materials shall be as follows:

(1) Persons engaged in the manufacture, distribution, wholesaling, importation renovation, processing, and/or germicidal treatment shall keep new and secondhand articles and/or materials segregated.

(2) Persons engaged in the business of selling or storing articles of bedding shall keep new and secondhand articles segregated prior to germicidal treatment of the secondhand articles. Secondhand articles which have not been germicidally treated and properly labeled, shall not be displayed on the sales floor.

(3) When new and secondhand filling materials or new and untreated secondhand articles of bedding have been mixed, the entire mixture shall be regarded as secondhand and shall be germicidally treated and properly labeled prior to sale.

(l) Mattresses and mattress pads manufactured, renovated or delivered into or within this state for purposes of sale in this state shall meet the federal standard for flammability of mattresses set forth in 16 Code of Federal Regulations, Part 1632.

§205.5. Definitions and Designations of Filling Materials.

(a) Cotton.

(1) The term "cotton" by itself shall not be used.

(2) Staple cotton is the fibrous growth as removed from the cottonseed in the usual process of ginning (first-cut from the seed).

(3) Cotton linters are the fibrous growth removed from the cottonseed subsequent to the usual process of ginning. The term "linters" alone shall not be used.

(4) Cotton by-product is a loose filling material consisting of cotton fibers which have been removed from the various machine operations in the preparation and manufacture of cotton yarn up to, but not including, the process of spinning, and shall include only the following materials commonly known in cotton mill terms as:

(A) cotton card or vacuum strips;

(B) cotton comber;

(C) cotton fly;

(D) cotton picker or motes.

(5) The term "blended cotton felt" or "blended cotton batting" shall be used when a mixture of cotton fiber is made into felt form.

(b) Down.

(1) The term "down" by itself may be used for the soft undercoating of waterfowl consisting of the light fluffy filaments grown from one quill-point but without any quill shaft. It is permissable to use the name of the fowl from which the down is obtained, such as goose down, duck down, etc.

(2) Plumules are downy waterfowl plumage with underdeveloped soft and flaccid quill with barbs indistinguishable from those of down.

(3) Down fiber is the detached barbs from down plumes and plumules separated from the quill point.

(4) Nestling down is a down not fully developed with a short sheath with relatively long soft barbs emanating from sheath.

(5) The tolerance levels for the labeling of down are as follows:

(A) a minimum of 80% down, plumules, and down fiber;

(i) consisting of down and plumules–minimum of 70%;

(ii) consisting of down fiber–minimum of 10%;

(B) the remaining 20% may consist of a combination of the following:

(i) natural waterfowl feathers;

(ii) down fiber;

(iii) damaged feathers–maximum 3.0%;

(iv) chicken feather and fiber–maximum 2.0%;

(v) residue–maximum 2.0%;

(vi) waterfowl feather fiber.

(6) Species designation tolerance. If the down product is labeled as to the waterfowl (goose or duck), a minimum of 90% of the waterfowl plumage contained therein must be of that species.

(c) Feathers.

(1) The term "feathers" by itself shall not be used.

(2) Goose feathers are feathers of any kind of goose, which are whole in physical structure, with the natural form and curvature of the feather.

(3) Duck feathers are feathers of any kind of duck, which are whole in physical structure, with the natural form and curvature of the feather.

(4) Waterfowl feathers may be used to designate any mixture of goose and duck feathers.

(5) Turkey feathers are feathers of any kind of turkey, which are whole in physical structure.

(6) Chicken feathers are feathers of any kind of chicken, which are whole in physical structure.

(7) Emu feathers are feathers of any kind of emu, which are whole in physical structure.

(8) Damaged feathers, in conjunction with the name of the fowl from which the feathers come, shall mean feathers which have been broken, injured by insects or depreciated from the original value in any manner and which exceeds the 10% allowable tolerance.

(9) Crushed feathers, in conjunction with the name of the fowl from which the feathers come, shall mean feathers which have been processed by a curling, crushing, or chopping machine.

(10) Feather mixtures when from two or more species shall be designated by name, character, and percentage by weight of each constituent in order of predominance, or mixtures may be designated by lowest grade as to species of origin (grades in descending order: goose, duck, turkey, chicken).

(d) Foam.

(1) The term "foam" by itself shall not be used.

(2) Foam is polymerized material consisting of a mass of thin-walled cells produced chemically or physically which is created by the interaction of an ester or an ether and carbamic acid derivative.

(3) The term "synthetic foam" may be used as a definition in lieu of the following generic terms:

(A) polyurethane foam;

(B) urethane foam;

(C) polyester foam;

(D) polyether foam;

(E) vinyl foam; and

(F) polystyrene foam.

(4) Urethane foam high resilience is a permissible term for urethane foam with a minimum density of 2.5 pounds per cubic foot, a minimum resilience of 60%, and a minimum support ratio of 2.4 pounds per cubic foot.

(5) Polystyrene foam beads are a filling material which has been processed into small round droplets approximately 1/2 inch in diameter, or less.

(6) When generic terms are used for foam products, they shall be true and correct.

(e) Hair.

(1) Hair–The coarse filamentous epidermal outgrowth of such mammals as horses, cattle, hogs, and goats when used in the manufacture of bedding, upholstered furniture, and filling materials. It shall be clean, properly cured, free from epidermis, excreta, and other foreign or objectionable substances and odors.

(2) Hair mixtures–The hair of different animal origin used in a blend or mixture. The kind and percentage, by weight of each, shall be stated on the label. Where materials other than hair are used with hair in a mixture, the kind and percentage by weight of each material shall be stated on the label.

(f) Manufactured fibers.

(1) Acetate fiber–Manufactured fiber in which the fiber-forming substance is cellulose acetate. Where not less than 92% of hydroxyl groups are acetylated, the term triacetate may be used as generic description of the fiber.

(2) Acrylic fiber–Manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 85% by weight of acrylonitrile units.

(3) Azlon fiber–Manufactured fiber in which the fiber-forming substance is composed of any regenerated naturally occurring proteins.

(4) Glass fiber–Manufactured fiber in which the fiber-forming substance is glass.

(5) Metallic fiber–Manufactured fiber composed of metal, plastic-coated metal, metal-coated plastic, or core completely covered by metal.

(6) Modacrylic fiber–Manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of less than 85%, but at least 35% by weight, of acrylonitrile units.

(7) Nylon fiber–Manufactured fiber in which the fiber-forming substance is any long chain synthetic polyamide having recurring amide groups.

(8) Nytril fiber–Manufactured fiber containing at least 85% of long chain polymer of vinylidene dinitrile when the vinylidene dinitrile content is no less than every other unit in the polymer chain.

(9) Olefin fiber–Manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 85% by weight of ethylene, propylene, or other olefin units.

(10) Polyester fiber–Manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 85% by weight of any ester of a dihydric alcohol and terephthalic acid.

(11) Rayon fiber–Manufactured fiber composed of regenerated cellulose, as well as manufactured fibers composed of regenerated cellulose in which substituents have replaced not more than 15% of the hydrogens of the hydroxyl groups.

(12) Saran fiber–Manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 80% by weight of vinylidene chloride units.

(13) Spandex fiber–Manufactured fiber in which the fiber-forming substance is a long chain synthetic polymer comprised of at least 85% of a segmented polyurethane.

(14) Vinyl fiber–Manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 50% by weight of vinyl alcohol units, and in which the total of the vinyl alcohol units and any one or more of the various acetal units is at least 85% by weight of the fiber.

(15) Vinyon fiber–Manufactured fiber in which the fiber-forming substance is any long chain synthetic polymer composed of at least 85% by weight of vinyl chloride units.

(16) Polyester pneumacel–A generic term for a polyester pneumatic cellular product.

(17) Synthetic fiber–May be used to designate any of the generic named fibers in this subsection.

(g) Miscellaneous fibers.

(1) Cellulose fiber–Generic term for any wood or other vegetable growth reduced to a fibrous state.

(2) Coconut husk fiber or coir–Generic term for fibers obtained from the outer shell of coconut.

(3) Excelsior–Generic term for shredded wood fibers but does not include waste such as shavings, sawdust, or similar wastes.

(4) Flax fiber–Generic term for fiber derived from the plant of the genus Linum usitatissimum.

(5) Jute fiber–Generic term for fiber obtained from various species (corchorus) of plants of the linden family.

(6) Kapok–Generic term for fibers from the seed of kapok trees.

(7) Sisal fiber–Generic term for fibers obtained from leaves of agave plants (Agave sisalana).

(h) Rubber.

(1) Rubber–Natural rubber and the following synthetic rubber-like materials: chloroprene, styrene-butadiene copolymers, butadiene-acrylonitrile copolymers, polymerized isobutylene, with or without comonomers present and thioplasts (any of the polysulfide rubbers consisting of organic radicals linked through sulfur).

(2) Latex foam rubber–Generic term for rubber latex which previously has not been coagulated or solidified.

(3) Sponge rubber–Generic term for rubber which has previously been coagulated or solidified.

(i) Wool or virgin wool. This term includes a fleece of sheep or lamb, which has been scoured or scoured and carbonized and shall be free of kemp and vegetable matter.

(j) Gel. Generic term for any filling material of a semi-solid form, typically encased in a leak proof fabric cover and consisting of a mixture of water or other liquid base, dissolved chemicals and/or a suspension of other chemicals, which provides special ergonomic and resiliency properties.

(k) Buckwheat hulls. Generic term for the hulls removed from the seed of the buckwheat plant.

(l) Universal definitions. The following terms are common industry definitions for fibers obtained as by-products during the various machine operations necessary in the manufacture of cotton yarn up to but not including the process of spinning. These terms must be preceded by the name of the textile fiber from which it is produced.

(1) Card, strip or stripping–Tangled or matted mass of fibers removed from the carding cloth during the carding process.

(2) Comber or noils–Tangled fibers removed during the combing process of textile fibers.

(3) Fly–Fibers removed from the machines during carding, drawing or similar textile operations.

(4) Napper–Lint removed during the process of raising the face of a cloth.

(5) Picker, picker motes, or motes–Matted or tangled masses of fiber resulting from the opening and cleaning of fibers in opener room of the textile mill.

(6) Sweepings–The fibrous sweepings from the floors of the textile mill.

§205.11. Permit Requirements; Types; Application; Conditions; Suspension.

(a) General requirements.

(1) A person may not manufacture, import, wholesale, distribute, or engage in the business of renovating or selling bedding in this state or for delivery in this state unless the person first obtains a permit for that specific purpose from the department. This requirement does not apply to a custom upholstery business that does not repair or renovate bedding for resale.

(2) A processor may not sell filling material in this state or for delivery in this state unless the person first obtains a permit for that purpose from the department.

(3) A person may not apply a germicidal treatment method to bedding unless the method has been registered with and approved in writing by the department and the person has been issued a germicidal treatment permit by the department.

(4) These permit requirements apply to each separate business location regardless of business name or ownership.

(5) All permits expire 12 months from the date of issuance by the department. The department may prorate permit fees as appropriate to provide for a common expiration date for persons holding and/or applying for more than one permit.

(b) Types of permits and permit fees.

(1) Mattress Manufacturer Permit. Required of all manufacturers of mattresses or box springs prior to shipping mattresses and/or box springs into or within this state for the purpose of resale. Permit fees are graduated based on the number of articles the manufacturer is requesting authorization to ship during the permit period. The fees are set out in Schedule A as follows:
Figure: 25 TAC §205.11(b)(1)

(2) Mattress Renovator Permit. Required of all renovators of mattresses or box springs prior to shipping mattresses and/or box springs in or within this state for the purpose of resale. Permit fees are graduated based on the number of mattresses or box springs the renovator is requesting authorization to ship during the permit period. The fees are set out in subsection (b)(1) of this section.

(3) Bedding Product Manufacturer Permit. Required of all manufacturers of bedding products, other than mattresses and box springs, prior to shipping such articles in or within this state for the purpose of resale. Permit fees are graduated based on the number of articles the manufacturer is requesting authorization to ship during the permit period. The fees are set out in Schedule B as follows:
Figure 25 TAC §205.11(b)(3)

(4) Wholesaler/Distributor Permit. Required of all wholesalers and distributors of bedding articles or filling materials prior to shipping such articles or filling materials into this state for the purpose of resale. Permit fees are graduated based on the number of articles or units of filling materials the wholesaler/distributor is requesting authorization to ship during the permit period. The fees are set out in Schedule B, subsection (b)(3) of this section.

(5) Importer Permit. Required of all importers of bedding articles or filling materials prior to shipping such articles or filling materials into this state for the purpose of resale. Permit fees are graduated based on the number of imported articles or units of filling materials the importer is requesting authorization to ship during the permit period. The fees are set out in Schedule B in subsection (b)(3) of this section.

(6) Processor Permit. Required of all manufacturers and/or processors of bulk filling materials prior to selling and shipping such filling materials into this state. The annual permit fee is $50.

(7) Germicidal Treatment Permit. Required of all persons prior to the application of a germicidal treatment process, approved by the department, to articles of bedding and/or filling materials to be shipped into or to be sold in this state. The annual permit fee is $50.

(8) Arts and Crafts Permit. Required of all persons who manufacture bedding articles other than mattresses (such as pillows, quilts, comforters), have no paid employees, and manufacture less than 250 articles per year for sale in this state. The annual permit fee is $25.

(c) Permit application.

(1) Application for an initial permit or to renew an expiring permit must be made through the department on an approved application form which may be obtained from the Product Safety Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

(2) A separate application must be completed and submitted for each specific permit applied for at each specific business location or plant location.

(3) The appropriate permit fee, payable to the department, must accompany each application.

(4) Additional information that may be required by the department includes the following:

(A) copy of current permits or licenses issued by another state, or states;

(B) copy of most recent bedding inspection report if the business or plant is located in a city, county, state or country that has bedding laws and regulations and conducts inspections;

(C) copies of bedding article labels proposed for use in this state;

(D) samples of products to be shipped into this state;

(E) confirmation of compliance with applicable federal flammability standards for mattresses and mattress pads or test results from an independent testing facility acceptable to the department;

(F) explanation of the germicidal treatment method to be applied to second-hand articles of bedding; and

(G) any other information that the department may determine is necessary for the protection of the public health and safety.

(d) Permit conditions.

(1) Each person required to obtain a permit shall keep accurate and up-to-date records of all articles of bedding shipped into or within this state and such records shall be made available to authorized representatives of the department when requested. The department may require, at the expense of the person, that an independent audit of the records of the person be conducted with the results of such audit provided to the department and the person.

(2) Each person required to obtain a Germicidal Treatment Permit shall:

(A) conspicuously post the permit on the premises of the person's business near the treatment device; and

(B) keep accurate records in a bound log book describing all bedding articles or materials treated, date of treatment, method of treatment, and the name and address of the owner of each item.

(3) Each person required to obtain a permit shall provide product samples in sufficient numbers to determine compliance with these regulations when requested by the department and shall reimburse retail business establishments for samples of bedding or materials taken by authorized representatives of the department.

(4) Each person required to obtain a permit shall provide test results acceptable to the department confirming compliance with federal flammability standards for mattresses and mattress pads when requested by the department.

(5) Each person required to obtain a permit shall maintain each business location in a sanitary condition that complies with §205.9 of this title.

(6) Each person required to obtain a permit shall allow, during normal business hours, an authorized representative or representatives of the department to conduct an announced or unannounced inspection of their place of business for purposes of determining compliance with the Act and regulations and to take samples of bedding articles or materials for inspection and analysis or to be held as evidence of a violation of these regulations.

(7) Each person required to obtain a permit shall allow an authorized representative or representatives of the department to copy records and take photographs of articles of bedding or materials during inspections.

(e) Permit denial, suspension, revocation

(1) An application for permit issuance or renewal will be denied by the department if the applicant fails or refuses to provide a complete application, pay the appropriate permit fee, provide requested information or product samples or test results, or if the business location or plant location is not in a sanitary condition in violation of the Act and regulations.

(2) An application for permit issuance or renewal may be denied by the department if the applicant has failed to make acceptable progress implementing corrective actions agreed upon by the applicant and the department to remedy previous violations of the Act or these regulations.

(3) A permit may be suspended or revoked by the department if the permit holder fails to maintain the permitted business location or plant location in a sanitary condition, manufactures or renovates and sells mattresses or mattress pads that do not comply with federal flammability standards, fails to germicidally treat articles of used bedding prior to resale, or commits any other or repeated violations of the Act or these regulations.

§205.12. Administrative Penalty.

(a) The department may assess an administrative penalty against a person who violates the Act or a rule adopted by the department under the Act as provided by this section.

(b) The penalty may not exceed $25,000 for each violation. Each day of a continuing violation constitutes a separate violation.

(c) In determining the amount of the administrative penalty, the department shall consider:

(1) the seriousness of the violation;

(2) the history of previous violations;

(3) the amount necessary to deter future violations;

(4) efforts made to correct the violation; and

(5) any other matters that justice may require.

(d) Individual violations may be reduced or increased based on the considerations listed in subsection (c) of this section.

(e) A person is subject to double the initial penalty on second finding of violation of any provision of the Act or regulations. Third and subsequent violations of a provision are subject to five times the initial penalty, not to exceed $25,000 per day, per violation.

(f) Violations shall be placed in one of the following severity levels:

(1) Critical violation. Severity Level III includes the types of violations that are the most significant and present a threat to public health and safety. The base penalty for a first violation will generally not exceed $10,000 per day, per violation. The same violation continuing after written notification by the department constitute separate violations. Examples of Severity Level III violations include but are not limited to:

(A) failure to germicidally treat, or properly treat, bedding by a method approved by the department;

(B) failure to maintain a business location in a sanitary condition;

(C) failure to comply with federal flammability standards for mattresses and mattress pads;

(D) failure to remove old covers from renovated mattresses and/or remove filling materials that are filthy, stained, have obnoxious odors, harbor insects or pathogenic organisms, were obtained from alleys, dumps or junkyards or other sources where the materials were exposed to the elements;

(E) labeling secondhand (used) bedding and/or bedding that was not properly germicidally treated as new or sanitized bedding;

(F) failure to obtain or renew the appropriate permit, or permits, prior to doing business in the state;

(G) falsifying required records or submitting false test results on bedding;

(H) refusal to recall bedding from commerce when so directed by the commissioner or the department;

(I) operating under another person's permit or a permit issued to another location; and

(J) using filling materials in bedding that emit irritating or toxic fumes or vapors.

(2) Serious violation. Severity Level II includes violations that are significant and which, if not corrected, could threaten public health and safety. The base penalty for a first violation will generally not exceed $2,500 per day, per violation. Examples of Level II violations include, but are not limited to:

(A) mixing germicidally treated bedding with untreated bedding;

(B) failure to label or accurately label bedding;

(C) failure to keep accurate and up-to-date records;

(D) selling unlabeled or falsely labeled bedding;

(E) selling used bedding that has not been germicidally treated; and

(F) concealing the label from the view of consumers.

(3) Significant violation. Severity Level I includes violations that are of more than minor significance and, if left uncorrected, could lead to more serious circumstances. The base penalty for Level I violations on first occurrence will generally not exceed $500 per day, per violation. Examples of Level I violations include, but are not limited to:

(A) attaching labels to bedding in unauthorized locations;

(B) failure to identify multiple filling materials on the label in terms of percentage, by weight, in descending order;

(C) failure to notify the department of changes in business location or ownership; and

(D) exceeding the 10 percent variance limit when stating the percentage, by weight, for bedding filling materials.

(g) All proceedings for the assessment of an administrative penalty are subject to Chapter 2001, Government Code.

(h) If, after investigation of a possible violation and the facts surrounding that possible violation the department determines that a violation has occurred, the department shall give written notice of the violation to the person alleged to have committed the violation. The notice must include:

(1) a brief summary of the alleged violation; and

(2) a statement of the amount of the proposed penalty based on the factors set forth in subsection (c) of this section; and a statement of the person's right to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(i) Not later than the 20th day after the date on which the notice is received, the person notified may accept the alleged violation and penalty determined by the department under subsection (c) of this section, or may make a written request for a hearing on that determination.

(j) If the person notified of the violation accepts the determination of the department or if the person fails to respond in a timely manner to the notice, the commissioner or the commissioner's designee shall issue an order approving the determination and ordering that the person pay the proposed penalty.

(k) If the person notified requests a hearing, the department shall:

(1) set a hearing date;

(2) give written notice of the hearing to the person; and

(3) designate a hearings examiner to conduct the hearing.

(l) The hearings examiner shall make findings of fact and conclusions of law and shall promptly issue to the commissioner or the commissioner's designee a proposal for decision as to the occurrence of the violation and a recommendation of the amount of any proposed penalty.

(m) Based on the findings of fact and conclusions of law and the recommendations of the hearings examiner, the commissioner or the commissioner's designee by order may find that a violation has occurred and may assess a penalty or may find that no violation has occurred.

(n) The department shall give notice of the order to the person alleged to have committed the violation. The notice must include:

(1) separate statements of the findings of fact and conclusions of law;

(2) the amount of any penalty assessed; and

(3) a statement of the right of the person to judicial review of the order under Chapter 2001, Government 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 13, 1999.

TRD-9905932
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: October 3, 1999
Proposal publication date: April 2, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

25 TAC §205.11

The repeal is adopted under Health and Safety Code, Chapter 345, §345.082, which provides the department with the authority to adopt necessary rules to implement and enforce Chapter 345; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health; and Government Code §2001.039.

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 13, 1999.

TRD-9905933
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: October 3, 1999
Proposal publication date: April 2, 1999
For further information, please call: (512) 458-7236

♦ ♦ ♦

TITLE 28. INSURANCE

Part 2. TEXAS WORKERS' COMPENSATION COMMISSION

Chapter 103. AGENCY ADMINISTRATION

Subchapter A. EMPLOYEE TRAINING AND EDUCATION PROGRAM

28 TAC §§103.1, 103.2, 103.3

The Texas Workers' Compensation Commission (the Commission) adopts new §§103.1, 103.2, and 103.3, concerning employee training and education programs without changes to the proposed text as published in the May 28, 1999, issue of the *Texas Register* (24 TexReg 3988) and the text will not be republished.

As required by the Government Code, §2001.033(1), the Commission's reasoned justification for this rule is set out in this order which includes the preamble, which in turn includes the rule. This preamble contains a summary of the factual basis for the rule, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were for or against adoption of the rule, and the reasons why the Commission disagrees with some of the comments and proposals.

The new rules codify policies and procedures currently implemented and those that will be established by the Commission regarding the training and education programs available to its employees. Government Code, §656.048 requires state agencies to adopt rules relating to the eligibility of the agency's administrators and employees for training and education supported by the agency and relating to the obligations assumed by the administrators and employees on receiving the training and education.

New §103.1 sets out the Commission's general provisions regarding training and education programs for employees. New subsection (a) permits the use of state funds for training and education of Commission employees and subsection (b) requires that the training or education be related to the duties or prospective duties of the employee. New subsection (c) requires that the training and education program benefit both the Commission and the participating employee and sets out the benefits expected. New subsection (d) states that a Commission employee may be required by the Commission to attend training or education programs related to the employee's job duties or prospective duties, and subsection (e) provides that participation in state-funded training and education programs is subject to the availability of funds.

New §103.2 lists the types of training and education that the Commission will include in its program and requires that the Commission develop policies which contain the elements listed in subsection (b).

New §103.3 clarifies that approval to participate in a training or education program paid for with state funds does not affect an employee's at-will employment status and does not constitute a guarantee of continued employment in a current or prospective position with the Commission.

No comments were received regarding adoption of the proposed rules.

The new rules are adopted under the Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; and the Texas Government Code, §656.048, which provides that each state agency shall adopt rules relating to the eligibility of the agency's administrators and employees for training and education supported by the agency, 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 13, 1999.

TRD-9905930

Susan Cory
Assistant General Counsel
Texas Workers' Compensation Commission
Effective date: October 3, 1999
Proposal publication date: May 28, 1999
For further information, please call: (512) 707-5829

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

Part 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Chapter 39. PUBLIC NOTICE

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§39.1, 39.101, 39.151, 39.201, 39.251, and 39.253; new §§39.302, 39.351, 39.401, 39.403, 39.405, 39.407, 39.409, 39.411, 39.413, 39.418-39.421, 39.423, 39.425, 39.501, 39.503, 39.509, 39.551, 39.553, 39.601-39.606, 39.651, 39.653, 39.701- 39.703, 39.705, 39.707, 39.709, 39.711, and 39.713; and the repeal of §39.401, concerning public notice. Sections 39.1, 39.101, 39.151, 39.201, 39.251, 39.302, 39.351, 39.403, 39.405, 39.407, 39.409, 39.411, 39.413, 39.418, 39.419, 39.420, 39.425, 39.501, 39.503, 39.509, 39.551, 39.553, 39.601, 39.602, 39.603, 39.604, 39.605, 39.606, 39.651, 39.653, 39.701, 39.705, 39.709, and 39.711 are adopted with changes to the proposed text as published in the July 16, 1999 issue of the *Texas Register (*24 TexReg 5303). Sections 39.253, 39.401, 39.421, 39.423, 39.702, 39.703, 39.707, and 39.713 and repeal §39.401 are adopted without changes to the proposed text and will not be republished. Certain provisions of the rules will constitute a revision to the state implementation plan (SIP). Specifically, §§39,201; 39.401; 39.403(a) and (b)(8)-(10); 39.405(f)(1) and (g); 39.409; 39.411(a), (b)(1)-(6) and (8)-(10) and (c)(1)-(6) and (d); 39.413(9), (11), (12), and (14); 39.418(a) and (b)(3) and (4); 39.419(a), (b), (d), and (e); 39.420(a), (b), and (c)(3) and (4); 39.423(a) and (b); 39.601; 39.602; 39.603; 39.604; and 39.605.

The provisions of former §39.401 are now set forth as new §39.351. Corrections to the proposed rules for Chapter 39 were published in the *Texas Register* on August 20, 1999 (24 TexReg 6573). The corrections were primarily of typographical errors and incorrect cross- references. The corrections are in the adopted rule text. Concurrently with this rulemaking, the commission is also adopting the rules review of and readopting the existing rules in Chapter 39, concerning Public Notice, in accordance with the rule review requirements of the General Appropriations Act, Article IX, §167, 75th Legislature, 1997.

BACKGROUND

The primary purpose of the adopted amendments and new sections is to implement House Bill (HB) 801, and portions of Senate Bill (SB) 7, SB 211, SB 766, SB 1308, and HB 1479, 76th Legislature (1999).HB 801 establishes new procedures for public participation in environmental permitting proceedings. It establishes procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing for certain actions. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment or opportunity for hearing as necessary to satisfy air quality federal program authorization requirements. These changes are implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122, and 305; changes for all of these chapters are published in this issue of the *Texas Register.* Changes to Chapters 55 and 321 were also proposed on July 16, 1999, but are not adopted at this time. This adoption also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

OVERVIEW OF HB 801 AND IMPLEMENTATION

HB 801, enacted by the 76th Legislature, revises the commission's procedures for public participation in environmental permitting by adding new Texas Water Code (TWC), Chapter 5, Subchapter M; revising Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.088; revising Texas Clean Air Act (TCAA), THSC, §382.056; and revising Texas Government Code, §2003.047. The changes in law made by HB 801 apply to certain permit applications declared administratively complete on or after September 1, 1999 and former law is continued in effect for applications declared administratively complete before September 1, 1999. Generally, the amendments made by this law are procedural in nature and are not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for hearing are provided.

More specifically, HB 801 encourages early public participation in the environmental permitting process and is intended to streamline the contested case hearing process. For example, it requires an applicant to publish newspaper notice of intent to obtain a permit 30 days after declaration of administrative completeness. It also requires the applicant to place a copy of the application and the executive director's preliminary decision at a public place in the county, and, in most cases, to publish newspaper notice of the executive director's preliminary decision of the application. In addition, the bill requires the commission to establish by rule the form and content of the notices and to mail notice to certain persons. It also authorizes the executive director to hold public meetings regarding applications which are required, if requested by a legislator, or if the executive director determines there is substantial public interest in the proposed activity. The executive director is also required to prepare responses to relevant and material public comment received in response to the notices or at public meetings, and file the responses with the chief clerk. It requires the commission to prescribe alternative cost-effective procedures for newspaper publication for small business stationary sources seeking air emissions authorization that will not have a significant effect on air quality. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment or opportunity for hearing as necessary to satisfy federal program authorization requirements. Contested case hearing procedures are also revised. The scope of proceedings and discovery is limited by the new law. These changes are implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted to Chapters 106, 116, and 122. Most of these chapters also contain changes necessary for the consolidation of the procedural rules of the agency and to improve consistency among the permitting programs as well as changes to clarify and update agency rules and changes necessary to facilitate permit processing.

Changes for all of these chapters are published in this issue of the *Texas Register.* Changes to Chapter 321 were also proposed on July 16, 1999, but are not adopted at this time.

OVERVIEW OF SB 7 AND IMPLEMENTATION

SB 7, also enacted by the 76th Legislature, restructures electric utility service in Texas. Owners of grandfathered facilities that generate electric energy for compensation are required to apply for an electric generating facility (EGF) permit from the commission by September 1, 2000. These permits are subject to notice under §382.056 of the Texas Health and Safety Code. SB 7 provides that initial issuance of these permits require notice and comment proceedings. However, amendment and renewal of these permits requires notice, comment, and opportunity for contested case hearing.

The notice provisions and public participation procedures for electric generating facility permits are implemented through changes to Chapters 39 and, to a limited extent, to Chapter 50. Renewals are subject to Chapters 39, 50, and 80 as amended. Additional implementation of the requirements of SB 7 is expected in future rulemaking by the commission.

OVERVIEW OF SB 766 AND IMPLEMENTATION

SB 766, enacted by the 76th Legislature, also amends TCAA, Chapter 382 by, among other things: (1) requiring the commission to establish procedures to authorize standard permits and permits by rule; (2) dividing the current category of exemptions from permitting into two categories: permits by rule for construction of facilities with insignificant air emissions, and exemptions from permitting for changes to existing facilities with insignificant air emissions; and (3) creating a voluntary emission reduction permit (VERP) for grandfathered facilities that must be applied for by September 1, 2001. Notice requirements for these changes are implemented in the changes to Chapter 39 because of the critical nature of the timing of the permit program. Public participation requirements applicable to VERPs under SB 766 are included in these chapters, specifically §§39.403(b)(11), 39.403(d), and 39.606. Additional implementation of the requirements of SB 766 is expected to occur in future rulemaking proposals by the commission.

OVERVIEW OF SB 1308 AND IMPLEMENTATION

SB 1308 allows the executive director to approve water quality management plans (WQMP) and revisions, so long as an opportunity for public participation has been provided. This bill, which amends Texas Water Code, §26.037, also requires rules to provide for commission review of the executive director's decision on a plan approval or revision. This adoption incorporates these requirements through §§39.401, 39.403, and 39.553.

OVERVIEW OF HB 1479 AND IMPLEMENTATION

HB 1479 amended §26.028 of the Texas Water Code and allows the commission to approve an application to renew or amend a permit without the necessity of a public hearing if: 1) the applicant is not applying to increase significantly the quantity of waste authorized to be discharged or change materially the pattern or place of discharge; 2) the activities to be authorized will maintain or improve the quality of waste; 3) the applicant's compliance history raises no issues regarding the applicant's ability to comply with a material term of its permit; and 4) for Texas Pollutant Discharge Elimination System (TPDES) permits, notice and opportunity to comment is provided in accordance with federal program requirements. This adoption implements these provisions.

OVERVIEW OF SB 211 AND IMPLEMENTATION

SB 211 amends §2001.142(c) of the Texas Government Code, relating to notice of decision in an administrative hearing, and provides that a party is presumed to have been notified on the third day after notice has been mailed. This requirement has been implemented and has guided rule drafting in Chapters 39, 50, and 80.

In addition to the changes required by legislation, the TNRCC is making several other changes to the public notice rules in Chapter 39.

OVERVIEW OF CHANGES NOT RELATED TO HB 801

For air permits, there are several changes regarding notice. Specifically, all air permit amendment applications for construction of new facilities must comply with the notice requirements in Chapter 39. In addition, changes to existing facilities must comply with the notice requirements in Chapter 39 when there are significant emission increases or in other specific circumstances. The rules also clarify when alternative language publication for an air application is required and the appropriate locations of notice signs. The requirement that notice for certain air applications be published in two consecutive issues of a newspaper has been changed to publication in one issue of a newspaper. Other changes made in this rulemaking adoption which are not related to HB 801 include those revisions necessary to incorporate by rule those changes made by SB 766 to the TCAA regarding exemptions from permitting and permits by rule and public notification and comment procedures for voluntary emission reduction permits. This adoption also incorporates public notification and current procedures required under SB 7 for electric generating facility permits.

The notice text for air applications has also been changed to make clear which air contaminants should be included in the text of the notice. Bilingual notice requirements related to air permit actions have also been clarified.

Chapter 39 also incorporates a procedure that allows the agency to suspend review of and return an application if the applicant does not publish notice. A second application fee will not be required if the applicant wishes to resubmit the application within six months. This change in procedure is not required by HB 801. However, it is consistent with the goal of ensuring the most effective use of agency resources, avoiding unwarranted delay in permit processing, and encouraging early public participation in the permit process.

The rules have been revised to reflect that there is no right to a contested case hearing on weather modification permits or licenses under Chapter 18, Texas Water Code, reflecting the interpretation of law given in commission orders which have addressed hearing requests on these applications.

ORGANIZATION OF CHAPTER

HB 801 applies only to certain applications that are administratively complete on or after September 1, 1999. Thus, in the adopted rules, Subchapters A-F are amended to apply only to applications that were administratively complete *before* September 1, 1999. At the same time, new Subchapters H-M apply only to applications that are administratively complete *on or after* September 1, 1999. Generally, Subchapters H-M are duplicated versions of the existing rules in Subchapters A-F, modified to in-

corporate substantive changes either related to HB 801 implementation, implementation of other bills, or other changes under this chapter. To facilitate this reorganization, §39.401 (related to Public Notice for Applications for Consolidated Permits) is repealed and renumbered as §39.351. Section 39.351 applies to all permit applications, regardless of when they become administratively complete. While HB 801 continues former law in effect for applications administratively complete before September 1, 1999, the commission recognizes that it may be a year or more before all of those applications have been acted on, especially those that go to contested case hearing. Therefore, the commission has chosen this parallel subchapter structure because the commission believes it is useful for the public to have easy access to rules for older applications as well as for new ones. Once all applications that were administratively complete before September 1, 1999 have been processed, the commission can delete the subchapters that apply to those applications.

In this adoption publication, only the applicability sections of Subchapters A-F are reproduced. For Subchapters H-M, the entire new subchapters are printed. Many of the sections of Subchapters H- M are the same or very similar to sections in Subchapters A-F. Where possible, section numbers are parallel; for example, §39.5 (General Notice Provisions) is similar to §39.405 (General Provisions). Generally, Chapter 39 is changed to incorporate certain statutory requirements of HB 801, to clarify and modify certain requirements for public notification and public participation, and to modify the processing of applications for air quality permits.

The revisions to Chapter 39 contain general provisions that apply to all affected programs and program-specific requirements. The latter are largely derived from statutory differences related to various programs included in HB 801 and applicable statutes. For applications administratively complete on or after September 1, 1999, Subchapter H contains general provisions and Subchapters I - M contain provisions applicable to specific types of applications.

Portions of Chapter 39 are changed to incorporate some aspects of SB 766 and SB 7. For example, the adoption includes reference to permits and public notification requirements for VERPs under THSC, §382.0519, permits for electric generating facilities subject to §39.264 of the Utilities Code, and the use of exemptions from permitting and permits by rule for construction of facilities and modification of existing facilities under TCAA, §§382.057 and 382.058. Portions of Chapter 39 implement SB 1308 relating to water quality management plan approval. The rules also incorporate requirements necessary to satisfy federal program approvals, requirements, and additional notice provisions set forth in various provisions of the Texas Water Code and the Texas Health and Safety Code.

To facilitate review, the agency will make copies of the rule available which show the differences between old and new subchapters. Copies may be obtained by calling Casey Vise, in the Office of Environmental Policy, Analysis and Assessment, at (512) 239-1932 and on the commission's website at: http://www.tnrcc.state.tx.us/oprd/forum.html#hb801.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the 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 the definition of a "major environmental rule" as defined in the act. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

"Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and establishes procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing as well as consolidate existing notice procedures for some air permitting programs, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the adopted rule is a major environmental rule, a regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopts a rule solely under the general powers of the agency. This adoption is expressly authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and Texas Water Code, Chapter 5, Subchapter M, as well as the other statutory authorities cited in the Statutory Authority section of this preamble. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with Texas Water Code, §5.551, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program. This action does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., Texas Water Code, Chapter 5, Subchapter M and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these adopted rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific primary purpose of the amendments and new sections is to revise the TNRCC rules to establish procedures for public participation in certain permitting proceedings as required by HB 801, and other legislation. The adoption relates to procedures for providing public notice, providing opportunity for public comment, and providing opportunity for requesting contested case hearings as well as specific procedures for hearings. The rule would also consolidate already existing notice procedures for some of the air quality permitting programs, correct, clarify, and/or update the air quality permit amendment process, requirements relating to sign posting for concrete batch plants, and clarification of requirements relating to bilingual education notices; and consolidate commission procedural rules. The adopted rules will substantially advance these stated purposes by providing specific provisions on the aforementioned matters. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the language consists of amendments and new sections relating to

the commission's procedural rules rather than substantive requirements.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The actions concern only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (31 TAC Chapter 505, 30 TAC §§281.40, et seq.).

HEARING AND COMMENTERS

A public hearing on the proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. Oral comments were provided by an individual and Locke, Liddell and Sapp, L.L.P.. The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999. Written comments were submitted by Baker & Botts, L.L.P., on behalf of the Texas Industry Project; Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll), on behalf of the Texas Chemical Council, Texas Association of Business and Chambers of Commerce (TABCC), and Texas Oil and Gas Association; Brown, Potts & Reilly, L.L.P., on behalf of Merco Joint Venture, L.L.C.; City Public Service (CPS) of San Antonio, Texas; Dow Chemical Company (Dow); Eastman Chemical Company, Texas Eastman Division (Eastman); Exxon Chemical Company's Baytown Chemical Plant, Baytown Olefins Plant and Mont Belvieu Plastics Plant (Exxon Chemical); Exxon Company, U.S.A., Baytown Refinery (Exxon); Henry, Lowerre, Johnson, Hess & Frederick, Attorneys at Law (Henry, Lowerre), on behalf of Blackburn and Carter, Clean Water Action, Consumers Union, Environmental Defense Fund, Henry, Lowerre, Johnson & Frederick, National Wildlife Federation, Public Citizen, Sierra Club, Lone Star Chapter, Texas Center for Policy Studies, and Texas Committee on Natural Resources; Jackson Walker L.L.P.; Jenkens & Gilchrist, P.C.; Public Interest Counsel, Texas Natural Resource Conservation Commission (PIC); Roller and Allensworth, L.L.P., on behalf of the Greenbelt Municipal and Industrial Water Authority; Small Business Compliance Advisory Panel (CAP); Texas Association of Business & Chambers of Commerce (TABCC); Texas Cattle Feeders Association (TCFA); Texas Cotton Ginners' Association; Texas Instruments Incorporated (TI); Thompson & Knight, L.L.P.; and the United States Environmental Protection Agency Region 6 Office (EPA).

COMMENTS REQUESTED

The commission solicited, in particular, comments regarding the requirements in §39.101(e)(2) and §39.501(d)(2) (Municipal Solid Waste applications); §39.503(d)(2)(B) (Industrial or Hazardous Waste applications); §39.651(d)(2) and §39.651(e)(2)(B) (Injection Well applications); and §39.603(a)(2) (Air Quality Permit applications) on the size of newspaper notice. The commission recognizes that the measurements in the rules did not necessarily reflect the measurements that newspapers use for advertisements.

During the comment period, the Texas Press Association forwarded information to the TNRCC on how most advertising space is sold. The notice size was adjusted only for air applications to match the size of Standard Advertising Units and still provide an effective notice to interested persons of the general public. This change will hopefully reduce the occurrence of errors and republication time and money. Requirements for solid waste and injection well applications were not changed. Rather, the information about Standard Advertising Units will be included in the Instructions for Publications sent to applicants along with the text of notice.

ANALYSIS OF COMMENTS AND ADOPTED RULES

Public Hearing

An individual expressed concern that commission public participation rules do not comply with EPA public participation requirements, particularly with regard to the permitting of municipal solid waste landfills. The commenter submitted a letter from EPA dated March 11, 1999, which summarizes EPA's policy on public participation in landfill permitting. The commenter made specific reference to the "RCRA Manual" and requirements therein for a public hearing within two weeks before or two weeks after the original filing of an application for a new permit or for a substantial Class C (It is possible the commenter said "3" rather than "C," but it was transcribed as "C"). The commenter also raised the questions of whether the commission considers air quality impacts in its consideration of landfill permit applications. The commenter did not identify a specific rule in regard to either of her comments.

The commission has made no change in response to these comments. The state of Texas administered a landfill permitting program before the enactment of federal law governing these facilities. Texas sought EPA approval for authorization to implement the Subtitle D requirements, and that request identified public participation procedures that would apply to applications for municipal solid waste permits. At the time of the request in 1993, EPA had only promulgated a draft State Implementation Rule (SIR), but Texas, as well as other states, were allowed to submit their proposals in accordance with the draft SIR. The request submitted by Texas was approved shortly thereafter. Although the SIR was only put into final form in 1998, the approval granted Texas the authority to implement the federal requirements for municipal solid waste landfills is not affected. In response to the comment regarding consideration of air quality impacts, the commission responds that air quality impacts are considered in the review of landfill permit applications and commission rules describe the timing and extent of air quality reviews.

Section 361.0791 of the Texas Health and Safety Code, and §39.101(d) of the commission's rules require the commission to hold a public meeting on an application for a new municipal solid waste (MSW) facility. However, some applicants do hold public meetings on applications for existing sites that are being amended. There are currently no statutory or regulatory requirements for a public meeting on an application for a Class 1 MSW permit modification.

General Comments on Chapter 39

Brown McCarroll observed that the commission has undertaken a quadrennial review of the commission's procedural rules in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997, while simultaneously adopting new rules to implement HB 801. The commenter stated that the quadrennial review should not be a bar to future consideration of necessary changes to the new rules following adoption. The commenter recommended that the commission clearly indicate

that the rules will be revisited after their implementation to address any problems resulting from the "fast track" time line for this rulemaking.

The commission agrees with the commenter that the new procedural rules being adopted should be subject to review to correct any deficiencies which may become apparent following adoption. The quadrennial review applied only to the existing Chapters 39, 50, and 80 of the commission's rules. The fact that the existing procedural rules have undergone the statutorily required quadrennial review, and the commission has determined that those rules continue to be necessary, will not prevent the commission from revisiting the procedural rules following implementation of HB 801.

Thompson & Knight, Exxon, and Baker & Botts, TI and Brown McCarroll submitted comments about Chapter 39 in general and suggested that the TNRCC take this opportunity to clarify notice requirements, eliminate inconsistencies, and reorganized the chapter.

The commission agrees and has made several clarifying and reformatting changes to Chapter 39 as discussed below to make this chapter easier to read and understand.

Subchapter A, §39.1. Applicability

The commission adopts amendments to §39.1 (Applicability) to provide that permit applications covered by Chapter 39 declared administratively complete before September 1, 1999 are subject to Subchapters A-F of Chapter 39 and that Subchapters H-M apply to permit applications declared administratively complete on or after September 1, 1999. This amendment also provides that consolidated permit applications regardless of when declared administratively complete are subject to Subchapter G. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provides that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

Brown McCarroll commented that, as written, §39.1 as proposed was overly broad and that, the rule might have the unintended result of making provisions applicable to solid waste applications applicable to, for example, the provisions applicable to water quality applications.

The commission has made changes in response to this comment to more clearly reflect that only Subchapter A and H are of general applicability in Chapter 39. The commenter also correctly identified the inadvertent deletion in the proposal of the phrase "This chapter applies to:" This phrase has been included in the adopted §39.1 to eliminate any ambiguity as to the reason for the applications listed in the subsections of §39.1. Subchapters B - F and Subchapter I - M contain the requirements applicable to specific types of applications.

Subchapter B, §39.101. Application for Municipal Solid Waste Permit.

Amended §39.101 (Application for Municipal Solid Waste Permit) reflects that rules in effect before September 1, 1999 continue to apply to applications declared administratively complete before that date. New Subchapters H-M apply to applications administratively complete on or after that date. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provides that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

Brown McCarroll suggested that, although the headings for the introductory rules found in Subchapters B through F of Chapter 39 reference the types of permits that are governed by each of the rules, the type of permit is not specifically referenced in the body of the rule and suggested that this rulemaking is an opportune time to clean up the Chapter 39 rules by adding a reference to the specific permit which is governed by each rule in the text of the rule.

The commission has made changes in response to this comment. While the commission, to avoid redundancy, has not adopted the exact language as proposed by the commenter, the rule as adopted does include clarifying changes to include a specific reference in the body of the rule to the specific type of permits governed by the rule as requested by the commenter.

Baker & Botts, in response to TNRCC's request for comments on the size of newspaper notices specified by §39.101(e)(2), 39.501(d)(2), 39.503(d)(2)(B), 39.651(d)(2), 39.651(e)(2)(B), and 39.603(a)(2), stated that they have not experienced difficulty in working with local newspapers to meet the intent of the referenced sizing requirements. The commenter recommended that the best course of action would be for the TNRCC to promulgate a rule that specifies that substantial compliance with the TNRCC's public notice rules satisfies applicable regulatory notice requirements.

The commission has made no change in response to this comment. The commission did not include such a rule in the notice of the proposed rule and does not believe that including a rule allowing substantial compliance with notice requirements should be included in the adoption without providing an opportunity for comment on such a provision. In addition, such a change is not required for implementation of HB 801, which is the primary purpose for this rulemaking.

Subchapter C, §39.151. Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge.

Amended §39.151 (Application for Wastewater Discharge Permit) reflects that rules in effect before September 1, 1999 continue to apply to applications declared administratively complete before that date. These amendments also provide that Subchapters H-M apply to applications administratively complete on or after that date. These changes are intended to incorporate the effective date and savings clause of HB 801. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provide that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

Brown McCarroll suggested that although the headings for the introductory rules found in Subchapters B through F of Chapter 39 reference the types of permits that are governed by each of the rules, the type of permit is not specifically referenced in the body of the rule and suggests that this rulemaking is an opportune time to clean up the Chapter 39 rules by adding a

reference to the specific permit which is governed by each rule in the text of the rule.

The commission has made changes in response to this comment. While the commission has not adopted the language exactly as proposed by the commenter to avoid redundancy, the commission has made clarifying changes to the rule to specifically reference the types of permits governed by this subchapter.

Subchapter D, §39.201. Application for a Preconstruction Permit.

Amended §39.201 (Application for a Preconstruction Permit) reflects that rules in effect before September 1, 1999 continue to apply to applications declared administratively complete before that date. These amendments also provide that Subchapters H-M apply to applications administratively complete on or after that date. These changes are intended to incorporate the effective date and savings clause of HB 801. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provide that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

Brown McCarroll suggested that although the headings for the introductory rules found in Subchapters B through F of Chapter 39 reference the types of permits that are governed by each of the rules, the type of permit is not specifically referenced in the body of the rule and suggests that this rulemaking is an opportune time to clean up the Chapter 39 rules by adding a reference to the specific permit which is governed by each rule in the text of the rule.

The commission has made changes in response to this comment. While the commission has not adopted the language exactly as proposed by the commenter to avoid redundancy, the commission has made clarifying changes to the rule to specifically reference the types of permits governed by this subchapter as requested by the commenter.

Subchapter E, §39.251. Application for Injection Well Permit.

Amended §39.251 (Application for Injection Well Permit) is adopted to reflect that rules in effect before September 1, 1999 continue to apply to applications declared administratively complete before that date. These amendments also provide that Subchapters H-M apply to applications administratively complete on or after that date. These changes are intended to incorporate the effective date and savings clause of HB 801. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provide that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

Brown McCarroll suggested that although the headings for the introductory rules found in Subchapters B through F of Chapter 39 reference the types of permits that are governed by each of the rules, the type of permit is not specifically referenced in the body of the rule and suggests that this rulemaking is an opportune time to clean up the Chapter 39 rules by adding a reference to the specific permit which is governed by each rule in the text of the rule.

The commission has made changes in response to this comment. While the commission has not adopted the language exactly as proposed by the commenter to avoid redundancy, the commission has made clarifying changes to the rule to specifically reference the types of permits governed by this subchapter.

§39.253. Application for Production Area Authorization.

Amended §39.253 (Application for Production Area Authorization) reflects that rules in effect before September 1, 1999 continue to apply to applications declared administratively complete before that date. These amendments also provide that Subchapters H-M apply to applications administratively complete on or after that date. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provides that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

Brown McCarroll suggested that although the headings for the introductory rules found in Subchapters B through F of Chapter 39 reference the types of permits that are governed by each of the rules, the type of permit is not specifically referenced in the body of the rule and suggests that this rulemaking is an opportune time to clean up the Chapter 39 rules by adding a reference to the specific permit which is governed by each rule in the text of the rule.

The commission has made changes in response to this comment. While the commission has not adopted the language exactly as proposed by the commenter to avoid redundancy, the commission has made clarifying changes to the rule to specifically reference the types of permits governed by this subchapter.

Subchapter F, §39.301. Notice of Declaration of Administrative Completeness, and 39.302. Applicability.

The commission withdraws the proposed amendment to §39.301 (Notice of Declaration of Administrative Completeness). New §39.302 (Applicability) reflects that rules in effect before September 1, 1999 continue to apply to applications declared administratively complete before that date. These amendments also provide that Subchapters H-M apply to applications administratively complete on or after that date. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provides that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

To avoid the duplication in §39.301 and §39.302, improve clarity and make the organization of this subchapter consistent with that of other subchapters, the commission has changed the title of §39.301 from Notice of Declaration of Administrative Completeness to Applicability and the title of §39.302 from Applicability to Notice of Declaration of Administrative Completeness and correspondingly reorganized, with some minor wording changes, the substantive provisions of these sections

Brown McCarroll suggested that although the headings for the introductory rules found in Subchapters B through F of Chapter 39 reference the types of permits that are governed by each of the rules, the type of permit is not specifically referenced in

the body of the rule and suggests that this rulemaking is an opportune time to clean up the Chapter 39 rules by adding a reference to the specific permit which is governed by each rule in the text of the rule.

The commission has made changes in response to this comment. While the commission has not adopted the language exactly as proposed by the commenter to avoid redundancy, the commission has made clarifying changes to the rule to specifically reference the types of permits governed by this subchapter as suggested by the commenter.

Subchapter G, §39.351. Public Notice for Applications for Consolidated Permits.

New §39.351 (Public Notice for Applications for Consolidated Permits) reflects the information previously set forth in existing §39.401 which is being concurrently repealed with this adoption.

In addition, to make §39.351 consistent with the new organizational structure of Subchapters B through F of Chapter 39, the commission has amended §39.351 as proposed to add a subsection relating to Applicability that provides that this section is applicable to applications for consolidated permits which combine authorizations under two or more program areas.

It should be noted that the statutory authority for this subchapter was incorrectly referenced in the proposal published in the July 16, 1999 issue of the *Texas Register* (24 Tex. Reg 5303). The correct statutory authority is TWC, Chapter 5, Subchapter J, which establishes the commission's authority concerning consolidated permitting procedures.

Subchapter H, §39.401. Purpose.

New §39.401 (Purpose), states that the purpose of Chapter 39 is to specify notice requirements for certain applications, including notices for public meetings, contested case hearings, notice and comment hearings, and WQMPs. This provision is very similar to existing §39.3 except that it updates this provision to reflect the applicability to comment hearings for certain permit applications (notice of which is currently covered by Chapter 39) and WQMPs (incorporating changes made by SB 1308 which modified the procedures for notice and public participation for these actions). Minor clarifications were also made to the rule as proposed.

EPA commented that the lack of evenly numbered sections in Chapter 39 is confusing and difficult for a casual reader.

The commission has made no changes in response to this comment. This section numbering allows for expansion of these rules without requiring major reorganization of the subchapters.

Brown McCarroll commented that there is no need to introduce Subchapter H-M in §39.401 because each of the rules in those new subchapters clearly indicates to which applications or permits it applies. The commenter suggested this section should be stricken, the text of §39.403 should become the first rule in the subchapter, and the remaining rules in Subchapter H are be renumbered accordingly.

The commission has made no changes in response to this comment. The commission believes it is necessary to restate these subchapters for introduction, and to guide applicants and interested persons to the other subchapters and public notice requirements, as appropriate.

§39.403 Applicability , §39.403(a) and (b)(1)-(5), (13)

New §39.403(a) (Applicability) reflects that rules in effect before September 1, 1999 continue to apply to applications declared administratively complete before that date. These amendments also provide that Subchapters H-M apply to applications administratively complete on or after that date. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provide that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999. Section 39.403(a)(1)-(3) explains the organization of Chapter 39, Subchapters H - M and has been added to facilitate use of this chapter for applicants and the general public.

Section 39.403(b)(5) has been changed from the rule as proposed. The commission has added clarification to note that these requirements apply to contested case and enforcement hearings which are covered by 30 TAC Chapter 80. In addition, §39.403(b)(6) has been revised from the rule as proposed to make clear that certain sections of Chapter 39 do not apply for radioactive material license applications. Section 39.403(b)(13) was added to implement SB 1308 which amends TWC §26.037 to allow the executive director to approve water quality management plans as long as there is an opportunity for public participation.

Brown McCarroll commented that subsections (a) and (b) of proposed §39.403 have the same deficiencies as existing §39.1. They proposed a revision which would strike subsection (a) and (b) of the rule as proposed and substitute with the following language: (a) This subchapter applies to any of the following types of permit applications that are declared administratively complete on or after September 1, 1999.

The commission has made some changes in response to this comment. However, the commission did not incorporate the commenter's recommended language. The commission believes the change would be inappropriate since there are additional notice requirements in each subchapter as well as in H. The commission believes the rule should inform applicants which sets of subchapters apply depending on the timing of their application. However, §39.403(a) (1) - (3) has been added to clarify the applicability of Subchapters H - M and to make the subchapters easier to understand and use.

Brown McCarroll commented that §39.403(b)(5) relating to the applicability of Subchapter H-M to contested case hearings is overly broad and that no statute mandates that the general provisions found in subchapter H of Chapter 39 be applicable to all contested case hearings, which is what would result from the rule as written. It was also noted that comparable provisions for applications that are declared administratively complete before September 1, 1999 cover hearings under Chapter 80 concerning applications for air quality permits under Chapter 116 and hearings on contested enforcement cases under Chapter 80. The commenter recommended deletion of the section.

The commission has made changes in response to this comment. The rule has been modified to limit the applicability of §39.403(b) to those requirements listed in the appropriate subchapters. All of the subchapters have these requirements listed, if applicable. Chapter 39 includes both notices of applications and notices of hearings. Section 39.403(b)(5) is necessary to

implement the statutory requirements for applicable actions on the procedures for contested case hearings.

Brown McCarroll commented that §39.403(b)(6) relating to the applicability of Subchapters H - M to radioactive materials licences should be modified in order to make it clear that there are some sections in Subchapters H - M that do not apply to radioactive materials licences.

The commission has made revisions in response to this comment and has modified §39.403(b)(6) as recommended.

TCFA commented on §39.403(b) and (c) relating to applications that are or are not subject to Subchapters H - M of Chapter 39 and expressed support for a streamlined public notice procedure for CAFOs filing applications for authorizations under Chapter 321, Subchapter B.

The commission acknowledges this statement of support.

§39.403(b)(8)-(12)

New requirements listed under §39.403(b)(8)-(12) reflects that notice requirements for air applications are now contained in Chapter 39 rather than Chapter 116 and to incorporate some of the changes resulting from SB 7 and SB 766. Those types of applications which would be newly subject to the provisions of Chapter 39 include: (1) applications for air quality permits under §382.0518 and §382.055 of the Texas Health and Safety Code, unless otherwise specified in this section; (2) applications subject to the requirements of Chapter 116, Subchapter G of this title (relating to Flexible Permits); (3) permit amendments under §116.116(b) and §116.710(a)(2) and (3) when an action involves: (A) construction of any new facility, (B) changes to an existing facility which results in a significant increase in allowable emissions of any air contaminant, or (C) other changes when determined by the executive director to enhance public participation; (4) applications subject to the requirements of Chapter 116, Subchapter C of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), whether for construction or reconstruction; (5) concrete batch plants (CBP) registered under 30 TAC Chapter 106 (relating to Exemptions from Permitting) unless the facility is to be temporarily located in, or contiguous to, the right-of-way of a public works project; (6) applications for voluntary emission reduction permits under §382.0519 of the Texas Health and Safety Code; and (7) applications for permits for electric generating facilities under §39.264 of the Utilities Code.

These actions are required to undergo notice in accordance with Chapter 39 and include public participation under Chapter 55 as required by TCAA, §382.056.

Specifically, §39.403(b)(8)(A) and (B) is to clarify that applications to amend existing permits for the purpose of authorizing new construction must comply with the notice requirements in 30 TAC Chapter 39, Subchapters H and K. This is required by the TCAA, §382.056(a), but was not codified in existing notice rules in 30 TAC Chapter 116. This subsection is consistent with the requirement that all applications for new permits which would authorize new construction must comply with the notice requirements, and clarifies that there is no basis for different notice requirements for applicants who are choosing to amend an existing permit versus obtaining a new permit. §39.403(b)(8)(B) clarifies which applications for changes of existing facilities must comply with the notice requirements of Subchapters H and K of Chapter 39. This is required by the Texas Clean Air Act, Texas Health Safety Code, §382.056(a), but was not codified in existing notice rules in Chapter 116 which are being concurrently repealed. This clarifies that changes to existing facilities for insignificant increases are not required to comply with notice requirements. The reference of insignificant emissions is an existing determination criteria of the commission which establishes sources that are exempt from permitting requirements. Permit amendments which do not meet the statutory definition of modification, as changed by SB 1126, 74th Legislature, 1995, retain that exempt status.

EPA commented that only those portions of §39.403(b) applicable to air quality permits should be submitted as SIP revisions which appear to be subparts (8) - (14). Concrete batch plants registered under Chapter 106 are exempt from permitting, hence construction or modification would not require public notice. EPA asked for verification where the TCAA was amended in 1985 to provide for a hearing on these sorts of facilities.

The commission has included only those sections which are applicable as revisions to the SIP. The TCAA was amended September 1, 1989 by the 71st Legislature to include §382.058 which requires notice for concrete batch plants which are not located contiguous or adjacent to the right-of-way of a public works project.

EPA commented that the term "modification of" contained in §39.403(14)(B) should be changed to "changes to" such that the term tracks the language used in the SIP.

There is no definition of "change" in the TCAA or 30 TAC Chapter 116. "Modification" is the appropriate term because it is defined in the TCAA, §382.0512 and Chapter §116.110(9). This term covers all physical or operational changes to a facility for which notice would be required under §39.403(b)(8)(B).

Baker & Botts commented that proposed §39.403(b)(13) changes current agency practice in requiring notice of all initial flexible permit applications, especially for those actions which would result in a reduction in emissions or no significant increases in emissions.

The commission has made revisions in response to this comment and has deleted §39.403(b)(13) and instead combined the flexible permit notice requirements with §39.403(b)(8) resulting in the notice requirements for flexible permits (new and amended) to be the same as §116.116 amendment criteria. This is because, as pointed out by the commenter, a flexible permit may be initially issued on an existing facility with no new facility construction or significant increase in allowable emission rates. This is consistent with §382.056(g) which does not require public notice if there are no new contaminants or increase in allowables emission rates. Notice requirements are focused on important actions which need public input and more accurately reflect statutory requirements.

Brown McCarroll commented that §39.403(b)(14) is redundant and confusing, noting that the applications for permit amendments covered under this section are required under §382.0518 of the Texas Health and Safety Code which is already referenced in proposed §39.403(b)(8). The comments recommended deleting subsection (b)(14) and renumbering the remaining paragraphs accordingly.

The commission agrees and has combined §39.403(b)(8) and (14) based on this comment and renumbered subsequent subsections accordingly.

CPS-San Antonio, Thompson & Knight, TCGA, and TABCC commented that the requirements proposed under §39.403(b)(14)(A) and (B) are a change in practice. The commenters believe the change would result in a significant increase in the number of amendments with insignificant emissions increases going to notice, which would be a burden to applicants and potentially lengthen the amendment process for very small projects. CPS recommended that these subsections should be changed such that only permit amendments that result in an increase in significant emissions, i.e. emissions of any air contaminant and emitted equal to or greater than the emission quantities defined in §106.4(a)(1), be subject to public notice.

For clarity, §39.403(b)(14)(A) and (B) have been moved to §39.403(b)(8) (A) and (B). The commission is adopting new §39.403(b)(8)(A) without changes. This subsection clarifies that applications to amend existing permits for the purpose of authorizing new construction must comply with the notice requirements in 30 TAC Chapter 39, Subchapters H and K. This is required by the TCAA, §382.056(a), but was not codified in existing notice rules in 30 TAC Chapter 116 which are concurrently being repealed. This subsection is consistent with the requirement that all applications for new permits which would authorize new construction must comply with the notice requirements, and clarifies that there is no basis for different notice requirements for applicants who are choosing to amend an existing permit versus obtaining a new permit. It also clarifies that applications for construction of new facilities with emissions of less than or equal to 25 tons per year must comply with notice requirements.

Section 39.403(b)(8)(B) clarifies which applications for changes of existing facilities must comply with the notice requirements of Subchapters H and K of Chapter 39. This is required by the Texas Clean Air Act, Texas Health Safety Code §382.056(a), but was not codified in existing notice rules in Chapter 116 which are being concurrently repealed. This subsection clarifies that which applications for changes to existing facilities must comply with notice requirements. This clarifies that changes to existing facilities for insignificant increases are not required to comply with notice requirements. The reference of insignificant emissions is an existing determination criteria of the commission which establishes sources that are exempt from permitting requirements. Permit amendments which do not meet the statutory definition of modification, as changed by SB 1126, 74th Legislature, 1995, retain that exempt status.

Brown McCarroll commented that proposed §39.403(b)(14)(C), which provided that the executive director can require certain air amendments to provide public notice, is an illegal delegation of authority to the commission and the executive director. The commenter also noted that the proposed rule preamble provided no explanation why this provision is necessary or even authorized under the multitude of statutory provisions. Further, Baker and Botts and Brown McCarroll commented that this subsection is vague, does not provide clear standards describing the circumstances under which additional notice would be required and, therefore, does not fairly apprise an applicant of the requirements for obtaining authorizations from the commission. They recommended deleting this provision.

For clarity, the commission has not deleted this provision in response to the comment, however, §39.403(b)(14)(C) has been renumbered as §39.403(b)(8)(C) and some changes have been made to this rule. The commission adopts this subsection with revisions. The TCAA, §382.056(a) states "the commission may require publication of additional notice"which is implemented by this rule. The commission believes that the general public should have the opportunity to comment on actions which are likely to affect ambient air quality, public health and welfare, or actions where it would be in the public interest to provide notice. This requirement addresses the concerns of the TCAA as noted in §§382.056(a) and 382.002. In response to comment this rule has been clarified to establish guidance on the foreseeable circumstances when notice would be required to ensure meaningful public participation in the circumstances which have been used in practice.

The commission has updated §39.403(b)(8) to correctly reference that renewals for flexible permits must comply with notice requirements of Chapter 39 in accordance with TCAA, 382.055.This requirement was inadvertently left out of the proposed rule.

Section 39.403(b)(14) has been moved to §39.403(b)(8). In corrections published in the *Texas Register* at 24 Tex Reg 6572 on August 20, 1999, a correction to §39.403(b)(14)(B) replaced the phrase "modification of" with the phrase "changes to." *T*he commission has made revisions to §39.403(b)(8)(B) to accurately reflect the definition of modification in 30 TAC §116.110.

§39.403(c)

Section 39.403(c) lists those types of applications that are not subject to Chapter 39, including the following: 1) applications for authorizations under Chapter 321, except for applications for individual permits under Subchapter B; 2) applications for registrations and notifications under Chapter 312 for Sludge Use, Disposal, and Transportation; 3) applications under Chapter 332 for Composting; 4) applications under Chapter 122, relating to Federal Operating Permits; 5) standard permits under Chapter 116, Subchapter F; 6) exemptions from permitting and permits by rule under Chapter 106, with the exception of concrete batch plants, as described in §39.403(b)(10); 7) applications under§39.15; 8) applications for minor amendments under §305.62 (c)(2); 9) applications for Class 1 modifications of industrial or hazardous waste permits under §305.69(b); 10) applications for Class I modifications of municipal solid waste permits under §305.70 (relating to Municipal Solid Waste Class I Modifications; 11) applications for Class 2 modifications of industrial or hazardous waste permits under §305.69(c); 12) applications for minor modifications of underground injection control permits under §305.72 for Underground Injection Control (UIC) Permit Modifications; 13) applications for minor modifications of Texas Pollutant Discharge Elimination System (TPDES) permits under §305.62(c)(3); and 14) applications for registration or notification of sludge disposal under §312.13.

Some of these subsections are recodifying the existing requirements of §39.15, including those actions under 30 TAC Chapters 312, 321, and 332. Other subsections, except for air applications, are adopted to mirror the regulatory requirements in §§305.62(c)(2), 305.69(b), 305.70, 305.69(c), 305.72, 305.62(c)(3) and §312.13 relating to sludge disposal. In addition, §39.15 has been incorporated into this subsection by reference to eliminate the duplication of creating a new §39.415 to

mirror the existing requirements of §39.15. For air applications, Chapter 122 federal operating permits are required to publish notice to meet federal requirements and TCAA, §392.056. However, due to the unique nature of these applications, notice and opportunity for notice and comment hearing are required in 30 TAC Chapter 122, §122.320. Air standard permits are not required to publish notice as these actions are authorized under TCAA, §382.051(a)(5) and are not applicable under TCAA, §382.056. TCAA, §382.057 authorizes changes to existing facilities under exemption and does not require notice and opportunity for hearing, except for concrete batch plants as required by TCAA, §382.058. SB 766 authorizes construction of facilities under permits by rule and does not require notice and opportunity for hearing except for concrete batch plants as required by TCAA, §382.058.

Baker & Botts, Eastman, and TI commented that the proposed language concerning applicability in Section 39.403(b) and exclusions in §39.403(c) is unclear with respect to such activities and that this could be interpreted as expanding the types of action for which public notice is required under current law. In addition, Baker & Botts commented that §39.403 should clarify that registration of storage tanks under 30 TAC §334.7 and §334.127 and registrations of certain solid waste activities under 30 TAC §330.4 and §335.2 and other routine registrations and certifications are not subject to public notice. Eastman recommended that language be added to clarify that 39 Subchapters H-M do not apply to commission authorized permit exempt activities in 30 TAC 335.

Section 39.403 (relating to Applicability) is intended only to incorporate the chapters and sections to which public notification applies. If any action is incorporated because of a reference in subsection (b), subsection (c) excludes them, if appropriate. If an application is not covered by subsection (b), there is no reason to exclude it in (c). If an action is exempt from a permit requirement in subsection (b), it is not applicable to notice requirements for permit applications. Section 39.403(c) has been revised to list some additional types of permits for which the notice requirements of Subchapters H-M do not apply. This rule is not meant to be all inclusive and actions for which there is no statutory or regulatory requirement for notice are not subject to this chapter.

TI and Baker & Botts commented that the proposed rules also require a more comprehensive treatment of the more limited public notice requirements for corrections of permits, voluntary transfers of permits, minor permit amendments and permit modifications, including Class 3 modifications, in order to conform with existing law and the unique requirements of Chapter 305, Subchapter D. Existing sections 39.15, 39.17, 39.105, 39.107, and 39.109, which will not be effective to applications that are administratively complete on or after September 1, 1999, should be re-adopted in the new notice rules.

The commission has made revisions in response to this comment. Section 39.403(b) and (c) have been revised to specifically exclude additional actions which otherwise may be inadvertently included and to address existing §§39.15, 39.17, 39.105, 39.107, and 39.109. The commission has expanded §39.403(c) to be more explicit on those actions which are inadvertently included by (b) and provide generic wording if the list is incomplete so that actions should not be considered applicable if not required by statute or other regulation. Further, the commission has clarified §39.403(c)(2) for proper title reference.

Merco commented that this subsection combines references to Chapter 312 and to the control of certain activities by rule and those authorization are excluded from the new public notice provisions under proposed §39.403(c)(2). Chapter 312 concerns sludge use, disposal, and transportation. The commenter suggested that the proposed rule be changed to read "applications for registrations and notification under Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation)."

The commission has made revisions in response to this comment and has used the suggested language.

Brown McCarroll commented that §39.403(c)(5) is erroneous because neither air quality standard permits nor standard exemptions require an application. The commenter recommended that the term be replaced with "registration" in the case of standard exemptions, and the word "claim" in the case of standard permits.

The commission does not agree with this comment. "Application" is defined in Chapter 3. Therefore, no changes have been made in response to this comment.

Baker & Botts commented that in §39.403(c)(6) the reference to §39.403(b)(11) should be to §39.403(b)(10).

The commission has made the proposed revisions in response to this comment.

§39.403(d)

§39.403(d) states that applications for initial issuance of voluntary emission reduction permits under §382.0519 of the Texas Health and Safety Code and initial issuance of permits for electric generating facilities under §39.264 of the Utilities Code are subject only to §§39.405, 39.409, 39.411, 39.418, 39.602, 39.603, 39.604, and 39.605 of Subchapter K. This is consistent with TCAA, §382.0519 and §382.05191 and the provisions of SB 7 (§39.264 of the Utilities Code). These permit applications are subject to notice, public comment, and public meetings, but not contested case hearings or requests for reconsideration of the executive director's decision.

Brown McCarroll commented that §39.403(d) contains cross-references with erroneous titles. The commenter stated that exceptions in this subsection should also except any reference to requests for a contested case hearing, and add other cross-references to those sections of the rule where such requests are found.

The commission has made revisions in response to this comment and have made the changes as suggested. Section 39.403(d) was revised by deleting requirements for Notice of Application and Preliminary Decision in §39.419. After further review of new Texas Health and Safety Code, §382.0519, as added by SB 766; and Texas Utilities Code, §39.264, as added by SB 7, it was determined that notice under §39.419 would never be required for VERPs and EGFs.

Eastman and Brown McCarroll recommended that §39.403(d) be revised to include the exclusions noted in the "Section by Section Analysis" for Chapter 39; and to provide that applications for initial issuance of voluntary emission reduction permits and initial issuance of permits for electric generating facilities are subject to notice, public comment, and public

meeting, but not contested case hearings or requests for consideration of ED's decision.

The commission has made revisions in response to this comment and has made the changes as suggested.

Baker & Botts recommended that §39.403(d) be amended to reference §39.606 which is also applicable to the issuance of a voluntary emission reduction permit.

The commission has made revisions in response to this comment and has made the changes as suggested.

CPS commented, with reference to §39.403(d), that §§39.603 and 39.604 should not apply to EGFs but should only follow the notice requirements of 30 TAC Chapter 122.

The commission does not agree with this comment. Chapter 122 is a separate authority for facility operation. Notice requirements are similar (i.e., Notice and Comment Hearing), but the mechanism for authorization is not identical for federal operating permits under Chapter 122 and other permit authorizations under Chapter 116. The commission believes the rules implement statutory requirements for the different types of actions and where possible, has strived for consistency and elimination of duplicative notice requirements. Therefore, no changes have been made in response to this comment.

The commission has also revised §39.403(d) by deleting requirements for Notice of Application and Preliminary Decision under §39.419. After further review of new TCAA, §382.0519, as added by SB 766, and Texas Utilities Code §39.264 as added by SB 7, it was determined that second notice would never be required for VERP and EGFs.

§39.403(e)

§39.403(e) includes in one provision all of those sections in Chapter 39 that do not apply to radioactive materials licenses, and reflects the somewhat unique notice requirements for these applications. This section states that radioactive material licenses under Chapter 336 of this title are not subject to the public notice requirements in §§39.405(c), 39.405(e), 39.413, 39.418, 39.419, and 39.420. Radioactive material licenses are generally subject to applicable public notice requirements in Subchapter A, and specific public notice requirements under new Subchapter M. Subchapter M contains equivalent requirements for §39.405(c) and (f) in §39.705 and §39.711 respectively. Requirements in §39.405(h) for broadcast notice of applications do not apply to applications for radioactive material licenses under Chapter 336. Additionally, as radioactive materials licenses are not affected by the changes in law made by HB 801, proposed requirements implementing HB 801 in new §39.420, relating to Transmittal of Executive Director's Response to Comments and Preliminary Decision, do not apply to Chapter 336 applications for radioactive material licenses. The changes made related to notice for radioactive materials licenses are primarily organizational in nature and are made to improve readability.

§39.405. General Notice Provisions.

Section 39.405 contains general notice provisions that apply to more than one program area. The commission has added short phrases to the beginning of each subsection for better organization and to clarify requirements. Section 39.405(a) includes the HB 801 requirement under Texas Water Code, §5.552 that Notice of Receipt of Application and Intent to Obtain Permit must be published within 30 days after the executive director declares the application administratively complete.

§39.405(a) allows the chief clerk to publish the notice and be reimbursed by the applicant if notice is not timely published by the applicant. The current rules contain this requirement. The commission intends for the chief clerk to exercise this authority only when necessary to protect the public interest by ensuring that an application is timely processed, such as the case of a permit renewal when the renewed permit would contain more protective provisions.

To avoid undue delay in permit processing, §39.405(a) includes a provision that the executive director may suspend further processing or return the application for failure to publish notice in a timely manner or failure to submit copies of the notice and publisher's affidavit as required under §39.405(e). This procedure is already available for air quality permits. If an application is returned, a new permit application fee will not be required if the applicant resubmits the application within 6 months of its being returned. The provision for suspension or return of the application allows the executive director to prevent from further processing without an opportunity for early public involvement if the applicant fails to provide timely proof of notice.

Section 39.405(b) provides that the chief clerk may require the applicant to provide necessary mailing lists in electronic form.

Section 39.405(c) states when notice by mail is completed..

Section 39.405(d) allows a combination of notices to satisfy more than one section of this chapter as long as all applicable notice requirements are satisfied. This section maximizes the flexibility allowed for issuing notice while ensuring compliance with applicable requirements.

Section 39.405(e) requires an applicant to file proof of notice in the form of a copy of the published notice and a publisher's affidavit. The section imposes a 10 business day deadline for submitting a copy of the required published notice and a 30 calendar day deadline for submitting a publisher's affidavit with the chief clerk as proof of publication. The rule has been revised from the proposed rule to allow 30 calendar days after the last date of publication for the applicant to file the affidavit, rather than 10 business days. This revision was made to ensure that applicants have sufficient time to comply with the affidavit filing requirement. It is important to get verification of notice as soon as possible to ensure proper notification and protect the public interest by ensuring that an application is timely processed. The timely filing of this information is important so that the agency can determine whether there is a notice defect requiring republication. Furthermore, the timely receipt of this information is important so that the commission may determine the applicable comment period and be capable of relaying this information to the public when requested. While it may be difficult to file a publisher's affidavit within 10 business days following the publication of notice, it is within the applicant's control and ability to obtain and file with the chief clerk a copy of the notice as published in the newspaper. The commission believes that allowing 10 business days for this filing is reasonable.

Section 39.405(f) contains general publication provisions. Under HB 801, Texas Water Code, §5.552(d) mandates that applicants satisfy existing statutory notice requirements, in addition to HB 801 requirements for notices of applications. Section 39.405(f)(1) satisfies HB 801's requirement that the No-

tice of Receipt of Application and Intent to Obtain Permit be published in a newspaper of largest circulation in the county. Additionally, §39.405(f)(2) is necessary to ensure that solid waste applications and injection well applications comply with the notice requirements of HB 801 and other applicable notice statutes, including Texas Health and Safety Code, §361.0791 and §361.0665.

In §39.405(f)(2), the commission has made a revision from the proposed rules to state that injection well applications, as well as solid waste applications, are subject to the publication requirements of §39.405(f)(2). Texas Water Code, §27.018(b) authorizes the commission to promulgate rules for the noticing of injection well applications. Injection well applications have been included and made subject to §39.405(f)(2) requirements in order to maintain consistency with current agency practice. Under current agency rules, injection wells disposing of solid waste are subject to hazardous waste notice requirements. Current agency rules for other injection wells track Texas Health and Safety Code Chapter 361 notice requirements applicable to industrial solid waste. By including injection wells in §39.405(f)(2), the rule achieves consistency in having injection well notices continue to track the solid waste notice requirements.

In §39.405(g), the commission has established the criteria for when a copy of an application must be placed in a public place in the county where the facility is or will be located. Section 39.405(g)(1) details when an administrative complete application must be in place for public review and how long it must remain available. Section 39.405(g)(2) details when a technically complete application and the executive director's preliminary decision must be in place for public review and that it must remain available until the commission takes action or refers the application to SOAH. This is required HB 801, TWC, §5.552(c)(2) and (e) and §5.553(c)(3) and (e); and TCAA, §382.056(b)(2), (d), (i)(3), and (j).

Brown & Potts recommended that staff review §39.405 to determine if certain references to Subchapters H-L inadvertently omit including Subchapter M relating to Public Notice for Radioactive Material Licenses.

The commission has reviewed §39.405 and determined no revisions are necessary in response to this comment. The omission of references to Subchapter M was intentional in §39.405(c), regarding the general requirements for mailing and hand delivery of notice, and §39.405(e), regarding the general requirements for proof of publication of notice. These requirements do not apply to radioactive material licensing applications. Subchapter M contains other requirements regarding mailing or hand delivery of notice (§39.705) and proof of publication of notice (§39.711) for radioactive materials licensing applications.

Henry, Lowerre proposed a revision to §39.405(a) to limit the circumstances when the chief clerk may cause notice to be published if the applicant fails to publish notice within the prescribed time period. Under the proposed revision, the chief clerk would have authority to publish the notice only in cases of revocation or suspension of permits. The commenter noted that the rules are intended to provide the public a full period of review. With respect to a Notice of Application and Intent to Obtain a Permit, HB 801 requires publication of notice within 30 days of an application being declared administratively complete. The comment included a recommended revision to the rule which would provide that an application would not be processed until Notice of Receipt of Application and Intent to Obtain Permit was published and that failure to publish the notice within the time required would subject the applicant to an enforcement action for violation of Texas law. The commenter further recommended revising the rule to include a procedure for requesting an extension of the time period for publishing notice.

The commission has not made any changes in response to this comment. Section 39.405(a) allows the chief clerk to publish the notice and be reimbursed by the applicant if notice is not timely published by the applicant. The current rules contain this requirement. The commission intends for the chief clerk to exercise this authority only when necessary to protect the public interest by ensuring that an application is timely processed, such as the case of a permit renewal when the renewed permit would contain more protective provisions. Section 39.405(a) includes authorization for the executive director to suspend further processing of an application and also to return an application if an applicant does not publish notice as required. The rule prevents prejudice to the public by authorizing the executive director to cease processing the application, and possibly to return the application, for an applicant's failure to timely publish notice. Accordingly, applicants reap no benefit from failure to publish notice in the time required. No additional punitive measures are necessary because there is no direct environmental harm. The commission further disagrees with the comment recommending procedures for seeking an extension of the publication time requirements because HB 801 does not provide for an extension of the 30 day publication deadline for notice of Receipt of Application and Intent to Obtain Permit.

Brown McCarroll proposed that the heading of §39.405 should be revised to include the word "Notice" in the title of this section.

The commission has made revisions in response to this comment and has made the change to the proposal as suggested.

Jenkens & Gilchrist suggested that the agency include as part of the preamble to the proposed rules an explanation clarifying that proposed §39.405 and §39.418 do not prevent an applicant from publishing its Notice of Receipt of Application and Intent to Obtain permit *before* the administrative completeness review is complete. The commenter observed that there is no express requirement that the notices cannot be published *before t*he application is deemed administratively complete. The commenter noted that including language in the preamble to clarify that an applicant is not required to wait until after the application is deemed administratively complete to publish its notice would allow notice to satisfy the requirements of both 30 TAC Chapters 39 and 305.

The commission has made no changes in response to this comment. Publishing the notice required under §39.418 before an application is deemed administratively complete would not further the goal of meaningful early public participation. Before being declared administratively complete, an application may lack sufficient information to allow for a meaningful review by the public. If the application lacks sufficient information necessary for the public to formulate substantive comments and identify relevant and material issues, the Notice of Receipt of Application and Intent to Obtain Permit would not serve HB 801's objectives of enhanced early public participation.

Brown McCarroll commented that §39.405(a) should be clarified as to the options available upon an applicant's failure to timely publish notice. The commenter questioned whether

the rule as proposed could be interpreted to allow the chief clerk to publish the notice, while simultaneously, the executive director suspended processing. The commenter further stated that in those cases where the chief clerk causes the notice to be published, it is unclear if the applicant can be held responsible for filing the affidavit, as required by subsection (f). Assuming the options under the rule are mutually exclusive, the commenter requested clarification as to whether it is the executive director who has the discretion to determine whether to pursue one of the options.

The commission has made revisions in response to the comment and has made revisions to the rule. Section 39.405(a) has been revised to clearly provide that the options available upon an applicant's failure to timely publish notice are mutually exclusive. The executive director may either (1) request that the chief clerk publish notice or (2) suspend processing of the application. The revisions to subsection (a) further clarify that the executive director exercises discretion as to which course of action may be followed. The revisions further clarify that the executive director is authorized to pursue these options for either a failure to publish or a failure to submit the required affidavits of publication.

Merco, TI and Baker & Botts each commented that proposed §39.405(d), regarding applicability requirements should be deleted. The commenters noted that this provision was confusing and unnecessary because it addresses applicability after this subject has also been addressed in §39.403.

The commission has made revisions in response to this comment and has deleted proposed §39.405(d) from the adopted rules and added its language to the applicability provisions of 39.403. Additionally, the commission has revised §39.403 to more comprehensively address applicability.

Brown McCarroll commented that §39.405(f) is ambiguous as to the affiant required for an affidavit of publication. The commenter stated that is a publisher's affidavit is required, the commission should be aware that in some instances newspapers will not provide a publisher's affidavit within 10 business days as required by the rule. If an affidavit from the applicant is acceptable, the commenter believes the time line is reasonable; however, the commenter further states that applicant affiants will not be able to attest to the circulation patterns of the paper in which the notice was published. Because the executive director may suspend the processing of the application under §39.405(a) for failure to file the affidavit within the time required, the commenter requested that the commission ensure that it is within an applicant's power to comply with the time period established by the rule. Dow also commented that the proposed 10 business days time frame for filing the affidavit is not workable because of circumstances beyond the control of the applicant. Dow observed that 15-20 days typically pass before the publisher mails the signed affidavit. The commenter stated that an additional 5-10 days transpire before the applicant receives the signed affidavit because of the mailing process and any delays. The commenter further observed that holidays may cause delays in the filing of the affidavit. Accordingly, the commenter believed that 30 calendar days from the date of notice should be the required deadline for the filing of the affidavit.

Because of organizational changes, proposed §39.405(f) is adopted as §39.405(e). The commission has made revisions in response to Brown McCarroll's comment regarding ambiguity in the proposed rule as to the required affiant. The rule has been revised to specify that an affidavit from the publisher is required. The rule has been clarified further to provide that the chief clerk shall file the affidavit in instances where the chief clerk causes notice to be published under §39.405(a)(1). The commission further agrees with the comments of Brown McCarroll and Dow to the extent they recommend revising the time period required for the filing of the publisher's affidavit to allow an applicant more time. The rule has been revised to require the filing of the publisher's affidavit within 30 calendar days after the last date of publication. However, because of the need for timely information concerning publication, the commission has revised the rule further to include a requirement that the applicant file a copy of the published notice (tear sheet) showing the date of publication and name of newspaper within 10 business days after the last date of publication. The timely filing of this information is important so that the agency can determine whether there is a notice defect requiring republication. Furthermore, the timely receipt of this information is important so that the commission may determine the applicable comment period and be capable of relaying this information to the public when requested. While it may be difficult to file a publisher's affidavit within 10 business days following the publication of notice, it is within the applicant's control and ability to obtain and file with the chief clerk a copy of the notice as published in the newspaper. The commission believes that allowing 10 business days for this filing is reasonable.

Brown McCarroll commented that §39.405(g) inadvertently states public notice for air permit applications must be published in a newspaper of largest circulation. The commenter noted that Texas Health and Safety Code, §382.056(a) provides that notice for air permit applications shall be published in a newspaper of general circulation in the municipality nearest to the proposed location of the facility, and that §39.603 correctly sets forth this requirement.

Because of organizational changes and renumbering, proposed §39.405(g) is now §39.405(f). The commission has made revisions in response to this comment and has revised adopted §39.405(f)(1) to clarify that newspaper criteria for air applications is listed in subchapter K.

Baker & Botts commented that determination of which newspaper has the largest circulation in a given county, as required by proposed §39.405(g), has sometimes proven difficult based on the various circulation figures that are available for a newspaper. The commenter suggested modifying this phrase to refer to paid subscriptions within the county for weekday, as opposed to weekend, newspaper delivery.

The commission has made no changes in response to this comment. The commission believes that largest circulation is commonly understood to mean total number of subscriptions and that such information is easily accessible.

Baker & Botts further commented that with respect to solid waste applications, HB 801 notice requirements and existing law are satisfied by publication in the newspaper of largest general circulation that is published in the county, or, in the absence of such a newspaper, the newspaper of largest general circulation in the county. The commenter stated that there is no need for solid waste applicants to be subject to two separate notice requirements under proposed §39.405(g)(1) and (2). The commenter states that there is no express will of the Legislature to require multiple publication in both

and in county and out of county published newspaper with largest circulation in the county. The commenter further stated that this comment applies to the notices required under §§39.418, 39.501(b), 39.501(c), 39.501(g)(2), 39.503(b), 39.503(c), 39.503(e), 39.503(f); 39.651(c), 39.651(d), 39.651(e) and 39.653(d). TI also commented that §39.405(g) potentially requires applicants to publish various notices in multiple newspapers and suggests that HB 801 publication requirements be harmonized with the more precise notice requirements of Texas Health and Safety Code, Chapter 361.

The commission has made no changes in response to these comments. If one newspaper is *published in the county,* yet a second paper that is not published in the county is the newspaper of *largest circulation in that county,* an applicant would be required to publish the Notice of Receipt of Application and Intent to Obtain Permit under §39.418 in the first paper to satisfy Texas Health and Safety Code, Chapter 361 requirements and publish in the second paper to satisfy HB 801 requirements under Texas Water Code, §5.552(b)(1). While the commission has attempted to harmonize statutory notice requirements when possible, the express provisions of Texas Water Code, §5.552(b)(1) prevent the commission from being able to provide absolute assurance that an applicant will never be required to publish notice under §39.418 in more than one paper. In addition, under HB 801, Texas Water Code, §5.552(d) requires applicants to satisfy existing statutory notice requirements, in addition to HB 801 notice requirements for notices of applications. The implementation of HB 801 increases the chances of an applicant being required to publish notice in more than one paper only with respect to the §39.418 Notice of Receipt of Application and Intent to Obtain Permit for solid waste and injection well applications. With respect to subsequent notices which may be required for these applications, HB 801 does not impose specific requirements regarding the newspaper that must be used for publication. For these subsequent notices, the sections of Subchapters I and L cited by the commenter incorporates the requirements of §39.405(f)(2); therefore, publication under these sections is only required to satisfy the existing requirements of Texas Health and Safety Code Chapter 361, including §§361.003(24), 361.079, 361.0791(e), 361.080(b), and 361.081(c).

Eastman commented that §39.405(g) should be revised to allow an applicant whose facility includes contiguous property in two counties to publish notice only in the newspaper with the largest circulation in one of the counties and in the vicinity of the facility.

The commission has made no changes in response to this comment and has no statutory basis for making the requested change. The notice requirements in question are derived from Texas Water Code, §5.552(b)(1) (39.405(f)(1)); and Texas Health and Safety Code, §§361.0665, 361.0791(e), 361.080(b), and 361.081(e) (39.405(f)(2)). None of these statutes grant the commission authority to waive notice requirements in each affected county when a facility is located in contiguous counties. Furthermore, under Texas Water Code, §5.551(2)(d), applicants must satisfy all existing statutory notice requirements under Chapter 361 in addition to the notice of application requirements under HB 801.

Eastman commented that §39.418 does not contain a requirement to make a copy of the application available to the public. Eastman recommended revising the rule to incorporate this requirement.

To implement Texas Water Code, §5.552(e) and Texas Health and Safety Code, §382.056(d) requirements that a copy of the application be available to the public in the affected county, the commission has added a new §39.405(g)(1). The commission included the requirement in the General Notice Requirement section as the applicant's obligation to maintain a copy of the application in a public space is a continuing obligation during the permitting process. This new subsection also addresses the time period that the copy of the application must be made available to make it clear to applicants and interested persons the time during which the permit application should be available. Although HB 801 does not address the time period during which the application should be available to the public, the commission believes that to facilitate more informed public comments and more refined requests for reconsideration and contested case hearing, the application should be available until the commission has taken action on the application or participants in the process can avail themselves of discovery in the contested case hearing process. Procedures related to designating application information confidential are also included. The commission recognizes that there are circumstances where portions of the application are confidential and subject to an Attorney General opinion confirming this confidential status, may be withheld from disclosure in response to a public information request under the Public Information Act. The TNRCC has procedures in place to separate confidential portions of the application from those that are available to the public. However, the TNRCC believes that the application made available to the public, while not informing the public of the substance or nature of the confidential portion of the application should reflect at least the existence of the confidential portions of the application. In this way, the confidentiality needs of applicants are respected while the public's right to know is likewise is observed.

Eastman commented that §39.419(e) is not clear as to the timing of making a copy of the permit application available for review and copying. The commenter suggested added timing requirements.

This requirement has been moved from §39.419(e) to §39.405(g)(2). The commission has made revisions in response to this comment. Because of reorganization, the requirements that the text of notice give details of the public place location where the application will be available for review and copying are now in §§39.411(b)(8) and (c)(5). In addition, §§39.405(g) as adopted now includes specific requirements relating to the time period that the copies of the application shall be available for review.

Eastman commented that §39.419(e), as well as §39.411(b)(14), should be clarified to state that a "public place in the county" is not limited to a publicly owned building. The commenter believes that any building reasonably accessible to the public in the vicinity of the facility should be allowed because, in some instances, the nearest publicly owned building may be distant from the facility.

This section has been moved from §39.419(e) to §39.405(g)(2). The commission has made no changes in response to this comment. The commission believes that to ensure that a building is reasonably accessible, only publicly owned or operated places should be used for the placement of applications for review and copying. In addition, the commission has no way to ensure that the public would have access to private properties.

§39.407. Mailing Lists.

Section 39.407 (Mailing Lists) mirrors the language in existing §39.7 requiring the chief clerk to maintain mailing lists of persons requesting notice of an application and allowing persons who have participated in past agency permit proceedings to request to be on a mailing list. All references to "commission" have been replaced with "agency" in order to be consistent with the terms defined in 30 TAC Chapter 3. As defined in the commission's rules, "agency" means the commission, the executive director, and their staffs. The rule has been adopted without substantive changes from §39.7 or from proposal.

TI and Baker and Botts commented, with reference to §39.407, that the names and addresses on facility mailing lists change frequently. Both of these commenters indicated that a periodic schedule should be established for confirmation of interest in remaining on the list. Alternately, the Chief Clerk should treat each permitting action separately and any person requesting to be added to facility's mailing list should be added for the duration of a particular permitting action.

The commission has made no change in response to this comment. The commission agrees that the names and addresses on facility mailing lists do change frequently and the suggestion to include a periodic schedule for updating the mailing list to confirm interest may merit further consideration. However, this provision was not included in the publication of the rule proposal and the commission believes that inclusion of a such a requirement would best be accomplished after opportunity for comment period. The commenters' suggested alternative that the rules provide for the chief clerk to treat each permitting action separately for purposes of maintaining a mailing list would not be consistent with the requirements of §39.413(a)(8) which incorporates by reference requirements of 40 CFR §124.10(c)(1)(ix). Finally, the rules as adopted under §39.407 authorize the chief clerk to, from time to time, request confirmation that persons on a mailing list wish to remain on the list.

Henry, Lowerre commented that §39.407 should be revised to include: enforcement actions; that the chief clerk and Office of Public Assistance shall publicize the opportunities to request to be included on such mailing lists; that mailing lists maintained by the chief clerk shall include mailing lists for individual facilities; types of facilities and types of permits; and that mailing lists shall be used to provide notice for actions under Chapters 26 and 27, Texas Water Code; and Chapters 361, 382 and 401, Texas Health and Safety Code. The commenter also stated that the TNRCC is at risk of losing authorization for its Title V Federal Operating Permit (FOP) Program under 40 CFR §71.27(d)(3)(E)(3) because of its failure to provide for these types of public outreach.

The commission has made no change in response to this comment. New §39.413(a)(8) incorporates the mailing list requirements set forth in 40 CFR §124.10(c)(1)(ix). No further rule changes are necessary to comply with federal program approval requirements. With respect to the suggestion that §39.407 be revised to include mailing lists for enforcement actions, the commission has not amended this section. However, the commission has amended §39.425 to specifically provide that persons may request to be included on mailing lists for the pleadings in the formal enforcement actions.

§39.409. Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice and Comment Hearing.

Section 39.409 is similar to existing §39.9 and requires commission notices to inform the public of any applicable deadlines to submit public comment, and, if applicable, requests for reconsideration, contested case hearing, or notice and comment hearing. The new rule has been clarified slightly since proposal to reference that the deadline for comments, which must be stated in the rule, is derived from new §55.152 of this title (relating to Public Comment Period). The new rule adds deadlines for filing requests for reconsideration (a new public participation mechanism allowed under HB 801) as well as requests for notice and comment hearings because some air applications which currently fall within the scope of Chapter 39 include this requirement. The provisions are necessary to implement the requirements of HB 801 that require the commission, by rule, to establish the time period for filing hearing requests and requests for reconsideration. Under the HB 801 requirements of §5.552, Texas Water Code and §382.056, Texas Health and Safety Code, notices are required to describe the procedural rights and obligations of the public. The rule is adopted without further changes.

EPA commented that verification is needed that §39.409 applies to air quality permits. Further, EPA commented that to be approvable as a SIP revision, a minimum of 30 days public notice and opportunity for comment is required before there is final action on the application. EPA did not believe the rule so provides.

Notice given under this chapter includes notice for air applications, as set forth in §39.403 (relating to Applicability). This section is intended to be notice to all applicants that are required to publish notice under Chapter 39, including air applications which are subject to Subchapter K. Changes have been made in Chapter 39 to clarify what is required to be in a notice (§39.411 and §39.603). The requirement that 30 days for public notice and opportunity for comment is required before final action on the application is found in new §39.603(a) and (b). In addition, clarifications have been made to §55.152 and that the public comment period shall end 30 days after the last publication of Notice of Receipt of Application and Intent to Obtain Permit, or, if Notice of Application and Preliminary Decision is required, then the comment period shall end 30 days after the last publication of this notice. Further, because the commission recognizes that public meetings may be held after the last publication, the comment period can be extended to the close of any public meeting. In addition, the complete permit application file is always available for public inspection in commission offices. The commission believes these rules meet the requirements for SIP approval.

Henry, Lowerre commented that the deadlines for public participation need to be flexible and that the rules need to provide for extensions for the filing of public comments, hearing requests and motions for reconsideration.

The commission has made no change in response to this comment. The commission notes that the rules as adopted provide for the commission to extend the time for a request for reconsideration and contested case hearing when there are circumstances where the requestor is seeking specific relief from the commission. While the rules do not allow for extensions of time to file public comment, any person who did not file timely comments may file a motion for rehearing or motion to overturn (previously motion for reconsideration). In addition, the rules provide that the public comment period is automatically extended to the close of any public meeting. Therefore, when there is signif-

icant public interest in an application that results in the holding of a public meeting, extended time periods for public comment will be provided. HB 801 and the commission rules implementing this bill are intended to encourage early public participation and the early resolution of disputed issues between applicants and protestants. The legislation allows for ample and expanded opportunities under the HB 801 process for public notice and comment periods. The commission believes it is appropriate to balance the competing need for defined permit processing time frames and public participation in the permitting process as reflected in adopted in Chapter 39.

§39.411. Text of Public Notice.

Section 39.411(a) is similar to existing §39.11. However, it adds a new requirement that applicants shall use the notice text provided and approved by the agency. The executive director may approve changes before notice is given.

Section 39.411(b) lists the required contents for notice of application and intent to obtain a permit. Among other requirements (for example, a description of the location of the proposed activity), the rule also requires descriptions of public participation procedures. The section also provides for certain program-specific requirements. In addition, the commission has added language pertaining to Class 3 modifications.

Section 39.411(c) lists the requirements for a notice of application and preliminary decision, including: (1) the items required in a notice of receipt and intent to obtain permit under §39.411(b); (2) a summary of executive director's preliminary decision; (3) the location in a public place in the county where the facility is located at which the application and executive director's preliminary decision are available for review and copying; and (4) the deadline to file comments or request a public meeting.

Section 39.411(d) states the required text of notice for public meetings and hearings. For notices of public meetings, the notice should include a brief description of public comment procedures, including how comments may be submitted and, if there exists an opportunity for hearing, that only relevant and material issues raised during the comment period can be considered if a hearing is granted.

These rules mirror the current requirements under §39.11; incorporate the requirements imposed under HB 801 (TWC §5.551(c) and §5.553(c) and TCAA, §382.056(b) and (g)); and includes new requirements for notices of air applications. The new requirements adopted for notice text of air applications include which criteria pollutants will be emitted by the project and information regarding how a person might be affected by the emissions of the project. These requirements are authorized by TCAA, §382.056(b)(8) and are included to provide meaningful information to the public about the project and how to participate in the commission's decision.

Brown McCarroll noted that §39.411 lists 18 possible types of information that may be required in the text of any one of the myriad notices required under other rules found in Subchapters H-M of Chapter 39. The commenter expressed concern that none of those other rules specify which of the 18 types of information is required for the particular notice that is the subject of the rule.

The commission has made revisions in response to the comment. To provide requested clarification, §39.411 has been reorganized to specify when notice is triggered and what information is required for each type of notice.

Baker & Botts commented that §39.411 should encourage the timely identification of issues and concerns in response to early public notices so that such matters can be addressed in the technical review.

The commission agrees that the rules should encourage identification of issues at an early stage of permit review. To clarify this, the commission has added language in §39.411(b)(4)(A) and (B) to be more precise regarding how the text of the Notice of Receipt of Application and Intent to Obtain Permit must describe the procedures for public comment. This change is consistent with HB 801's goal of encouraging early public participation in the environmental permitting process. For example, an applicant is required to publish newspaper notice of intent to obtain a permit and notice of the executive director's preliminary decision on the application. The applicant must also place a copy of the application and the executive director's preliminary decision at a public place in the county and the executive director is authorized to hold public meetings. The executive director is also required to prepare responses to relevant and material public comment received in response to the notices. All of the above examples describe provisions in the commission's rules implementing HB 801 which encourage earlier public participation.

Brown McCarroll suggested that the commission adopt rules that delineate the exact information that is required for each specific type of notice.

The commission has made revisions in response to this comment. Section 39.411 has been revised to clarify the information that must be included in each specific type of notice.

Brown McCarroll suggested that the proposed §39.411 be replaced with a new §39.411 titled "Notice of Hearing." They suggested that the new rule list the applicable information that will be required in the text of the notice, including items listed in proposed §39.411(b)(1)-(3), (7), (8), (11), and (18) as well as the SOAH Docket Number (if known at the time notice is published, or otherwise given), and SOAH's address and phone number. The comment concluded by suggesting that the rules in Subchapters I-M also cross reference this new rule; indicating that the new rule will govern what the notice of hearing will contain. The rules affected are: §§39.501(e), 39.503(e), 39.551(e), 39.651(e), 39.652(d), and 39.709.

The commission agrees that the information required in each type of notice for each type of permit should be clear. As a result, §39.411 has been revised to clarify the information for each specific type of notice. Section 39.411(d) has been added to specifically address the requirements for notice of meetings and hearings. All subchapters of Chapter 39 cross-reference §39.411 for appropriate text of notice requirements.

Henry, Lowerre commented that Subchapters H-M, in §39.411(b) and §39.413, must state explicitly that notice is required and identify the type of notice required.

The commission agrees that the rules should be clear about when and what type of notice is required for each type of permit. As a result, §39.411 has been revised to clarify when notice is required and then necessary information for each notice type. All subchapters of Chapter 39 cross-reference §39.411 for appropriate text of notice requirements.

The EPA commented that §39.411 should state that an approvable SIP must provide notice of availability of the State's anal-

ysis of the application. The commenter indicated that this requirement appeared to be missing from the proposed rule.

The commission's analysis of applications for federal preconstruction reviews under Prevention of Significant Deterioration (PSD), Nonattainment (NA), or Hazardous Pollutant Major Sources (FCAA §112(g)) are provided by §39.419 notice requirements to meet all federal program requirements. To address 40 CFR §51.161(a) and (b) for all other construction and modification application reviews, the applications and files are available for public inspection in at least one location in the area which may be affected by the emissions from a facility. This file contains the commission's analysis of the effect of construction or modification on ambient air quality, including the commission's preliminary determination on the application. In accordance with 40 CFR §51.161(b)(2), under §39.418 notice requirements, there is a 30 day comment period on the application, which all facilities with new construction or modification must provide. The commission has also added §55.152(b), which extends the public comment period to beyond the 30 days listed in the newspaper publication to the close of any public meeting. The TCAA, §382.056(l) requires the commission to respond to relevant and material issues raised by the public during the §39.419 notice on the preliminary decision. The commission has expanded this requirement in §39.420 to require responses to comments received from either the notice under §39.418 or the notice under §39.419 to ensure that the general public has the opportunity to comment on the commission's preliminary decision and application analysis if any interest is expressed for a project. If any member of the general public requests to be on a mailing list or comments on the application, they are mailed sent the executive director's preliminary decision and analysis of the application and provided an additional 30 day opportunity to comment, request a reconsideration of the executive director's decision, or request a contested case hearing.

Jenkens & Gilchrist commented that the language in §39.411(b)(4) should be revised to clarify that the "relevant and material issues" referred to in this paragraph are those *disputed factual* issues that are "relevant and material to the Commission's decision on the application" in accordance with TWC, §5.555(d)(1) and (3). The commenter suggested language.

The commission has made the revisions requested by this comment and the text of notice in §39.411(b)(4)(B) has been amended to clarify that the comments which will be considered by the commission in granting a hearing request must be relevant and material to the commissions' decision and disputed factual issues.

Henry, Lowerre commented that §39.411(b)(4) or (10) should include "a description of procedures for public comment and request for reconsideration processes and procedures for submitting comments and requests and for submitting requests for extensions of time for submitting comments or requests for reconsideration..." The comment implicitly requested adding to Chapter 39 procedures for requesting extensions of time for submitting comments or requests for reconsideration.

The commission does not agree with the comment that procedures for requesting extensions should be added to Chapter 39. Public comment periods are established in §55.152 as beginning at the first day after the Notice of Intent and continues until the end of the comment period for any Notice of Preliminary Decision or at the close of any public meeting. This is an extensive period of time for the general public to make comments on an application. The time frames provided for requesting reconsideration and hearings are under §55.201 which allows for an extension. As a result, none of these time periods need to be addressed in Chapter 39. However, §39.411(b)(4) has been revised to include a brief description of the public participation procedures and outlines the basic requirements and limitations of public comments in response to this comment.

Henry, Lowerre recommended that §39.411(b)(5) include a description of "the procedures for requesting a public hearing, reconsideration or a notice of the specific requirements for adequate requests, and a description of the criteria used by the commission to determine whether to grant such requests."

The commission agrees that the notice should clearly state the procedures for public involvement in the permitting process. In response to this comment, §39.411(b)(5) has been revised to require a brief description of the public's opportunity for public meetings, hearings, or requests for reconsideration and outlines the basic requirements for consideration by the commission. Sections 39.411(b)(5) and (c)(6) have also been revised to describe the criteria required by HB 801 for holding a public meeting. The text of §39.411(b)(5) was changed to make it clear that notices should specifically tell people they can request a public meeting as well as a contested case hearing.

Henry, Lowerre recommended that §39.411(b)(6) be revised to include a statement that requests must include "a specific or general description of the location and activity of the requestor at that location which is the basis of the claim of being an "affected person."

The commission has made revisions to the rules in response to this comment. Section 39.411(b)(10) has been clarified to describe what information a requestor should provide to establish how they might be an "affected person" for hearing requests which may be submitted for air applications in response to Notice of Receipt and Intent to Obtain Permit. The other solicited opportunity for requesting a contested case hearing occurs after the transmittal of the executive director's response to comments, so this information has also been included in 55.156.

Henry, Lowerre recommended that §39.411(b)(7) be revised to include "a description of the public meeting process, procedures for requesting a public meeting and the criteria that will be used by TNRCC to determine whether to hold a public meeting."

In response to this comment, §39.411(b)(5) and (c)(6) have been revised to describe the criteria required by HB 801 for holding a public meeting which includes any requests by a state legislature or if there is significant public interest in the application.

Brown McCarroll recommended that §39.411(b)(10) be modified for consistency (see, e.g., subsection (9)) and clarity, to indicate that the deadline to file requests for reconsideration or hearing do not always apply. The commenter proposed the following modification: "(10) the deadline to file comments, or if applicable, requests for reconsideration or hearing;"

The commission has made revisions in response to this comment. The rule has been changed to note that requests for hearing or reconsideration are not applicable at this point in the process and may occur only in response to the executive director's response to comments. This is included in §39.411(c)(3).

To further improve the clarity of the notice requirements, the commission reorganized §39.411(b). As a result of this reorganization, there were several changes. The following changes are intended to include all air application specific issues§39.411(b)(10): previous §39.411(b)(6) was moved to §39.411(b)(10); statement about location of hearing requester relative to proposed facility was moved from§39.411(b)(6) to §39.411(b)(10)(B) because only air applications provide opportunity to request a contested case hearing with this notice; §39.411(b)(10)(B)(i)-(iv) were added to clarify the information needed from hearing requesters; and §39.411(b)(10)(C) added the words "contested case" for clarity and consistency.

Eastman recommended that §39.411(b)(14) be clarified to state that a "public place in the county" is not limited to a publicly-owned building. They suggested that any building reasonably accessible to the public in the vicinity of the facility should be allowed. This would be preferable to them since, in some counties, the nearest publicly-owned building may be distant from the facility.

The commission does not agree with these comment. In order to ensure that a building is reasonably accessible, only publicly owned or operated places should be used for placement of the applications for review and copying. This especially important due to the applicability of Americans with Disabilities Act requirements for public buildings. In addition, the commission has no way to ensure that the public would have access to private properties. Due to reorganization, the requirements that the text of notice give details of the public place location are now in §39.411(b)(8) and (c)(5).

Eastman commented that, in cases when the applicants have a contiguous facility which overlaps into another county, the applicant should be allowed to place one permit application in a public place in the vicinity of the facility to satisfy this requirement. They note that it would be burdensome to require this in both counties.

The commission does not agree with these comment. The text of HB 801 explicitly requires that the application be placed "at a public place in the county in which the facility is located or proposed to be located." As a result, the commission has made no change in response to this comment.

Brown McCarroll and Baker & Botts commented that §39.411(b)(16)(A) requires all public notices for air permit applications to list all criteria pollutants and pollutants regulated under various state standards. Brown McCarroll questioned if the commission intended that the list only include those air contaminants for which authorization is sought in the application. If not, the rule would require every notice for any facility to contain the same list of air contaminants. Brown McCarroll recommended that the commission require the notice to list "regulated air contaminants emitted in quantities greater than *de minimis* levels." Baker Botts suggested that only those criteria pollutants for which the permit applications seeks authorization to emit should be required to be identified.

The commission has made revisions in response to this comment regarding which pollutants must be listed in the notice, and has changed §39.411 to reflect this comment. *De minimis* levels are not defined in these rules or the statute, therefore the commission can not make the requested change. It should be noted that, according to new §39.411(b)(10)(A) the notice need only list pollutants "for which authorization is sought in the application."

The commission created §39.411(c) to list all applicable text information which is needed for the Notice of Application and Preliminary Decision. During the reorganization of this section the following changes were made: (c)(2) moved from (b)(4) with clarifying revisions; (c)(3) moved from (b)(9) with revisions to note that action can occur by Executive Director if timely hearing or reconsideration requests were not received and that the time period for such requests will be after transmittal of the Executive Director's decision and response to public comments; (c)(4) moved from (b)(11) with a revision that states the information will include a summary (not just a statement) of the Executive Director's preliminary decision; (c)(5) moved from (b)(14) with clarification that the application must be updated will all additional information; (c)(6) moved from (b)(10) and revised to clarify that notice should solicit requests for public meeting, but not requests for reconsideration or hearing (except for air which is covered under (b)(16); (c)(6) also changed to specify how the public can request a public meeting; and (c)(7) moved from (b)(13).

The commission created §39.411(d) to list all applicable text information which is needed for notice of public meetings or hearings. During the reorganization of this section the following changes were made: (d)(1) includes applicable information from (b); (d)(2) is moved from (b)(7) with revisions to eliminate redundancy; and (d)(3) based on (c)(2) with revisions to delete requirement of font size (not required by statute).

The following changes were made to clarify what information is required in the Notice of Application and Preliminary Decision, not the Notice of Receipt of Application and Intent to Obtain Permit: previous §39.411(b)(9) was moved to (c)(3); previous 39.411(b)(10) moved to (c)(6); previous §39.411(b)(11) moved to (c)(4); and previous §39.411(b)(13) moved to (c)(7); and remaining requirements for updated and complete application and preliminary decision were moved to (c).

Previous §39.411(b)(7) was moved to (d)(2) since it is only applicable to meetings and hearings

§39.413. Mailed Notice.

Section 39.413 (Mailed Notice) is similar to existing §39.13, except that the reference in §39.13 provided that the section does not apply to applications for radioactive material licenses is removed since portions of §39.413 are now applicable to radioactive material licenses under 39.705.This change is necessary to clarify and maintain consistency in the interpretation and application of commission rules.

Brown McCarroll commented that §39.413 contains overlapping and confusing requirements.

The commission has made revisions in response to this comment. As adopted, the rule recognizes that there may be applicable program-specific mailing requirements. Changes include updating §39.413(7) to include a corrected reference for a rule adopted on July 14, 1999.

Henry, Lowerre recommended that §39.413 be revised to provide that the applicant shall notice as appropriate.

The commission does not agree with the specific language suggested in this comment, however, §39.413 has been revised to refer to the respective subchapters for special instructions regarding these mailed notices. The circumstances when applicants are required to mail notices are very limited and

instead of placing those requirements in this section, the rules in the relevant subchapters include those requirements.

§39.418. Notice of Receipt of Application and Intent to Obtain Permit.

§39.418 (Notice of Receipt of Application and Intent to Obtain Permit), describes the requirements and procedures for an applicant to publish the notice of receipt of application and notice of intent to obtain a permit, a new requirement created by HB 801 in TWC, §5.552 and TCAA, §382.056(a). These rules implement this newspaper publication requirement in different ways for different programs. The applicant is required to publish the notice of intent to obtain a permit once in the newspaper of largest circulation in the county, except for air applications which publish in a paper of general circulation in the municipality nearest the facility. Slightly different newspaper publication requirements apply to solid waste permit and injection well applications to satisfy both the amendments made by HB 801 and Texas Health and Safety Code, Chapter 361 requirements, and maintain consistency between solid waste and injection well notice requirements. The chief clerk will mail this notice to those listed in §39.413, and for air applications, the chief clerk will also mail notice according to §39.602. §39.418 is consistent with the explicit requirement of HB 801 that provides that applicable public notice requirements under Chapters 26 and 27 of the TWC 361 of the Health and Safety Code.

Brown McCarroll commented that the commission should adopt rules that delineate the exact information that is required for each specific type of notice. By way of example, the commenter submitted proposed revisions to §39.418 intended to clarify the required content of that notice.

The commission agrees that the rules as proposed needed clarification regarding the content and action requirements for specific notices. Accordingly, §§39.411, 39.418, and 39.419 have been revised to clarify text and action requirements for each type of notice. Each of Subchapters I-M has now included specific provisions requiring notice pursuant to §39.418 and §39.419. When a specific type of notice is required in each of the Subchapters, references have also been included as to the required contents of the specific notice by reference to the pertinent subsections of §39.411. Because of these changes, §§39.411, 39.418, and 39.419 have been reorganized.

Baker & Botts and TI commented that the failure to publish the Notice of Receipt of Application and Intent to Obtain Permit within 30 days of administrative completeness, as required under §39.418, should be excused if the chief clerk experiences backlogs which prevent the timely mailing of instructions for public notice to the applicant. Brown McCarroll also commented that the rule is confusing as to exactly when the requirement to provide notice is triggered. The commenter suggested that the 30 day time period for publication of notice begin upon an applicant's receipt of the instructions for notice from the chief clerk.

The commission agrees with the comment in general and believes that applicants should not be penalized because of any delays in the mailing of the text of notice from the chief clerk's office. In response to this comment, the commission will implement operational changes to ensure that the determination of administrative completeness and the notice for publication is forwarded to applicants as soon as possible. The rule has been revised in subsection (a) to clarify that the determination of administrative completeness and the notice to be published will be sent to the applicant concurrently.

EPA commented that §39.418(b)(3) provides that subdivisions (1) and (2) do not apply to air applications, but rather notice is to be given as provided in Subchapter K. The commenter noted, however that Subchapter K references §39.418 which, again, excepts air applications from the notice requirements which are stated in that section. Because of these circular provisions, it appears to the commenter that the rules contain no requirements providing for the Notice of Receipt of Application and Intent to Obtain Permit on an air application. Baker & Botts & TI commented that the reference to mailed notice for air applications in §39.418(b)(3) was redundant and confusing because of its reference to the mailed notice requirement of Subchapter K. Baker & Botts and TI recommended that the subsection be deleted.

The commission has made revisions in response to the comment. Section 39.418(b)(3) has been revised to specify and clarify that air permit applicants must comply with each of the specific Subchapter K notice requirements listed when giving notice under §39.418. Specifically, applicants for air permits are required to publish newspaper notices under §39.603 and §39.604 and the chief clerk mails notice under §39.602. The commission believes the rule has been appropriately clarified and does not need to be deleted.

Baker & Botts and TI commented that §§39.418, 39.419, and 39.420 should be prefaced with the phrase "when required by and subject to Subchapters I through M." The commenters stated that the agency should only include the general requirements applicable to public notices in Subchapter H. The commenters believe that specific requirements to give notice should be set forth separately for each media and should be contained only in Subchapters I - M.

The commission has made no changes in response to these comments. Each of Subchapters I-M has now included specific provisions requiring notice pursuant to §§39.418 and 39.419. When a specific type of notice is required in each of the Subchapters, references have also been included as to the required contents of the specific notice by reference to the pertinent subsections of §39.411. Because of these clarifications, the additional suggested revisions are not necessary.

In §39.418(b)(4),the commission has revised the reference to §39.411 to now reference §39.411(b) in order to achieve more specificity and clarity.

In §39.418(b)(1), the commission has revised the rule to reference that injection well applications are subject to §39.405(f)(2).

§39.419. Notice of Application and Preliminary Decision.

Section 39.419 (Notice of Application and Preliminary Decision) follows the requirements in Texas Water Code, §5.553 and Texas Health and Safety Code, §382.056(g), as added by HB 801. It requires that, after technical review is complete, the executive director files the preliminary decision and the draft permit with the chief clerk, except for certain air applications that follow different procedures specified in §39.419(e). It requires that an applicant publish notice of the preliminary decision in a newspaper at least once in the same paper as the notice of intent unless otherwise required in Chapter 39. The requirement that an applicant publish in the same newspaper as that used for the notice of intent is established as a matter of convenience and consistency. Section 39.419 also includes

a list of those circumstances where an applicant for an air quality permit is not required to publish notice of the preliminary decision consistent with the language in TCAA, §382.056(g), as amended by HB 801. Applicants would not have to publish this notice if the following occurs: (1) as a result of publication of Notice of Receipt of Application and Intent to Obtain a Permit, no hearing requests have been received or all hearing requests have been withdrawn by the time the executive director has made a preliminary determination; or (2) the application is for any amendment, modification, or renewal application which does not result in an increase in allowable emissions nor the emission of a new air contaminant unless the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations; or the application is for initial issuance of a voluntary emission reduction permit or an electric generating facility permit. In accordance with Texas Health and Safety Code, §382.056(p), §39.419(e)(3) has been added to require Notice of Preliminary Decision (for air quality permit applications) to meet federal program requirements. This includes NA permits, PSD permits, and actions relating to Hazardous Air Pollutants for Major Sources. The commission notes that the executive director's Notice of Preliminary Decision is the notice of draft permit for those programs for which the commission has federal program approval.

As previously noted, the requirement of proposed §39.419(e) was moved to §39.405(g)(2) for clarification. Consequently, proposed §39.419(f) has been redesignated as §39.419(e) in this adoption. This change is reflected in the commission's responses to testimony received on the proposed subsection (f).

Henry, Lowerre commented that §39.419(f)(1)(C) should be revised to provide that Notice of Application and Preliminary Decision is not required for an application for any amendment, modification, or renewal application that would not result in allowable emissions and would not result in the emission of an air contaminant not previously emitted "unless a public comment has raised the issue of the compliance history of the applicant in a fashion that could lead the commission to determine that the applicant has unresolved violations which constitute a recurring pattern of egregious conduct or that demonstrate a consistent disregard for the regulatory process." The commenter stated that this revision is necessary to give notice to the public and the applicant of the exception to the general rule that these applications are not subject to hearing or to this notice.

The commission has made no changes in response to this comment. TCAA, §382.056(o) requires the commission to evaluate the compliance history of the applicant and the facilities in question as a part of the application review process. The statute requires an evaluation of violations contained in the applicant's compliance history. A complaint received from the public can result in an inspection and any appropriate enforcement action documenting violations. However, in order for any violation to be documented in the applicant's compliance history, the complaint must be received by the TNRCC, investigated, and confirmed before a violation is issued. If complaints are received for the first time during the public comment period, the applicant's compliance history will contain no violations which could provide a basis for the commission to hold a hearing under TCAA, §382.056(o). Since the statute requires evaluation of violations, the air permitting program contacts the appropriate regional office and local air pollution control programs throughout the review process to ensure the latest compliance information is evaluated prior to issuance of a permit.

EPA commented that, unless a hearing is requested, no notice or public comment period will be provided. Section 39.419(f) provides that for air applications, no notice of application and preliminary decision is required if no hearing request is submitted. Although §55.152 provides for a public comment period, that provision is dependent upon either publication of Notice of Application under §39.419 which may not occur, or Notice of Receipt of Application, which may not occur.

The commission is adopting §55.152(a)(1), which provides for a 30 day comment period for air applications after notice is provided under §39.418. Notice under §39.418 always occurs for any construction of a facility or modification of facilities which may affect ambient air quality. The commission is also adopting §55.152(a) which provides for a 30 day comment period for air applications if notice is provided under §39.419.

EPA commented that §39.419(f)(1)(C) provides that no Notice of Application and Preliminary Decision is required for amendments, modifications, or renewals which would not result in an increase in allowable emissions and does not result in emissions of an air contaminant not previously emitted. The commenter was concerned that the public has no opportunity to determine for itself if it agrees that no increase in allowable emissions occurs or if the proposed change will not result in the emissions of an air contaminant not previously emitted. Finally, the commenter stated that the provision may not satisfy the provisions of 40 CFR §51.161, and that the TNRCC should explain how this section satisfies revisions of CFR §51.161

The commission's analysis of applications for federal preconstruction reviews under PSD, NA, or Hazardous Pollutant Major Sources (FCAA §112(g)) is provided by §39.419 notice requirements to meet all federal program requirements. To address 40 CFR §51.161(a) and (b) for all other construction and modification application reviews, the applications and files are available for public inspection in at least one location in the area which may be affected by the emissions from a facility. This file contains the commission's analysis of the effect of construction or modification on ambient air quality, including the commission's preliminary determination on the application. In accordance with 40 CFR §51.161(b)(2), under §39.418 notice requirements, there is a 30 day comment period on the application, which all facilities with new construction or modification must provide. The commission has also added §55.152(b), which extends the public comment period to beyond the 30 days listed in the newspaper publication to the close of any public meeting. The TCAA, §382.056(l) requires the commission to respond to relevant and material issues raised by the public during the §39.419 notice on the preliminary decision. The commission has expanded this requirement in §39.420 to require responses to comments received from either the notice under §39.418 or the notice under §39.419 to ensure that the general public has the opportunity to comment on the commission's preliminary decision and application analysis if any interest is expressed for a project. If any member of the general public requests to be on a mailing list or comments on the application, they are mailed the executive director's preliminary decision and analysis of the application and provided an additional 30 day opportunity to comment, re-

quest a reconsideration of the executive director's decision, or request a contested case hearing.

CPS commented that §39.419(f)(1)(c) should be revised so that all permit amendments and modifications that do not result in a significant increase in allowable emissions or significant increase in emissions of pollutants not previously emitted be allowed to forego the public notice all together. Otherwise, CPS suggested that permit amendments, modifications, or renewals that do not result in significant increases in emissions of existing or future new contaminants be allowed to forego the second Notice.

The commission has not made changes in response to these comments. Applications to amend existing permits for the purpose of authorizing new construction must comply with the notice requirements in §39.418 and §39.419. This is required by the TCAA, §382.056(a). This requirement is consistent with the requirement that all applications for new permits which would authorize new construction must comply with the notice requirements, and clarifies that there is no basis for different notice requirements for applicants who are choosing to amend an existing permit versus obtaining a new permit. These requirements also clarify that applications for construction of new facilities with insignificant emissions must comply with notice requirements in accordance with the statute. However, applications for changes to existing facilities with insignificant emissions increases do not have to comply with the notice requirements of Chapter 39 as detailed in §39.403(8). In addition, adopted §39.419(e)(1)(C) specifies that, unless there is a pattern of noncompliance as specified by TCAA, §382.056(o), if an application is for an amendment or renewal with no increase in allowable emissions, Notice of Application and Preliminary Decision is not required in accordance with TCAA, §382.056(g). This statute does not make a distinction for "significant" or "insignificant" emissions increases, and only states "an increase."

Baker & Botts commented that §39.419(f)(2) should be clarified to provide that mailed notice under §39.419(c) is not required for air applications and the mailing of notice under §39.419(f)(2) is not required if the conditions set forth in §39.419(f)(1)(A)-(C) are met.

The commission has made changes in response to this comment to clarify the rule. The commission has revised §39.419(c) to provide that the chief clerk mail notice under §39.413, unless otherwise required in §39.419. Because mailed notice for air applications is given under §39.419(f)(2), the rule as changed for adoption clarifies that §39.419(c) does not apply to air applications. Section 39.419(e)(2) has been revised such that if notice is required under §39.419 for an air application, it is given under §39.419(f)(2).

TI commented that §39.419(f)(2) should be eliminated because it is redundant and confusing as the issue of mailed notice for air applications is addressed by §39.602.

The commission has not made changes in response to this comment. The commission believes that the subsection's reference to §39.602 is helpful in referring the reader to the mailed notice provisions applicable to air applications.

EPA commented that §39.419(f)(3) is subject to the problems of §39.418 and §39.419(f)(2) by virtue of its references to Subchapter K and that Subchapter's reference to §39.418, which excludes the air program.

The commission has revised §39.603(b) to address this problem and the adopted rule should clarify the circumstances for notice requirements and ensure public participation in the air permitting process.

EPA commented that it is unclear whether §39.419(f)(3) applies to modifications or changes which may be applicable to federal preconstruction approvals.

The commission has not made any changes in response to this comment. Adopted §39.419(e)(3) refers to "applications" which includes, by definitions in 30 TAC Chapter 3, any new permit or major modification under federal preconstruction permit review requirements. Therefore, all new permits or major modifications of existing permits for federal preconstruction reviews PSD, NA, or Hazardous Air Pollutant Major Sources under FCAA §112(g)) are required to publish Notice of Application and Preliminary Decision.

CPS recommended that §39.419(f)(3) be clarified to read that the Notice of Application and Preliminary Decision shall be published for permits that "are for the following federal preconstruction approval for new sources" in order to distinguish the publication requirements for renewals or other minor permit actions on existing, previously permitted NA, PSD or Hazardous Air Pollutant Major Sources sites.

The commission has not changed this section in response to this comment. Section 39.419(f)(3) states that Notice of Application and Preliminary Decision is required for "federal preconstruction approvals" as listed. In accordance with federal statutes and regulations, a major modification may be required to meet these federal preconstruction requirements even when there is no new facility construction (for example, change in method of operation or after shutdown), and it is necessary that these authorizations undergo notice to assure compliance with federal program mandates.

In §39.419(d), the commission revised the rule to more specifically identify that the text of notice of requirements for Notice of Application and Preliminary Decision are those in §39.411(c)

Section 39.419(e)(1)(D) was added by the commission because Texas Utilities Code, §39.264, as added by SB 7, and TCAA, §382.0519, as added by SB 766, do not require notice of preliminary decision for VERPs and EGFs.

§39.420. Transmittal of the Executive Director's Response to Comments and Decision.

Section 39.420 relates to transmittal of the executive director's response to comments and opportunity to request reconsideration or hearing, and mirrors the requirements in TWC, §5.553 and TCAA, §382.056(m) as added by HB 801. This section establishes the duties of the chief clerk to transmit the executive director's decision, responses to comments, and instructions for requesting that the commission reconsider the executive director's decision and instructions for requesting a contested case hearing. TCAA, §382.056(l) requires the commission to respond to relevant and material issues raised by the public during the §39.419 notice on the preliminary decision. The commission has expanded this requirement in §39.420 to require responses to comments received from either the notice under §39.418 or the notice under §39.419 to ensure that the general public has the opportunity to comment on the commission's preliminary decision and application analysis if any interest is expressed for a project. The revised ensures that the public will receive a response if relevant, material, or otherwise comments

are submitted at any point during the processing of the application period. This expansion is essential to meet at least the air permit requirements under 40 CFR §51.161 and SIP requirements. If any member of the general public requests to be on a mailing list or comments on an application, they are mailed sent the executive director's preliminary decision and analysis of the application and provided an additional 30 day opportunity to comment, request a reconsideration of the executive director's decision, or request a contested case hearing. No opportunity for requesting reconsideration or contested case hearing is provided for those air permit applications which do not allow for these actions under law, such as VERP, EGF, standard permits, exemptions from permitting, etc. (TCAA, §382.056 SB 766, SB 7). However, the commission responds to comments on these actions. Responses to comments for VERP and EGF applications are treated in the same way as Title V FOP applications which are replied to under 30 TAC §122.345, which are subject to notice and comment hearings.

Baker & Botts and TI recommended that restructuring §39.420 would simplify application of public notice requirements and recommended prefacing §39.420 with the phrase "when required by and subject to Subchapters I through M" to eliminate potential ambiguities in the rules.

The commission has made changes to the rule to eliminate ambiguity, by structuring the HB 801 requirements in a list form. However, the change recommended by the commenters has not been adopted because Subchapters I through M do not include requirements relating to the duties of the chief clerk to transmit the executive director's decision, responses to comments, and instructions for requesting that the commission reconsider the executive director's decision and instructions for requesting a contested case hearing. These requirements are contained in §55.156 (Public Comment Processing). Therefore, the commission has added an introductory phrase to the rule as follows: "when required by and subject to §55.156."

Jenkens & Gilchrist commented that the rule as proposed contains a probable error. The commenter indicated that the cross-reference to §39.419(f)(1)(C) relating to items that do not need to be included in the transmittal of the executive director's decision and response to comment for air applications should instead cross-reference §39.419(f)(1)(A)-(C).

The rule as adopted has been changed to explicitly identify those circumstances where no opportunity to request reconsideration or contested case hearing is allowed. These include VERP, EGF, and circumstances when a hearing request has been withdrawn, or when the commission is prohibited from seeking further public comment under TCAA, §382.056(g).

This subsection as adopted describes under what circumstances transmittal of the executive director's decision, response to public comments, instructions for requesting reconsideration of the executive director's decision or contested case hearing is not applicable. The commission has made changes from the rule as proposed and the rule as adopted clarifies that the transmittal of certain documents is not required for voluntary emission reduction permits and electric generating facilities consistent with the requirements of SB 7 and SB 766 as enacted during the 76th Legislative Session.

§39.421. Notice of Commission Meeting to Evaluate a Request for Reconsideration or Hearing on an Application.

§39.421 (Notice of Commission Meeting to Evaluate a Request for Reconsideration or Hearing on an Application) mirrors existing §39.21 (Notice of Commission Meeting to Evaluate a Hearing Request on an Application). However, §39.421 adds a requirement to notify all persons who commented (or a representative of a group or association) to the list of persons who receive notice of a commission agenda when a hearing request will be considered. The title of the section is modified to indicate that it applies to requests for reconsideration provided for under HB 801, as well as to hearing requests.

§39.423. Notice of Contested Case Hearing.

§39.423 (Notice of Contested Case Hearing) mirrors existing §39.23, but is changed to clarify the requirements for the notice of a contested case hearing on a commission referral to the State Office of Administrative Hearings on the sole question of whether a hearing requestor is an affected person. Section 39.423 was changed to incorporate the requirement of SB 211, that when a notice is mailed, a party is presumed to receive notice three days after mailing. Thus, instead of requiring the chief clerk to mail notice ten days before a hearing, the rule requires notice to be mailed 13 days before the hearing.

§39.425. Notice of Contested Enforcement Case Hearing.

Section 39.425 (Notice of Contested Enforcement Case Hearing) is similar to current 39.25. However, while §39.25 states that the chief clerk shall give notice to the parties, as required under §2001.052 of the APA; §39.425 requires notice to the statutory parties and persons who have requested to be on the mailing list. The new rule further incorporates both the ten days notice required under the APA, §2001.051(1), and the additional three days for mailed notice, to harmonize with SB 211. This section as adopted sets forth the notice requirements for contested enforcement hearings. It reflects both the ten days notice required under the Administrative Procedure Act and adds three days for mailed notice to harmonize with the provisions of SB 211.

Henry, Lowerre commented that the rule as proposed should be changed since at the time this section is effective, there are no parties. The commenter further stated that since TNRCC rules now provide for intervention in some enforcement hearings, the notice needs to be provided to the executive director, Office of Public Interest Counsel, "respondent," anyone who files a complaint that resulted in the enforcement action, and anyone, who requests such notice or to be on the mailing list for that facility.

The commission has made changes, in part, in response to this comment. The rule has been revised to change "parties" to "statutory parties, respondents and persons who have requested to be on the mailing list for the pleadings in the formal enforcement action." The commission has not included the requested provision that would include *c*omplainants on the chief clerk's mailing list because it is important to protect the identity of complainants and respect the desire of such individuals to remain anonymous. In those circumstances where the complainant is not concerned with disclosure of his identity, the complainant may request to be included on the mailing list and thus receive notice of the enforcement hearing.

Subchapter I, §39.501. Application for Municipal Solid Waste Permit.

The commission adopts new §39.501 (Application for Municipal Solid Waste Permit). This section establishes the notice

requirements for municipal solid waste permits to satisfy the statutory requirements of TWC, §5.552 and §5.553. Since publication, this section has been revised to include new §39.501(a) stating that the section applies to applications declared administratively complete on or after September 1, 1999. This new section is similar to existing §39.101, but replaces the current requirement for Notice of Intent to Obtain a Permit with the new HB 801 requirement for Notice of Receipt of Application and Notice of Intent to Obtain a Permit under §39.501(c). Since publication, §39.501(c) has been revised to specifically reference the publication requirements Notice of Receipt of Application and Notice of Intent to Obtain a Permit under §39.418, as well as the requirements for text of notice under §39.411.

The requirements in §39.501(c) will satisfy the statutory requirements of §361.0665, Health and Safety Code (relating to Notice of Intent to Obtain Municipal Solid Waste Permit). However, in order to satisfy THSC, §361.067, §39.501(c) requires that the agency also mail a copy of the application or a summary of its contents to the mayor, county judge, and health authority. This requirement has been retained in §39.501(c) because under HB 801, TWC §5.552(d), applicants must satisfy existing statutory requirements in addition to the requirements of HB 801.

Adopted §39.501 does not include subsection (c) from current §39.101, because requirements for the notice of draft permit are replaced by the new HB 801 requirements for Notice of Application and Preliminary Decision in new §39.419 (Notice of Application and Preliminary Decision).

The commission has revised §39.501(d) to clarify that the Notice of Application and Preliminary Decision shall be published after the chief clerk mails the notice to the applicant. The language in existing §39.101(d), relating to notice of public meeting, is included in new §39.501(e), and has a grammatical change from §39.101(d). Section 39.501(f)(3)(B) contains grammatical changes from its counterpart in existing §39.101(e)(3)(B).

Since proposal, §39.501(f)(3)(A) and §39.503(f)(3)(A) have been revised to mirror the requirements in existing §39.101(f)(3)(A) and §39.103(f)(3)(A) that the applicant must file an affidavit certifying compliance with its obligation to mail notice of hearing. This requirements is not included in §39.405(e), which only requires an affidavit of newspaper publication, and must be included in the rules to satisfy THSC, §361.081(b).

Brown McCarroll suggested that §§39.501(a), 39.503(a), and 39.651(a) be revised to indicate that Subchapters I and L apply to applications declared administratively complete on or after September 1, 1999.

The commission has made revisions in response to this comment and has added new §§39.501(a), 39.503(a) and 39.651(a). Subsequent subsections in these rules have been renumbered accordingly.

Brown McCarroll suggested that §39.501(a) and §39.503(a) be revised to specifically reference the type of permit governed by these provisions.

The commission has made revisions in response to this comment and has renumbered §39.501(b) and §39.503(b) accordingly.

Baker & Botts commented that the language in §39.501(b)(2)(A) regarding newspaper publication requirements should be stricken because of its redundancy, as publication requirements for solid waste applications are set forth at §39.405(g), which is referenced by §39.418.

Because of organizational changes, §39.501(b) is now §39.501(c). Also because of organizational changes, §39.405(g) is now §39.405(f). The commission agrees that part of §39.501(c)(2)(A) is redundant and has deleted §39.501(c)(2)(A)(i). However, the provisions regarding publication in a newspaper in the immediate vicinity in which the facility is located or proposed to be located are not in §39.405(f) and therefore, have been retained because of the specific requirements of THSC, §361.0665(c).

Jenkens and Gilchrist suggested that §39.501(b)(2) be amended to state that it is not necessary to wait until after the administrative completeness review is complete before an applicant may publish the Notice of Receipt of Application and Intent to Obtain Permit.

The commission believes that publishing notice before an application is declared administratively complete may not provide meaningful information to the general public in that an application may not have enough information for any substantial review by the public to identify all or any relevant and material issues. Therefore, the commission has not made any changes in response to this comment.

Baker & Botts suggested that §39.501 should clarify that public notice requirements for MSW permit modifications are limited to those set forth in §305.70.

The commission has made revisions in response to this comment and has added §39.403(c)(10) to clarify this.

Changes were made to §§39.501(d) and 39.503(d) (§§39.501(c) and 39.503(c) in proposed rule) to clarify that the references to §39.405 are references to the notice language in §39.405, and not to a notice required by §39.405. The commission also revised §39.503(d) (1) to clarify the requirements of combined notices and §39.501(d) to clarify the required timing for publication of the Notice of Application and Preliminary Decision.

§39.503. Application for Industrial or Hazardous Waste Facility Permit.

This section establishes the notice requirements for industrial and hazardous waste facility permits to satisfy the statutory requirements of TWC §5.552 and §5.553. Since proposal, the commission has added an applicability provision in §39.503(a) stating which industrial and hazardous waste applications must comply with the section, based on the application's date of administrative completeness. New §39.503 (Application for Industrial or Hazardous Waste Facility Permit) parallels current §39.103, except that §39.503 has been modified to satisfy the statutory provisions of HB 801. As required under HB 801, §5.553, Texas Water Code, §39.503(c)(2)(A) requires Notice of Receipt of Application and Intent to Obtain Permit under new 39.418.The new Notice of Receipt of Application and Intent to Obtain Permit satisfies the current requirement in §281.17(d) of this title for Notice of Receipt of Application. Furthermore, notice under the new rule satisfies TWC §5.552 and THSC §361.079 notice requirements. Adopted §39.503 does not include subsection (d) from current §39.103 because requirements for the notice of draft permit are replaced by the new HB 801 requirements for Notice of Application and Preliminary Decision in new §39.419.

New §39.503(c)(2)(B) also retains the requirement that the agency mail a copy of the application or a summary of its contents to the mayor, county judge, and health authority. Although under HB 801 those persons also receive the concurrent Notice of Receipt of Application and Intent to Obtain Permit, the requirement to mail a copy or summary of the application, from §361.067, Texas Health and Safety Code, is retained in §39.503(c)(2)(B). Under HB 801, §5.552(d), applicants must comply with all existing statutory notice requirements in addition to HB 801 requirements.

The language in existing §39.103(e), related to notice of public meeting, is included in new §39.503(e), and has a grammatical change from §39.503(e). The commission has revised §39.503(d)(1) to clarify the requirements of combined notice. The commission has also revised §39.503 (f)(2) to clarify that the publication requirements of §39.503(f)(2)(A) apply to all industrial or hazardous waste notices of hearing, whereas §39.503(f)(2)(B) applies additionally only to hazardous waste notices of hearing. This change harmonizes THSC, §361.003(24) and §361.080 (b).

The commission revised §39.503(b), (b)(1), (c), (d)(1), and (h) to incorporate the changes made in rules adopted by the commission on July 14, 1999.

Jenkens and Gilchrist suggested that §39.503(b)(2) be amended to state that it is not necessary to wait until after the administrative completeness review is complete before an applicant may publish the Notice of Receipt of Application and Intent to Obtain Permit. The proposed rules require that these notices be provided after the executive director determines the application is administratively complete, making it impossible to combine the notice required by §39.418 with the notice required under §305.69(c) and §305.69(d).

The commission believes that publishing notice before an application is declared administratively complete may not provide meaningful information to the general public in that an application may not have enough information for any substantial review by the public to identify all or any relevant and material issues. Therefore, the commission has not made any changes in response to this comment. The Notice of Receipt of Application and Intent to Obtain Permit required under §39.18 is not required for Class 2 modifications, and the commission has added new §39.403(c)(11) to clarify this. Additionally, the commission has determined that the Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title is equal to or more stringent than the current notice provisions for Class 3 modifications under §305.69(d)(2). Therefore, the commission is substituting the more stringent Notice of Receipt of Application and Intent to Obtain Permit for the existing notice of modification in §305.69(d)(2). A change has been made to adopted §39.509 to reflect this determination. Thus, there will be no conflict between §39.418 and §305.69(d)(2) because the requirements of §39.418 supercede §305.69(d)(2).

TI, Baker & Botts, and Eastman commented that the requirements in §39.503(c)(1) and §39.651(c)(1) to publish notice in a newspaper circulated in each county that is adjacent and contiguous to the county in which the facility is to be located is burdensome and is not required by HB 801 or existing statutes. Eastman commented that the requirement is burdensome in requiring the applicant to publish multiple notices covering far more geographic area than reasonably required and suggested that this section be clarified so that it does not apply to existing facilities.

Under THSC §361.003(24), the definition of "affected person" includes persons who may reside in the county where the facility is located, or in counties adjacent or contiguous to the county where the facility is located. Accordingly, the commission requires notice to be given to residents of these counties. The commission does not agree that this requirement should not apply to existing facilities since there is no statutory exemption for existing facilities if permit actions requested trigger public notice. Therefore, no changes have been made in response to this comment.

The commission has revised §39.503(f)(2) and §39.651(f)(2) to clarify that the publication requirements of §39.503(f)(2)(A) and §39.651(f)(2)(A) apply to all industrial or hazardous waste notices of hearing, whereas §39.503(f)(2)(B) and §39.651(f)(2)(B) apply additionally only to hazardous waste notices of hearing. This change harmonizes THSC §361.003(24) and §361.080(b).

§39.509. Application for a Class 3 Modification of an Industrial or Hazardous Waste Permit.

The commission adopts new §39.509 to establish the notice requirements for Class 3 modifications to satisfy the statutory requirements of TWC, §5.552 and §5.553. This section also establishes which applications for Class 3 modifications must comply with the section, based on the application's administrative completeness date. New §39.509 parallels current §39.109, except that §39.509 has been modified to require Class 3 modifications to meet the notice requirements in §39.418 and §39.419, instead of complying with the notice requirements in 305.69. In addition, the commission has provided for notice of public meetings.

Currently, pursuant to federal regulations, applicants for Class 3 modifications must publish notice of receipt of application no later than 7 days after the commission receives the application. Now, HB 801 requires applicants for Class 3 modifications to publish Notice of Receipt of Application and Intent to Obtain Permit, as well as the Notice of Application and Preliminary Decision. The Notice of Receipt of Application and Intent to Obtain Permit must be published within 30 days after the application is declared administratively complete.

The commission has determined that the Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title is equal to or more stringent than the current notice provisions for Class 3 modifications under §305.69(d)(2). Therefore, to avoid requiring applicants to publish notice three times, the commission is substituting the more stringent Notice of Receipt of Application and Intent to Obtain Permit for the existing notice of modification in §305.69(d)(2). Adopted §39.509 has been amended to reflect this determination. Applicants for Class 3 modifications will also be required to publish Notice of Application and Preliminary Decision. Therefore, there will be no conflict with §305.69(d)(2) because this change supercedes the requirement in §305.69(d)(2).

Additionally, the commission has determined that the comment period for Class 3 modifications of solid waste permits now begins with the publication of the Notice of Receipt of Application and Intent to Obtain Permit, and concludes 45 days (for hazardous waste permit applications) or 30 days (for non-hazardous industrial permit applications) after the publication of

the Notice of Application and Preliminary Decision. The commission has amended §55.152(a)(4) to reflect this change."

The following comments pertain to Class 3 modifications and the consolidated response to these comments below:

Henry, Lowerre and Jenkens and Gilchrist commented that §39.509 should be revised to allow applicants to combine the notices required under §305.69 and Chapter 39. Henry, Lowerre commented that the commission should seek a solution that retains the 7 day deadline and since HB 801 states that the notice under that law must be "not later than 30 days after administrative completeness," the seven day deadline meets the express requirements of HB 801. If the notice (at the 7 day deadline) provides most, if not all, of the information required by HB 801, HB 801 could then be satisfied. Henry, Lowerre also suggested that a procedure would need to be added so that interested persons obtain written notice (by mail) of the determination of administrative completeness no less than 30 days after that determination. Jenkens and Gilchrist commented that §39.509 should be expanded to include applications for Class 2 modifications.

TI and Baker & Botts commented that public notice requirements should not be in addition to the existing public notice requirements of §305.69 for industrial and hazardous solid waste permit modifications, including Class 3 modifications. Public notice requirements are driven by federal law, not state law, and the existing notice requirements are better tailored for these routine requests.

Thompson & Knight commented that the commission should adopt a consistent early notice provision. Notice within 30 days following administrative completeness is both early and meaningful because the application is then complete and available for review. This approach eliminates a needless duplication of early notice. The absence of 40 CFR §270.42 from the list of required elements in 40 CFR §271.13 allows states flexibility in this aspect of the permitting process.

Eastman commented that requiring Class 3 modifications to meet §39.418 and §39.419 would result in two additional newspaper and mailed notices which would significantly increase the amount of time for processing and approval of the modification request. Eastman recommends that §39.509 be deleted and §39.403(c) be revised to state that applications for Class 3 permit modifications subject to §305.69 are not subject to the requirements of Chapter 39 Subchapters H- M and recommends that §39.403(c) also state that Class 1 and 2 permit modifications subject to §305.69 are not subject to the requirements of Chapter 39, Subchapters H-M.

The commission agrees that consistent early notice provisions are needed and has attempted to revise the rules to achieve as much consistency as is possible under the current state statutory requirements and federal requirements. The commission also agrees that the requirement for Class 3 modifications to meet §39.418 and §39.419 will result in the applicant being required to publish two notices, which may increase the amount of time for processing and approval of the modification request.

The Notice of Receipt of Application and Intent to Obtain Permit under §39.18 and the Notice of Application and Preliminary Decision under §39.419 are not required for Class 2 modifications, and the commission has added new §39.403(c)(9) and (11) to clarify this. In addition, the commission believes that publishing notice before an application is declared administratively complete may not provide meaningful information to the general public in that an application may not have enough information for any substantial review by the public to identify all or any relevant and material issues.

Regarding Class 3 modifications, the commission has determined that the Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title is equal to or more stringent than the current notice provisions for Class 3 modifications under §305.69(d)(2). Therefore, to avoid requiring applicants to publish notice three times, the commission is substituting the more stringent Notice of Receipt of Application and Intent to Obtain Permit for the existing notice of modification in §305.69(d)(2). Adopted §39.509 has been amended to reflect this determination. Although, changes to §305.69 cannot be made as part of this rulemaking because the commission did not propose to amend that section, §39.509 specifies that an applicant for a Class 3 modification must comply with §39.418 and §39.419 instead of complying with the provisions of §305.69(d)(2). Therefore, there will be no conflict with §305.69(d)(2) because this change supercedes the requirement in §305.69(d)(2). Applicants for Class 3 modifications will also be required to publish Notice of Application and Preliminary Decision.

Subchapter J, §39.551.Application for Wastewater Discharge Permit, including Application for the Disposal of Sewage Sludge or Water Treatment Sludge.

The commission adopts new §39.551 to implement the HB 801 requirements for Notice of Receipt of Application and Intent to Obtain Permit in proposed §39.418 and the Notice of Application and Preliminary Decision in proposed new §39.419. Under this proposal, the Notice of Receipt of Application and Intent to Obtain Permit replaces the notice of administrative completeness under current requirements. Also, the Notice of Receipt of Application and Intent to Obtain Permit would be required to be published by the applicant no later than the 30th day after the date the executive director determines the application to be administratively complete.

New §39.551 includes an applicability provision that was not included in the rule as proposed and the remainder of §39.551 was renumbered accordingly. This section is consistent with the provisions of HB 801 and new §39.403 reflecting that the new law is not intended.

Since proposal, the commission has deleted the statement in §39.551(c)(1), proposed as (b)(1), that this notice may be combined with the notice in §39.419. A deadline for hearing requests is not included because at the point in the process when the Notice of Application and Preliminary Decision is published, the commission is seeking only public comment, and is not seeking hearing requests. In addition, changes are made throughout the section to reflect the new Notice of Application and Preliminary Decision required by sections in Chapter 5, Texas Water Code as amended by HB 801.

The commission made an additional change in §39.551 to clarify that the reference to the section governing the form of the School Land Board Notice is §5.115(c) of the Texas Water Code. Because §39.419(b) provides that the Notice of Application and Preliminary Decision is published as required in specific subchapters, the publication of notice under §39.551(c)(1) is not separate from the §39.419 notice requirement.

New §39.551(c)(1)(C) explains that the Notice of Application and Preliminary Decision must include a deadline for a person to file a public comment or to request a public meeting. Consistent with the requirements of HB 801, this notice will not include an opportunity to request a contested case hearing. Under new §39.420, persons who submit comments in response to this notice during the public comment period will be included in the transmittal of the executive director's preliminary decision and the executive director's response to comments, and will be instructed on how to request a reconsideration of the executive director's decision or request a contested case hearing.

Section 39.551(e) (§39.551(d) in the rule as proposed) sets forth the notice requirements for certain types of water quality applications. New §39.551(e) incorporates the requirements in HB 801 in the notice for a minor amendment of a water quality permit. To parallel federal program requirements, the proposed amendment further states that the executive director shall prepare a response to all relevant and material or significant public comments received by the commission under §55.152 (Public Comment Processing).

Section 39.551(e)(4)(renumbered to §39.551(f)(4) in the adopted rule) sets forth the notice requirements for notice of contested case hearing for water quality applications.

Merco commented that the title of Subchapter J implies that all applications for the disposal of sewage sludge are subject to Subchapter J, regardless of whether the applicant applied for a permit, registration or notification and suggested that the commission include an applicability section.

The commission has changed the rule in response to this comment and added an applicability section in §39.551 that specifically provides that Subchapter J does not apply to registrations and notifications for sludge disposal. Corresponding changes were made in §39.403(c).

Brown McCarroll commented that to make these provisions consistent with the companion rules in Subchapters B through F, the first rule in each subchapter should indicate that the subchapter applies to the specific type of application if declared administratively complete on or after September 1, 1999.

The commission agrees and has changed §39.551(a) accordingly.

CPS commented that the phrase "issued September 14, 1998" be deleted from §39.551(a)(2) because this date is not relevant to the requirements of HB 801. CPS further comments that new TPDES permit applications declared administratively complete before September 1, 1999 should be subject to the new subchapter C and those declared on or after September 1, 1999 should be subject to subchapters H and J.

The commission agrees that the September 1, 1999 date is the relevant date for HB 801 purposes and applicability of these subchapters. However, the commission has made no change in response to this comment regarding §39.551(a)(2), renumbered in the adoption as §39.551(b)(2). Subchapter C and J provide that mailed notice to adjacent or downstream landowners is not required for applications for new TPDES permits for discharges authorized by an existing state permit issued before September 14, 1998 for which an application does not propose a major amendment. While the commission agrees that the September 14, 1998 date is not relevant to the requirements of HB 801, it is relevant as to whether adjacent or downstream landowner mailed notice is required. This exemption from landowner mailed notice requirements is independent of HB 801 requirements and is not affected by this law.

CPS commented that including the School Land Board notice requirement in §39.551(a) of the proposed rule be included in §39.413 *Mailed Notice* as part of the required list to avoid confusion relating to the landowner notice exemption for renewals and minor amendments and the School Land Board notice requirements.

The commission agrees that the rule as proposed may create some ambiguity and reorganized §39.551(b) (§39.551(a) in the proposal) for clarification to avoid confusing School Land Board notice requirements and landowner noticed exemptions. A corresponding change clarifying these requirements has also been included in §39.651, relating to injection well permits.

Baker & Botts commented that the reference to §39.11 in §39.551(b)(4)(A) of the proposed rule should instead refer to §39.411.

The commission agrees that the reference to 39.11 is incorrect and has changed the rule as adopted in response to this comment. Section 39.551(c)(4)(A) (which was §39.551(b)(4)(A) in the rule as proposed but was renumbered with the addition of an applicability section) has been changed to §39.411(b)(1)-(3), (b)(5)-(7), (b)(9), (b)(12) and (c)(2)-(6) to correctly identify the items in the text of notice section applicable to applications filed on or after September 1, 1999 consistent with HB 801 requirements. The commission has changed this subsection in response to this comment.

TI and Baker & Botts commented that with regard to §39.551(c)(1), no opportunity for a contested case hearing should be provided if an applicant has not proposed a major amendment to a state water quality permit that is to be converted to a TPDES permit.

The commission has made no change in response to this comment. HB 801 is not intended to expand or restrict the types of actions for which notice, opportunity for public comment and opportunity for public hearing are provided. Neither HB 801 nor HB 1479 implemented by this rule adoption provide for such a limitation on contested case hearings. Further, the change suggested by these commenters was not included in the rule as proposed, and the commission does not believe that it would be appropriate to make this change without providing an opportunity to comment.

Section 39.551(c) in the proposed rule (renumbered as §39.551(d) in the rule as adopted given the addition of an applicability section) includes requirements related to notice of application and preliminary decision for certain TPDES permits. CPS commented that this subsection be deleted as unnecessary since the September 14, 1998 date is irrelevant to HB 801 provisions.

While the commission agrees that the September 14, 1998 date is not relevant to HB 801 requirements, the September 14, 1998 date is relevant to the applicability of non HB 801 notice requirements. Therefore, the commission has made no change in response to this requirement.

Brown McCarroll commented that the phrase "TPDES major facility permits" is used in §39.551(d)(3)(B) as proposed but is not defined in this rule and recommended that a definition should

be included. Section 39.551(d)(3)(B) in the rule as proposed now appears in the rule as adopted as 39.551(e)(3)(B).

TPDES major facility is defined in 40 CFR §122.2. Major facility permits are designated on an annual basis by EPA. When a facility is placed on the list, they are notified by the EPA or TNRCC. In response to this comment, the commission has modified the rule and added a reference to this subparagraph to reflect that TPDES major facility permits are as designated on an annual basis.

CPS requested in its comments that the commission renumber proposed §39.551(c) (renumbered in the adoption as §39.551(d)) together with the recommendation that the proposed §39.551(c) be deleted, as discussed above) and rename it "Notice of Application and Preliminary Decision.

The commission has not changed the rule as requested by the commenter. As described above, the commission has not deleted §39.551(c) in the rule as proposed (§39.551(d) in the adopted rule) because it is needed to specify the notice requirements for certain permits converted to TPDES permits. The recommended change in title of this section is not appropriate because this section encompasses subjects broader than Notice of Application and Preliminary Decision.

Brown McCarroll commented that §39.551(f)(4) relating to notice of contested case hearings for TPDES permits should inform the reader of everything that is required to be in the notice.

The commission agrees and has changed the rule to reflect the specific text of notice requirements of §39.411 are required.

The commission made an additional change in 39.551 to clarify that the reference to the section governing the form of the School Land Board Notice is Section 5.115(c) of the Texas Water Code.

§39.553. Water Quality Management Plan Updates.

The commission adopts new §39.553, relating to Water Quality Management Plans (WQMP) updates. This new section requires that the commission's chief clerk publish public notice of the WQMP updates in the *Texas Register.* The chief clerk shall mail notice to persons known by the commission to be interested in the WQMP update or identified on mailing lists maintained by the chief clerk. The rule identifies the specific contents of the text of the public notice, provides a 30-day public comment period, and allows for a public meeting on a WQMP update, in accordance with §55.156 (Public Comment Processing). A 30-day public comment period is consistent with the public notice period for other water quality permitting matters, federal requirements for processing of TPDES permits, and federal guidelines governing the state Continuing Planning Process. This new section also identifies procedures for the executive director to respond to all significant public comments received by the commission before the end of the comment period. Finally, new §39.553 identifies that the executive director may certify the WQMP update and provides for the commission's chief clerk to mail a copy of the response to comments as well as the certified WQMP update, to all persons who submitted timely comments.

New §39.553 sets forth the notice requirements for WQMP. New adopted §39.553(b)(3) (§39.553(a)(3) in the proposed rule) sets forth the text of notice requirements for WQMP.

Brown McCarroll suggested that the Chapter 39 subchapters begin with applicability sections which explicitly state the types of applications which must meet the subchapter requirements.

The commission agrees and modified §39.553(a) to include an applicability section and subsequent subsections have been renumbered to reflect this addition.

Brown McCarroll commented that §39.553(a)(3) should be modified to delete the cross- reference to §39.411.

Due to the addition of the applicability subsection, this rule has been renumbered to §39.553(b)(3). The commission has made no change in response to this comment as it is helpful for the purposes of clarity to explicitly reflect that WQMP updates are not subject to the text of notice requirements in §39.411.

Subchapter K, §39.601 Applicability.

The commission adopts new §39.601 (Applicability). This section states those actions which must comply with notice requirements for this chapter to satisfy the statutory requirements of TCAA, §382.056 and §382.057 which requires notice for facilities which are obtaining authorization under TCAA, §§382.0518, 382.057, and 382.055. This section also establishes which rules air applications must comply with depending on their date of administrative completeness.

Brown McCarroll comments that §39.601 should be revised to match the companion rules in Subchapters B through F, with the first rule in each subchapter should indicate that the subchapter applies to the specific type of application

The commission has made revisions in response to this comments and has revised the rule accordingly.

§39.602. Mailed Notice.

The commission adopts new §39.602 (Mailed Notice). This section establishes the circumstances and timing of mailing notices to certain persons corresponding to published notice requirements under §39.418 (Notice of Receipt of Application and Intent to Obtain Permit) and §39.419 (Notice of Application and Preliminary Decision) and the appropriate wording of these notices as listed in §39.411(b) and (c). This section satisfies the statutory requirements of TCAA, §382.056(a), (b), (g), (i), which requires certain text in the notices after administrative completeness and preliminary determination and copies to be sent to the applicant, persons on a mailing list, or commenters on the application. The statutory requirement to send mailed notice to the state senator and representative who represent the area where the facility is or will be located in required by TCAA, §382.0516.

Brown McCarroll, Baker & Botts, and TI commented that, although required to be performed by §39.602, there are no specific mailed notice requirements listed in this section. Instead, it is recommended that the commission substitute a specific cross-reference to those rule provisions which require mailed notice. Also, the commenter proposed that §39.602 refer to §39.413(a)(9), (11), (12), and (14). In addition, there is no subsection (a) in §39.413 as currently proposed. Baker & Botts and TI also state that additional requirements for mailed notice should not be imposed since the TCAA specifies the notice recipients for mailed notice of air permit applications.

The commission has revised §39.602 to reference mailed notices and the reference to §39.414(a) to eliminate confusion. There are no additional requirements in the rule beyond current

practice or required by statute. Section 39.413(9) refers to the applicant who must be notified of requirements to publish notice; §39.413(11) refers to those persons who have requested to be on a mailing list and is required by HB 801; §39.413(14) refers to those persons who have expressed an interest in the application and follows through in ensuring public participation in the permit application process; §39.413(12) is included to note that the executive director to include persons who may have an interest in the application which are not otherwise anticipated by the current rules (such as EPA or local air pollution control programs). The commission has also added new §39.603(a) and (b) to specify when notices are required for air applications.

Henry, Lowerre requested that the agency expand the list of people who will receive mailed notice to include those in §39.413(a)(2), (3), and (7). It was suggested that if TNRCC is seeking to provide effective notice and opportunities for public comment, broad notice should be provided, especially, where the costs are minimal.

The commission declines to make this change as there is no statutory authority to expand the list of mailed notices for air applications to those in (2), (3), or (7).

§39.603. Newspaper Notice, §39.603(a)-(d)

The commission adopts new §39.603, concerning Newspaper Notice. The commission has reorganized the rule from proposal to improve clarity. The commission also made minor corrections to references as proposed. Section 39.603(a) establishes the circumstances when notice is required to be published under §39.418 (Notice of Receipt of Application and Intent to Obtain Permit) to satisfy the statutory requirements of TCAA, §382.056(a) which requires notice to be published 30 days after the executive director has determined the application to be administratively complete. Section 39.603(b) establishes the circumstances when notice is required to be published under §39.419 (Notice of Application and Preliminary Decision) to satisfy the statutory requirements of TCAA, §382.056(g) which requires notice to be published in certain circumstances after the executive director's preliminary decision.

Section 39.603(c) lists the requirements for publication in a newspaper. Specifically, §39.603(c) sets the criteria for the newspaper to meet the statutory requirements of TCAA, §§382.056(a) in that it must be a newspaper of general circulation in the nearest municipality; §39.603(c)(1) requires a notice to be published containing information as required in §39.411 to meet the statutory requirements of TCAA, §382.056(a), (b), (g), and (i), which establish when notice must be published with certain information to inform the public on the pending application; §39.603(c)(2) establishes the criteria for additional notice in the newspaper which is authorized under TCAA, §§382.056(a) and readopts the current requirements of §116.132(b). The use of a display notice is the next best effective means of encouraging public participation in the application review process. Section 39.603(d) establishes the circumstances and methods by which applicants must publish notice in alternate languages to meet the statutory requirements of TCAA, §382.056(a).

Henry, Lowerre commented that the proposal to reduce the number of notices from two issues to one needs to be rejected as HB 801 did not require or suggest this change. Instead, HB 801 provided cheaper and less frequent notice requirements for air permits because of existing differences in air permits (i.e., two newspaper notices and signs). Reducing notices for air permits is contrary to the goals of HB 801 to assure effective and early notice. Exxon expressed support for the amendment.

The commission recognizes that HB 801 did not expressly provide for this change. Rather, the commission makes the change in order to continue its effort to consolidate procedural requirements and make them more consistent. The commission has determined that to be consistent with other media notice requirements, the number of issues in which notice must be published was reduced to one (no other program was/is required to publish in consecutive issues or publish notice in alternate languages). Further, this change is consistent with TCAA, §382.056(a).

Baker & Botts, Eastman, and Exxon questioned the statutory basis for the requirement to publish notice in two separate sections of one paper. This requirement is expensive and burdensome and not required by HB 801 or any other state law. In addition, Eastman noted out that this notice does not comply with the text requirements of §39.411.

The statutory reference for additional notice by commission is TCAA, §382.056(a) which allows additional publication of notice. This requirement is currently in Chapter 116 and is moved to Chapter 39 with no substantive changes. This notice is the most efficient and cost- effective notice is that given in the public notice section of a newspaper. The commission has also determined that this requirement is needed in order to give TCAA, §382.056(a) meaning and that for businesses (other than small business stationary sources which will not have a significant effect on air quality), use of a display notice is the next best effective means of encouraging public participation in the application review process. Further, the commission believes that this additional notice compensates for not doing individual mailings which are required for the other commission programs. Finally, this is not a new requirements for air permit applicants as this notice is currently required by Chapter 116 and has not proven to be excessively burdensome to previous applicants. This notice does not need to necessarily meet the requirements of §39.411(b)(4) and (5) as the intent of this notice is to forward interested members of the public to the notice which details the information required by the statute on how to participate in the air permit application process.

TCFA noted that notice requirements of §39.603(a)(2) is more costly to publish and is more likely to be published inaccurately by the smaller newspapers and therefore they support the proposed rule.

Baker & Botts commented that §39.603(a) requires notice when stated by this chapter, but none appears to be required in this section or the remaining parts of the chapter.

The commission has revised this subsection by adding §39.603(a) and (b) and adding 33 days for publication for notice under §39.419, consistent with the deadlines to publish notice under §39.418. Subsequent subsections are renumbered.

Brown McCarroll commented that §39.603(a)(1) should be modified to delineate what information should be included in the text of the notice and to delete the cross-reference to §39.411.

The commission has revised §39.603(c)(1) to specifically detail the text of notice under §39.411(b) and (c) required for air applications for both §39.418 and §39.419.

Eastman recommended that §39.603(b)(4) be made consistent with the language in §39.603(a); specifically: "in the municipality nearest to the location" be substituted for "county."

Section 39.603(b)(4) has been renumbered to §39.603(c)(4). Further, the commission did not make the recommended change because this requirement is taken directly from TCAA, §382.056(a).

Henry, Lowerre commented that newspaper notices required under §39.603 should be of a sufficient size, but not less than 18 inches.

During the comment period, the Texas Press Association forwarded information to the TNRCC on how most advertising space is sold. The notice size was adjusted to match the size of Standard Advertising Units, and the commission believes it will still provide an effective notice to interested persons of the general public. This change will hopefully reduce the occurrence of errors and republication time and money, as noted by comments by TCGA and TCFA. This section has been revised to require this notice to be 6 column inches, or 12 square inches in size. The commission believes the size of 12 square inches should be sufficient to attract attention to the notice.

§39.603(e)

Section 39.603(e) defines the criteria for small business stationary sources (§39.603(1)(A)) which will not have a significant effect on air quality (§39.603(1)(B)) and describes the alterative notice procedures which these applications may follow (§39.603(1)) to meet the statutory requirements of TCAA, §382.056(a). Section 39.603(e) was proposed as §39.603(c) and was renumbered due to the addition of §39.603(a) and (b) . The criteria used for defining a small business stationary source is directly from HB 801 which amends TCAA, §382.056(a) which states that the commission shall establish rules for alternate notice procedures "if the applicant is a small business stationary source as defined in §382.0365 and will not have a significant effect on air quality." Both the criteria of §382.0365 and no significant effect on air quality must be included in the rule. TCAA, §382.0365(g)(2) defines a "small business stationary source" as one which meets the requirements of the Federal Clean Air Act (FCAA), §507(c) (42 USC Section 7661f) and the FCAA Amendments of 1990, §501 (federal publication No. 101-549). This federal definition is incorporated in §39.603(e)(1)(A)(i)-(iv). TCAA, §382.057(a) empowers the TNRCC to establish by rule the criteria for facilities which "will not make a significant contribution of air contaminants to the atmosphere." These facilities and associated sources are prescribed in 30 TAC Chapter 106 (relating to Exemptions from Permitting). The emissions criteria from §106.4(a) are used in §39.603(e)(1)(B) to codify the requirements of §382.056(a).

TCGA and TABCC commented that the criteria for a small business should simply include the proposed 39.603 (c)(1)(A)(i) and (iv) (criteria that the source is not a major stationary source for federal air quality permitting and it is owned/operated by a person that employs 100 or fewer individuals). This is the criteria used in the past by the TNRCC. It is believed that the intent of the new legislation was to use the existing definition for these purposes. TCGA expressed support for this provision.

Section 39.603(c) has been renumbered to §39.603(e). HB 801 amends TCAA, §382.056(a) which states that the commission shall establish rules for alternate notice procedures "if the applicant is a small business stationary source as defined in TCAA, §382.0365 and will not have a significant effect on air quality." Both the criteria of TCAA, §382.0365 and no significant effect on air quality must be included in the rule. TCAA, §382.0365(g)(2) defines a "small business stationary source" as one which meets the requirements of the Federal Clean Air Act (FCAA), §507(c) (42 USC Section 7661f) and the FCAA Amendments of 1990, §501 (federal publication No. 101-549). This federal definition is incorporated in §39.603(e)(1)(A)(i)-(iv). TCAA, §382.057(a) empowers the TNRCC to establish by rule the criteria for facilities which "will not make a significant contribution of air contaminants to the atmosphere." These facilities and associated sources are prescribed in 30 TAC Chapter 106 (relating to Exemptions from Permitting). The emissions criteria from §106.4(a) are used in §39.603(e)(1)(B) to codify the requirements of §382.056(a).

The TABCC commented that §39.603(c)(1)(B) is confusing. Although it appears this clause is intended to provide a definition of what it means to "not have a significant impact on air quality," it is not clear how to meet the statute.

Section 39.603(c) has been renumbered to §39.603(e). The commission has revised the wording of this subsection to clarify the intent.

TABCC commented that the criteria listed in §39.603(c)(2) are not understandable. They requested clarification as to whether this wording meant to match the requirements for not making a significant contribution.

Section 39.603(c) has been renumbered to §39.603(e). TCAA, §382.057(a) empowers the commission to establish by rule the criteria for facilities which "will not make a significant contribution of air contaminants to the atmosphere." These facilities and associated sources are prescribed in 30 TAC Chapter 106 (relating to Exemptions from Permitting). The emissions criteria from §106.4(a) are used in §39.603(e)(1)(B) to codify the requirements of §382.056(a).

The commission has revised §39.603(e)(1)(A)(iii), to clarify that 75 tons per year applies to the combination of all pollutants rather than 75 tons for each contaminant, to clarify the statutory requirement. In addition, §39.603(e)(1)(B) has been revised to be consistent with the wording of §39.403(b)(8)(B) with regard to the definition of insignificant emissions.

§39.604. Sign-Posting.

Section 39.604 establishes the requirements for applicants to post signs at the location of the facility for which notice is required, including information which must be on the signs, locations of the signs, when signs must be posted, and the circumstances under which variations may be approved by the executive director. These rules implement the statutory requirements of TCAA, §382.056(c) which requires a sign to be posted in a prominent location at the property where the facility is or will be located. This section also readopts the requirements of §116.133.

Henry, Lowerre commented that the change in sign posting seems appropriate. The commenter also stated that the commission should solve the problem that signs currently are too small to be noticed and the agency should increase the size of signs.

The only changes originally proposed to the sign posting requirements were renumbering, reorganization, and clarification of location along a public street, highway, or road. Additional

changes in response to comments have occurred with respect to changing the lettering size to a single consistent height instead of various different sizes for easier creation by applicants and viewing by the public. No changes or limitations are proposed for the existing location of the signs at facility sites. The commission has determined that the size of the signs does not need further revision. Sign posting has proven to be an extremely effective method of notification of the public as demonstrated over the last 15 years. The rules clearly state that the signs must be visible with multiple placement along the property lines. The rule takes into account the size of the site upon which the facility will be/is located. For a large site, there is more notice provided by multiple signs.

Baker & Botts, TI, and Eastman commented that the requirement to post multiple signs at the facility is burdensome and expensive. Additionally, TCAA only requires "a" sign to be posted; not multiple signs.

TCAA, §382.056(a) allows the commission to require additional notice and the substantive requirements adopted in §39.604 are only moved from Chapter 116 with no significant changes. The sign posting requirements, including multiple signage, has been in the rules for over 15 years and has proven to be an extremely effective method of notification of the public. The rule takes into account the size of the site upon which the facility will be/is located. For a large site, there is more notice provided by multiple signs. If only one sign were used at the entrance to a large facility, it is likely that it would not be discernable from the other plant signage and therefore would not serve its purpose to inform the public.

TABCC commented that the sign requirements under §39.604(a)(1) seem too complex.

The commission has adjusted these requirements for simplicity by stating that all lettering would be the same size as opposed to varying sizes.

Brown McCarroll suggested that §39.604(a)(2) be revised to improve readability.

The commission agrees the change clarifies the rule and has incorporated these revisions.

Brown McCarroll suggested that §39.604(b) specify when signs must be posted. The commenter also recommended revising the name of the notice from Notice of Receipt of Application and Intent to Obtain Permit to Notice of Intent to Obtain Permit.

The commission has added the reference to when the application should be available for review. The commission declines to change the name of the notice for reasons explained in §39.418 of this preamble. Primarily the title of this notice is required by overlapping statutory requirements.

CAP states that "certification" should be replaced with another term due to the significance of the word "certification" under the TCAA.

The commission agrees and changed "certification" to "verification" throughout this subchapter.

Section 39.604(a) has been revised to add "substantial compliance" provision since alternatives can be approved by executive director under the current rule.

§39.605. Notice to Affected Agencies.

Section 39.605 establishes the requirements for notifying and sending copies of the notices, affidavits, and verifications to certain agencies. This rule readopts the existing requirements of §116.134, and adds requirements for verifications to be sent for sign posting and alternative language notice to demonstrate compliance with the requirements under §39.603(d) and 39.604.The commission has the discretion to require this verification under TCAA, §382.051(3), which states that a person applying for a permit shall submit to the commission "any other information the commission considers necessary."

Baker & Botts noted that the text of the proposed §39.605 as published in the *Texas Register* at 24 TexReg 5337 was not underlined. This may require corrective action to ensure the valid promulgation of the rule.

This correction was published in the *Texas Register* at 24 TexReg 6572 on August 20, 1999.

Brown McCarroll questioned the statutory basis for requiring all applicants to provide copies of newspaper notices, affidavits and certification to each of the entities listed in §39.605(1), (2)(C), and (3). These requirements merely increase administrative burdens and the potential for delays in permitting if the requirement is inadvertently overlooked. They recommend that the section be deleted entirely.

The commission has made no change in response to this comment, as this rule only codifies the long-standing practice of the air permitting program. Many of these contacts are required for program delegation or due to contractual requirements (EPA and local air pollution control programs). Codifying this practice does not increase any burden on applicants or add any delays to the current permitting process. This verification is authorized under TCAA, §382.051(3).

§39.606. Alternative Means of Notice for Voluntary Emission Reduction Permits.

Section 39.606 establishes the requirements for small business stationary source VERP applicants to request and use an alternative means of notice to implement the statutory requirements of SB 766.

Brown McCarroll commented that the title §39.606 "Alternative Means for Certain Actions" is awkwardly phrased. In addition, several other recommendations were suggested, including changing the word "means" to "method."

The commission has revised the title of this section to specify this section applies to VERPs. The commission declines to incorporate the other changes as proposed as the word "means" is directly from the statute from SB 766.

Subchapter L, §39.651. Application for Injection Well Permit.

Section 39.651 sets forth the public notice requirements specifically applicable to injection well applications. The rule incorporates the requirements of existing §39.251, but has added provisions to comply with HB 801 notice requirements. Section 39.651(a) has been added to the rule since proposal to specify that §39.651 applies to applications declared administratively complete on or after September 1, 1999, pursuant to HB 801.

Because of the addition of new §39.651(a), proposed §39.651(b) is now §39.651(c). Section 39.651(c)(2) has been revised since proposal to specifically reference §39.418, which contains the HB 801 requirements for Notice of Receipt of Application and Intent to Obtain Permit. The new Notice of

Receipt of Application and Intent to Obtain Permit replaces the current requirements in §281.17(d) of this title (relating to Notice of Receipt of Application and Determination of Administrative Completeness). The notice under §39.418 now satisfies TWC, §5.552 and THSC, §361.079. Specific references to §39.413 mailed notice requirements have been deleted because these requirements are now incorporated through 39.418.This subsection has been revised to reference more specifically particular parts of §39.411 which contain the notice contents required by HB 801.

Section 39.651(d) requires the §39.419 (Notice of Application and Preliminary Decision) mandated by HB 801. The subsection has been revised to reference more specifically particular parts of §39.411 which contain the notice contents required by HB 801. Specific references to §39.413 mailed notice requirements have been deleted because these requirements are now incorporated through §39.419. The commission has revised §39.651(d)(1) since proposal to clarify that the §39.419 notice may be satisfied by publication in one newspaper, if that paper meets the requirements of both §39.405(f)(2) and §39.651(d)(1). Under §39.651(d)(1), the §39.419 notice must be published once in a newspaper of general circulation in each county which is adjacent or contiguous to each county in which the proposed facility is located. Under THSC, §361.003(24), the definition of "affected person" includes persons who may reside in the county where the facility is located, or in counties adjacent or contiguous to the county where the facility is located. Accordingly, the commission will require notice to be published in these counties to ensure that residents of these counties, potentially affected persons under the statute, are given proper notice.

Section 39.651(e) mirrors existing requirements for notices of public meeting.

Section 39.651(f) contains the requirements for notices of contested case hearings for injection well applications.

In §39.651(f)(2)(A) and (B), the commission has revised the notice of contested case hearing publication requirements to clarify that under (A) all injection well application notices of hearing must be published in the county where the facility is located and in adjacent and contiguous counties, whereas the publication requirements under (B) apply additionally only to a hazardous waste facility. These revisions harmonize notice requirements derived from THSC, §261.003(24) and §361.080(b). Since proposal, §39.651(f)(3)(B) has been revised to mirror the requirement in existing §39.251(f)(3)(B) that the applicant must file an affidavit certifying compliance with its obligation to mail notice of hearing. This requirement is not included in §39.405(e), which only requires an affidavit of newspaper publication, and must be included in the rules to satisfy THSC, §361.081(b).

Section 39.653 sets forth notice requirements which are specific to production area authorizations. Section 39.653(b) has been revised since proposal to reference specifically §39.418 which contains the HB 801 requirements for Notice of Receipt of Application and intent to Obtain Permit. This subsection has also been revised to reference specifically the parts of §39.411 which contain the text of this notice required by HB 801. Section 39.653(c) has been revised since proposal to reference specifically §39.419 which contains the HB 801 requirements for Notice of Application and Preliminary Decision mandated by HB 801. This subsection has also been revised to reference specifically the parts of §39.411 which contain the text of this notice required by HB 801.

Brown McCarroll submitted proposed revisions to §39.651 intended to reorganize and clarify the rule and make it consistent with other provisions of Chapter 39. The commenter's proposal changed the names of the notices required and would have set forth the required contents of each required notice in the text of this rule, rather than referring to portions of §39.411.

The commission has not made the changes requested by the commenter because the rule has been revised in other ways to achieve more clarity. The rule now specifically references §39.418 in §39.651(b) and specifically references §39.419 in §39.651(c), setting forth clearly the specific types of notice required and when the specific type of notice is required pursuant to those sections. When a specific type of notice is required under §39.651(b) or (c), references have also been included as to the required contents of the specific notice by reference to the pertinent subsections of §39.411. The names of the notices are not changed as suggested because they are specifically named so as to comply with existing statutory requirements, as well as HB 801 requirements. Section 39.411 has been revised to include the text of notice requirements for public meetings. Because of these clarifications, the additional suggested revisions are not necessary.

Brown McCarroll proposed to add a new §39.651(a) applicability clause stating that Subchapter L applies to applications for injection well permits that are declared administratively complete on or after September 1,1999.

The commission agrees that an applicability clause is necessary and has modified the rule accordingly.

Jenkens & Gilchrist commented that §39.651(b)(2) should be amended to state that it is not necessary to wait until after the administrative completeness review is complete before an applicant may publish his Notice of Receipt of Application and Intent to Obtain Permit.

The commission responds that publishing the notice required under §39.418 before an application is declared administratively complete would not further the goal of meaningful early public participation. Before being declared administratively complete, an application may lack sufficient information to allow for a meaningful review by the public. If the application lacks sufficient information necessary for the public to formulate substantive comments and identify relevant and material issues, the Notice of Receipt of Application and Intent to Obtain Permit would not serve HB 801's objectives of enhanced early public participation.

Brown McCarroll proposed a revision to §39.651(c)(2) that required the executive director to give notice to certain persons and entities required by law to receive notice after the application is declared administratively complete.

Section 39.651(b)(2) has been renumbered to §39.651(b)(3) and subsequent subsection have been renumbered. The commission has made no changes in response to this comment and has not incorporated the requested change to because the chief clerk, not the executive director, makes this notification as required by TWC, §5.552(b)(2).

Baker & Botts and TI commented that the §39.651(c)(1) requirement to publish notice in a newspaper circulated in each county that is adjacent and contiguous to the county in which the facility

is to be located is overly burdensome and should be eliminated. The commenter believes that this requirement is not expressly required by HB 801 nor any other state law.

The commission has made no changes in response to this comment. Under THSC, §361.003(24), the definition of "affected person" includes persons who may reside in the county where the facility is located, or in counties adjacent or contiguous to the county where the facility is located. Accordingly, the commission will require notice to be published in these counties to ensure that residents of these counties, potentially affected persons under the statute, are given proper notice.

§39.653. Production Area Authorizations.

Section 39.653 establishes the notice requirements and determination of administrative completeness for Production Area Authorizations. The commission has revised this section from the requirements of §39.253 to include notices under §39.418 and §39.419 in accordance with HB 801 and TWC, §5.552(a) and §5.553(a).

Jenkens & Gilchrist suggested that §39.653(b)(2), be amended to state that it is not necessary to wait until after the administrative completeness review is complete before an applicant may publish the Notice of Receipt of Application and Intent to Obtain Permit.

The commission believes that publishing notice before an application is declared administratively complete may not provide meaningful information to the general public in that an application may not have enough information for any substantial review by the public to identify all or any relevant and material issues. Therefore, the commission has not made any changes in response to this comment.

Subchapter M, §39.701. Applicability

Adopted Subchapter M mirrors current Subchapter F, except for minor changes to correct references to Subchapter F and Subchapter H of Chapter 336, and to clarify that certain requirements in Subchapter H of this chapter also apply to Subchapter M. New §39.701 clarifies that Subchapter M only applies to those radioactive material licenses declared administratively complete on or after September 1, 1999. Current Subchapter F will remain effective and apply to all applications declared administratively complete before September 1, 1999. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provide that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

TABCC, and Brown McCarroll commented that §39.701 should be amended to specify the text of the notice that is required to be mailed and published under Subchapter M.

The commission believes that the text of the notice by publication or mail does not need to be specified in this section because it is already specified in proposed §39.411 (Text of Public Notice) which applies to Subchapter M. However, language generally referencing applicable sections in Subchapter H has been added for clarification. This additional language will assist in the interpretation of the requirements of this Subchapter by clarifying that certain provisions in Subchapter H of this chapter also apply to public notices for radioactive material licenses.

§39.702. Notice of Declaration of Administrative Completeness.

Proposed new §39.702 mirrors language in §39.301 regarding mailing of notice of declaration of administrative completeness, except for the renumbering of the section to accommodate the applicability section. Therefore, we are readopting this section without any substantive changes.

Jenkens & Gilchrist suggested that §39.702 be amended to state that it is not necessary to wait until after the administrative completeness review is complete before an applicant may publish the Notice of Receipt of Application and Intent to Obtain Permit.

The commission believes that publishing notice before an application is declared administratively complete may not provide meaningful information to the general public in that an application may not have enough information for any substantial review by the public to identify all or any relevant and material issues. Therefore, the commission has not made any changes in response to this comment.

§39.703. Notice of License Applications Upon Completion of Technical Review.

Proposed new §39.703 contains language identical to §39.303 regarding notice of license applications upon completion of technical review. This section is adopted without any substantive changes.

§39.705. Mailed Notice for Radioactive Material Licenses.

New §39.705 contains language equivalent to §39.305 regarding mailed notice for radioactive material licenses. The language changes in §39.705 consolidate the description of the specific recipients of mailed notice for these licenses by referencing the applicable recipients from the list already provided in proposed §39.413. The substantive list of recipients for mailed notice under this Subchapter remain unchanged from existing §39.305. This change is necessary to maintain consistency in the interpretation and application of the commission's requirements for mailed notice under this chapter.

Brown McCarroll commented that §39.705 contained references to §39.413(b), (c), (h), (i), and (l), which do not exist in the proposed rule as published.

The commission has corrected the language to refer to the appropriate subparts of §39.413(2), (3), (8), (9), and (12). This change to correct the references in §39.705 is necessary to clarify the requirements for mailed notice and to provide consistency in the interpretation and application of the TNRCC's requirements.

§39.707. Published Notice.

New §39.707 mirrors language in §39.307 regarding published notice, and this section is adopted without changes.

Brown McCarroll commented that this section should be amended to specify the text of the notice that is required to be mailed and published.

The commission believes that the language specified in proposed §39.411 is sufficient because it applies generally to Subchapters H through M, unless specified otherwise. The nonsubstantive changes in the language for proposed §39.707 are necessary to clarify and maintain consistency in the interpretation and application of commission rules.

§39.709. Notice of Contested Case Hearing on Application. New §39.709 contains language identical to §39.309 regarding

notice of contested case hearing on Application, except that subsection (b) references to Chapter 336, Subchapters F and H have been corrected to state the full titles of those Subchapters.

Brown McCarroll commented that this section should be amended to contain a cross-reference to a new rule which would establish the text of the Notices for Contested Case Hearings.

The commission has added a new §39.709(c) to refer to proposed §39.411(d) which specifies the requirements for the text of the Notice for Contested Case hearings. The change in the language for proposed §39.709 is necessary to clarify and maintain consistency in the interpretation and application of commission rules.

§39.711. Proof and Certification of Notice.

Proposed new §39.711 contains language identical to §39.311 regarding proof and certification of notice, except that the proposed section would apply to applications declared administratively complete on or after September 1, 1999. The language of §39.711(b) has been changed to state that the filing of an affidavit is required to maintain consistency with §39.405.

Brown McCarroll commented that §39.711(b) should be modified to delete the words "acceptance of" because it is ambiguous as to who would be accepting the publisher's affidavit and it is not the acceptance of the affidavit that creates the rebuttable presumption, but the publisher's affidavit itself which creates the rebuttable presumption of actual publication of the notice.

The commission agrees with this comment and has changed the language to maintain consistency with §39.405 which specifies that filing of the publisher's affidavit creates the rebuttable presumption of compliance. This change is necessary to clarify and maintain consistency in the interpretation and application of commission rules.

§39.713. Public Notification and Public Participation.

Proposed new §39.713 is identical to §39.313 regarding public notification and public participation, except that the proposed section would apply to applications declared administratively complete on or after September 1, 1999. Therefore, it is adopted without any substantive changes.

Subchapter A. APPLICABILITY AND GENERAL PROVISIONS

30 TAC §39.1

STATUTORY AUTHORITY

The amendment is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants;

§401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and Texas Utilities Code, §39.264

§39.1. Applicability.

Any permit applications listed below that are declared administratively complete before September 1, 1999 are subject to Subchapter A of this chapter (relating to Applicability and General Provisions), and Subchapters B-F of this chapter (relating to Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications, Public Notice of Air Quality Applications, Public Notice of Other Specific Applications, and Public Notice for Radioactive Material Licenses), as applicable. Any permit applications listed below that are declared administratively complete on or after September 1, 1999 are subject to Subchapter H of this chapter (relating to Applicability and General Provisions), and Subchapters I-M of this chapter (relating to Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications and Water Quality Management Plans, Public Notice of Air Quality Applications, Public Notice of Injection Well and Other Specific Applications, and Public Notice for Radioactive Material Licenses), as applicable. All consolidated permit applications are subject to Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits), regardless of when they were declared administratively complete. This chapter applies to:

(1) applications for municipal solid waste, industrial solid waste, or hazardous waste permits under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361;

(2) applications for wastewater discharge permits under Texas Water Code, Chapter 26.

(A) This paragraph includes:

(i) applications for the disposal of sewage sludge or water treatment sludge under Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation);

(ii) applications for permits under Chapter 321, Subchapter B of this title (relating to Commercial Livestock and Poultry Production Operations).

(B) This paragraph does not include:

(i) applications for authorizations under Chapter 321 of this title (relating to Control of Certain Activities by Rule), other than applications under Subchapter B of this chapter;

(ii) applications for authorizations under Chapter 312 of this title, except applications for a permit under the chapter; and

(iii) applications under Chapter 332 of this title (relating to Composting);

(3) applications for underground injection well permits under Texas Water Code, Chapter 27, or under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361;

(4) applications for production area authorizations under Chapter 331 of this title (relating to Underground Injection Control);

(5) hearings under Chapter 80 of this title (relating to Contested Case Hearings) concerning applications for air quality permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(6) hearings on contested enforcement cases under Chapter 80 of this title; and

(7) applications for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules);

(8) applications for consolidated permit processing and consolidated permits processed under Texas Water Code, Chapter 5, Subchapter J, and Chapter 33 of this title (relating to Consolidated Permit Processing).

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 3, 1999.

TRD-9905740
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter B. PUBLIC NOTICE OF SOLID WASTE APPLICATIONS

30 TAC §39.101

STATUTORY AUTHORITY

The amendment is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer

utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264

§39.101. Application for Municipal Solid Waste Permit.

(a) Applicability. This subchapter applies to applications for municipal solid waste permits that are declared administratively complete before September 1, 1999. Any permit application that is declared administratively complete on or after September 1, 1999 is subject to Subchapter I of this chapter (relating to Public Notice of Solid Waste Applications).

(b) Preapplication local review committee process. If an applicant decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant must submit to the executive director a notice of intent to file an application, setting forth the proposed location and type of facility. The executive director shall mail notice to the county judge of the county in which the facility is to be located. If the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice shall also be mailed to the mayor of the municipality. The executive director shall also mail notice to the appropriate regional solid waste planning agency or council of government. The mailing shall be by certified mail.

(c) Notice of intent to obtain a permit.

(1) On the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete, the following actions shall be taken.

(A) The applicant shall publish notice of intent to obtain a permit at least once under §39.5(g) of this title (relating to General Provisions).

(B) The chief clerk shall publish notice of the application in the *Texas Register.*

(C) The chief clerk shall mail notice to the persons listed in §39.13 of this title (relating to Mailed Notice).

(D) The executive director shall mail notice of this determination along with a copy of the application or summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located, and to the county judge and the health authority of the county in which the facility is located.

(d) Notice of draft permit.

(1) The applicant shall publish notice at least once under §39.5(g) of this title.

(2) The chief clerk shall mail notice to the persons listed in §39.13 of this title (relating to Mailed Notice).

(3) The notice shall specify the deadline to file public comment or hearing requests, which shall be not less than 30 days after newspaper publication.

(e) Notice of public meeting.

(1) If the application proposes a new facility, the executive director shall hold a public meeting in the county in which the facility is to be located to receive public comment concerning the application. A public meeting is not a contested case proceeding under the APA. A public meeting held as part of a local review committee process under subsection (b) of this section meets the requirements of this subsection if public notice is provided under this subsection.

(2) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting under §39.5(g) of this title. The published notice shall not be smaller than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches.

(3) The chief clerk shall mail notice to the persons listed in §39.13 of this title.

(f) Notice of hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) The applicant shall publish notice at least once under §39.5(g) of this title.

(3) Mailed notice.

(A) If the applicant proposes a new facility, the applicant shall mail notice of the hearing to each residential or business address located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice shall be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the hearing. Within 30 days after the date of mailing, the applicant must file an affidavit certifying compliance with this paragraph with the chief clerk. Filing an affidavit certifying facts that constitute compliance with the notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(B) If the applicant proposes an amendment of a permit, the chief clerk shall mail notice to the persons listed in §39.13 of this title.

(4) Notice under paragraphs (2) and (3)(B) of this subsection shall be completed at least 30 days before the hearing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 3, 1999.

TRD-9905741
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter C. PUBLIC NOTICE OF WATER QUALITY APPLICATIONS

30 TAC §39.151

STATUTORY AUTHORITY

The amendment is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the

commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

§39.151. Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge.

(a) Applicability. This subchapter applies to applications for wastewater discharge permits, including sludge disposal applications, that are declared administratively complete before September 1, 1999. Any permit application that is declared administratively complete on or after September 1, 1999 is subject to Subchapter J of this chapter (relating to Public Notice of Water Quality Applications and Water Quality Management Plans).

(b) Notice of receipt of application and administrative completeness. The chief clerk shall mail notice to the School Land Board if the requirements of Texas Water Code, §5.115(c) apply to an application that will affect lands dedicated to the permanent school fund. The notice shall be in the form required by that section. The chief clerk shall also mail notice to the persons listed in §39.13 of this title (relating to Mailed Notice), except that mailed notice to adjacent or downstream landowners is not required for:

(1) an application to renew a permit; or

(2) an application for a new Texas Pollutant Discharge Elimination System (TPDES) permit for a discharge authorized by an existing state permit issued before September 14, 1998 for which the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title (relating to Amendment).

(c) Notice of draft permit. For all draft permits except those in subsection (d) of this section, the following provisions apply.

(1) The applicant shall publish notice that the executive director has prepared a draft permit at least once in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located and in each county affected by the discharge. The executive director shall provide to the chief clerk a list of the appropriate counties, and the chief clerk shall provide the list to the applicant.

(2) The chief clerk shall mail notice to the persons listed in §39.13 of this title, except that mailed notice to adjacent or downstream landowners is not required for an application to renew a permit. For any application involving an average daily discharge of five million gallons or more, in addition to the persons listed in §39.13 of this title, the chief clerk shall mail notice to each county judge in the county or counties located within 100 statute miles of the point of discharge who has requested in writing that the commission give notice, and through which water into or adjacent to which waste or pollutants are to be discharged under the permit, flows after the discharge.

(3) The notice must set a deadline to file public comment or hearing requests with the chief clerk that is not less than 30 days after newspaper publication. However, the notice may be mailed to the county judges under paragraph (2) of this subsection no later than 20 days before the deadline to file public comment or hearing requests.

(4) For TPDES permits, the text of the notice shall include:

(A) everything that is required by §39.11 of this title (relating to Text of Public Notice); and

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

(ii) the location of the sludge treatment works treating domestic sewage sludge; and

(iii) the use and disposal sites known at the time of permit application.

(d) Notice of certain draft TPDES permits. For a new TPDES permit for which the discharge is authorized by an existing state permit issued before September 14, 1998, the following shall apply.

(1) If the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title, the following mailed and published notice is required.

(A) The applicant shall publish notice that the executive director has prepared a draft permit at least once in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located and in each county affected by the discharge. The executive director shall provide to the chief clerk

a list of the appropriate counties, and the chief clerk shall provide the list to the applicant.

(B) The chief clerk shall mail notice of the application and draft permit, providing an opportunity to submit public comments, to request a public meeting, or to request a public hearing to:

(i) the mayor and health authorities of the city or town in which the facility is or will be located or in which pollutants are or will be discharged;

(ii) the county judge and health authorities of the county in which the facility is or will be located or in which pollutant are or will be discharged;

(iii) if applicable, state and federal agencies for which notice is required in 40 Code of Federal Regulations (CFR) §124.10(c);

(iv) if applicable, persons on a mailing list developed and maintained according to 40 CFR §124.10(c)(1)(ix);

(v) the applicant;

(vi) persons on a relevant mailing list kept under §39.7 of this title (relating to Mailing Lists);

(vii) any other person the executive director or chief clerk may elect to include; and

(viii) if applicable, the secretary of the Coastal Coordination Council.

(C) The notice must set a deadline to file public comment, to request a public meeting, or to request a public hearing with the chief clerk that is at least 30 days after newspaper publication.

(D) The text of the notice shall include:

(i) everything that is required by §39.11 of this title;

(ii) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(iii) for applications concerning the disposal of sludge:

(I) the use and disposal practices;

(II) the location of the sludge treatment works treating domestic sewage sludge; and

(III) the use and disposal sites known at the time of permit application.

(2) If the application proposes any term or condition that would constitute a major amendment to the state permit under §305.62 of this title, the applicant must follow the notice requirements of subsection (c) of this section.

(e) Notice for other types of applications. Except as required by subsections (b), (c), and (d) of this section, the following notice is required for certain applications.

(1) For an application for a minor amendment to a permit other than a TPDES permit, or for an application for a minor modification of a TPDES permit, under Chapter 305, Subchapter D of this title (relating to Amendments, Modifications, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits), the chief clerk shall mail notice, that the executive director has determined the application is technically complete and has prepared a draft permit, to the mayor and health authorities for the city or town, and to the county judge and health authorities for the county in which the waste will be discharged. The notice shall state the deadline to file public comment, which shall be no earlier than ten days after mailing notice.

(2) For an application for a renewal of a confined animal feeding operation permit which was issued between July 1, 1974, and December 31, 1977, for which the applicant does not propose to discharge into or adjacent to water in the state and does not seek to change materially the pattern or place of disposal, no notice is required.

(3) For an application for a minor amendment to a TPDES permit under Chapter 305, Subchapter D of this title (relating to Amendment, Modifications, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits), the following requirements apply.

(A) The chief clerk shall mail notice of the application and draft permit, providing an opportunity to submit public comments and to request a public meeting to:

(i) the mayor and health authorities of the city or town in which the facility is or will be located or in which pollutants are or will be discharged;

(ii) the county judge and health authorities of the county in which the facility is or will be located or in which pollutants are or will be discharged;

(iii) if applicable, state and federal agencies for which notice is required in 40 CFR §124.10(c);

(iv) if applicable, persons on a mailing list developed and maintained according to 40 CFR §124.10(c)(1)(ix);

(v) the applicant;

(vi) persons on a relevant mailing list kept under §39.7 of this title (relating to Mailing Lists); and

(vii) any other person the executive director or chief clerk may elect to include.

(B) For TPDES major facility permits, notice shall be published in the *Texas Register.*

(C) The text shall meet the requirements in §39.11 of this title and subsection (b)(4) of this section.

(D) The notice shall provide at least a 30-day public comment period.

(E) The executive director shall prepare a response to all significant public comments received by the commission under §55.25 of this title (relating to Public Comment Processing).

(f) Notice of hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Not less than 30 days before the hearing, the applicant shall publish notice at least once in a newspaper regularly published or circulated in each county where, by virtue of the county's geographical relation to the subject matter of the hearing, a person may reasonably believe persons reside who may be affected by the action that may be taken as a result of the hearing. The executive director shall provide to the chief clerk a list of the appropriate counties.

(3) Not less than 30 days before the hearing, the chief clerk shall mail notice to the persons listed in §39.13 of this title, except that mailed notice to adjacent or downstream landowners is not required for an application to renew a permit.

(4) For TPDES permits, the text of notice shall include:

(A) everything that is required by §39.11 of this title;

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

(ii) the location of the sludge treatment works treating domestic sewage sludge; and

(iii) the use and disposal sites known at the time of permit application.

(g) Notice for discharges with a thermal component. For requests for a discharge with a thermal component filed pursuant to Clean Water Act, §316(a), 40 CFR Part 124, Subsection D, §124.57(a), public notice, which is in effect as of the date of TPDES program authorization, as amended, is adopted by reference. A copy of 40 CFR Part 124 is available for inspection at the library of the agency, Park 35, 12100 North Interstate 35, Austin.

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 3, 1999.

TRD-9905742

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Effective date: September 23, 1999

Proposal publication date: July 16, 1999

For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter D. PUBLIC NOTICE OF AIR QUALITY APPLICATION

30 TAC §39.201

STATUTORY AUTHORITY

The amendment is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.061, which es-

tablishes the authority of the commission to delegate to the executive director; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

§39.201. Application for a Preconstruction Permit.

(a) Applicability. This section applies to the following types of air actions that are declared administratively complete before September 1, 1999:

(1) hearings under Chapter 80 of this title (relating to Contested Case Hearings) on applications for permits, permit amendments or permit renewals under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification); and

(2) hearings under Chapter 80 of this title on applications for a registration for a standard exemption required to provide public notice under Chapter 116 of this title.

(b) Notice of hearing. The applicant shall publish notice of the hearing in a newspaper of general circulation in the municipality in which the facility is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility. The notice must be published not less than 30 days before the hearing.

(c) Any application listed in subsection (a) of this section that is declared administratively complete on or after September 1, 1999 is subject to Subchapter K of this chapter (relating to Public Notice of Air Quality Applications).

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 3, 1999.

TRD-9905743

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Effective date: September 23, 1999

Proposal publication date: July 16, 1999

For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter E. PUBLIC NOTICE OF OTHER SPECIFIC APPLICATIONS

30 TAC §39.251, §39.253

STATUTORY AUTHORITY

The amendments are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air per-

mit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

§39.251. Application for Injection Well Permit.

(a) Applicability. This section applies to applications for injection will permits that are declared administratively complete before September 1, 1999. Any permit applications that are declared administratively complete on or after September 1, 1999 are subject to Subchapter L of this chapter (relating to Public Notice of Injection Well and Other Specific Applications).

(b) Preapplication local review committee process. If an applicant decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant must submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. In addition, if the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice shall be mailed to the mayor of the municipality.

(c) Notice of receipt of application. When the executive director receives an application for, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(d) Notice of administratively complete application.

(1) The chief clerk shall mail notice to the School Land Board if the requirements of Texas Water Code, §5.115 apply concerning an application that will affect lands dedicated to the permanent school fund. The notice shall be in the form required by that section. The chief clerk shall also mail notice to the persons listed in §39.13 of this title (relating to Mailed Notice), and to the persons who own mineral rights within the cone of influence, as that term is defined by §331.2 of this title (relating to Definitions).

(2) After the executive director determines that the application is administratively complete, the executive director shall mail a copy of the application or a summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located. The executive director shall also mail a copy of the application or a summary of its contents to the county judge and the health authority of the county in which the facility is located.

(e) Notice of draft permit.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area which is adjacent or contiguous to each county in which the facility is located.

(2) The chief clerk shall mail notice to the persons listed in §39.13 of this title, to the persons who own mineral rights within the cone of influence, as that term is defined by §331.2 of this title, and to local governments located in the county of the facility. "Local governments" shall have the meaning provided for that term in Texas Water Code, Chapter 26.

(3) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.5(h) of this title (relating to General Provisions).

(4) The notice shall specify the deadline to file public comment or hearing requests. The deadline shall be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(f) Notice of public meeting.

(1) If the applicant proposes a new hazardous waste facility, the executive director shall hold a public meeting in the county in which the facility is to be located to receive public comment concerning the application. If the applicant proposes a major amendment of an existing hazardous waste facility permit, the executive director shall hold a public meeting if a person affected files with the chief clerk a request for public meeting concerning the application before the deadline to file public comment or hearing requests. A public meeting is not a contested case proceeding under the APA. A public meeting held as part of a local review committee process under subsection (b) of this section meets the requirements of this subsection if public notice is provided in accordance with this subsection.

(2) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting under §39.5(g) of this title. The published notice shall not be smaller than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches.

(3) The chief clerk shall mail notice to the persons listed in §39.13 of this title.

(g) Notice of hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Newspaper notice.

(A) If the application concerns a facility other than a hazardous waste facility, the applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area which is adjacent or contiguous to each county wherein the proposed facility is located.

(B) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.5(g) of this title. The published notice shall 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 text of the notice shall include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) For all applications concerning underground injection wells, the chief clerk shall mail notice to persons listed in §39.13 of this title, and to the persons who own mineral rights within the cone of influence, as that term is defined by §331.2 of this title (relating to Definitions).

(B) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address, not listed under subparagraph (A) of this paragraph, located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice shall be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the hearing. Within 30 days after the date of mailing, the applicant must file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subsection.

(4) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.5(h) of this title.

(5) Notice under paragraphs (2)(A), (3), and (4) of this subsection shall be completed at least 30 days before the hearing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 3, 1999.

TRD-9905705

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Effective date: September 23, 1999

Proposal publication date: July 16, 1999

For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter F. PUBLIC NOTICE OF RADIOACTIVE MATERIAL LICENSE APPLICATIONS

30 TAC §39.302

STATUTORY AUTHORITY

The new section is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary

Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

§39.302. Applicability.

Applicability. This subchapter applies to applications for radioactive material licenses, under Chapter 336 of this title, that are declared administratively complete before September 1, 1999. Any applications that are declared administratively complete on or after September 1, 1999 are subject to Subchapter M of this chapter (relating to Public Notice of Radioactive Material License Applications).

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 3, 1999.

TRD-9905707
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter G. PUBLIC NOTICE FOR APPLICATIONS FOR CONSOLIDATED PERMITS

30 TAC §39.351

STATUTORY AUTHORITY

The new section is adopted under TWC, Chapter 5, Subchapter J, which establishes the commission's authority concerning consolidated permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes

the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

§39.351. Public Notice for Applications for Consolidated Permits.

(a) Applicability. This section applies to applications for consolidated permits, which combine authorizations under two or more program areas.

(b) Combined public notices shall be given for applications consolidated under Texas Water Code, Chapter 5, Subchapter J, and Chapter 33 of this title (relating to Consolidated Permit Processing) only when:

(1) combined notice is requested by the applicant; and

(2) combined notice satisfies all statutory and regulatory requirements that would apply if each application had been processed separately, including, without limitation, all requirements for notice content, publication, mailing, broadcasting, and the posting of signs.

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 3, 1999.

TRD-9905709

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Effective date: September 23, 1999

Proposal publication date: July 16, 1999

For further information, please call: (512) 239-1932

♦ ♦ ♦

30 TAC §39.401

STATUTORY AUTHORITY

The repeal is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air per-

mit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

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 13, 1999.

TRD-9905708

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Effective date: September 23, 1999

Proposal publication date: July 16, 1999

For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter H. APPLICABILITY AND GENERAL PROVISIONS

30 TAC §§39.401, 39.403, 39.405, 39.407, 39.409, 39.411, 39.413, 39.418-39.421, 39.423, 39.425

STATUTORY AUTHORITY

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to

adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.061, which establishes delegation of authority to the executive director; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

§39.403. Applicability.

(a) Permit applications that are declared administratively complete on or after September 1, 1999 are subject to Subchapters H-M of this chapter (relating to Applicability and General Provisions, Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications, Public Notice of Air Quality Applications, Public Notice of Injection Well and Other Specific Applications, and Public Notice for Radioactive Material Licenses). Permit applications that are declared administratively complete before September 1, 1999 are subject to Subchapters A-F of this chapter (relating to Applicability and General Provisions, Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications and Water Quality Management Plans, Public Notice of Air Quality Applications, Public Notice of Other Specific Applications, and Public Notice for Radioactive Material Licenses). All consolidated permit applications are subject to Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits).

(1) Explanation of Applicability. Subsection (b) of this section lists all the types of applications to which Subchapters H-M of this chapter apply. Subsection (c) of this section lists certain types of applications that would be included in the applications listed in subsection (b), but that are specifically excluded. Subsections (d) and (e) of this section specify that only certain sections apply to applications for radioactive materials licenses or voluntary emission reduction permits.

(2) Explanation of Organization. Subchapter H of this chapter contains general provisions that may apply to all applications under Subchapters H-M of this chapter. Additionally, in Subchapters I-M of this chapter, there is a specific subchapter for each type of application. Those subchapters contain additional requirements for each type of application, as well as indicating which parts of Subchapter H of this chapter must be followed.

(3) Types of Applications. Unless otherwise provided in Subchapters H-M of this chapter or Subchapter G of this chapter, public notice requirements apply to applications for new permits, concrete batch plant air quality exemptions from permitting or permits by rule, and applications to amend, modify, or renew permits.

(b) As specified in those subchapters, Subchapters H-M of this chapter apply to notices for:

(1) applications for municipal solid waste, industrial solid waste, or hazardous waste permits under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361;

(2) applications for wastewater discharge permits under Texas Water Code, Chapter 26, including:

(A) applications for the disposal of sewage sludge or water treatment sludge under Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation); and

(B) applications for individual permits under Chapter 321, Subchapter B of this title (relating to Concentrated Animal Feeding Operations).

(3) applications for underground injection well permits under Texas Water Code, Chapter 27, or under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361;

(4) applications for production area authorizations under Chapter 331 of this title (relating to Underground Injection Control);

(5) contested case hearings for permit applications or contested enforcement case hearings under Chapter 80 of this title (relating to Contested Case Hearings);

(6) applications for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), except as provided in subsection (e) of this section;

(7) applications for consolidated permit processing and consolidated permits processed under Texas Water Code, Chapter 5, Subchapter J, and Chapter 33 of this title (relating to Consolidated Permit Processing);

(8) applications for air quality permits under §382.0518 and §382.055 of the Texas Health and Safety Code. In addition, applications for permit amendments under §116.116(b) of this title (relating to Changes to Facilities), initial issuance of flexible permits under Chapter 116, Subchapter G of this title (relating to Flexible Permits), amendments to flexible permits under §116.710(a)(2) and (3) of this title (relating to Applicability) when an action involves:

(A) construction of any new facility as defined in §116.10(4) and (10) of this title (relating to General Definitions);

(B) modification of an existing facility as defined in §116.10(9) of this title which result in an increase in allowable emissions of any air contaminant emitted equal to or greater than the emission quantities defined in §106.4(a)(1) of this title (relating to Requirements for Exemptions from Permitting) and of sources defined in §106.4(a)(2) and (3) of this title; or

(C) other changes when the executive director determines that:

(i) there is a reasonable likelihood for emissions to impact a nearby sensitive receptor;

(ii) there is a reasonable likelihood of high nuisance potential from the operation of the facilities;

(iii) the application involves a facility or site for which the compliance history contains violations which are unresolved or constitute a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process;

(iv) there is a reasonable likelihood of significant public interest in a proposed activity; or

(9) applications subject to the requirements of Chapter 116, Subchapter C of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), whether for construction or reconstruction;

(10) concrete batch plants registered under Chapter 106 of this title (relating to Exemptions from Permitting) unless the facility is to be temporarily located in or contiguous to the right-of-way of a public works project;

(11) applications for voluntary emission reduction permits under Texas Health and Safety Code, §382.0519;

(12) applications for permits for electric generating facilities under §39.264 of the Utilities Code;

(13) Water Quality Management Plan (WQMP) updates processed under Texas Water Code, Chapter 26, Subchapter B.

(c) Notwithstanding subsection (b) of this section, Subchapters H-M of this chapter do not apply to the following actions and other applications where notice or opportunity for contested case hearings are otherwise not required by law:

(1) applications for authorizations under Chapter 321 of this title (relating to Control of Certain Activities by Rule), except for applications for individual permits under Subchapter B of that chapter;

(2) applications for registrations and notifications under Chapter 312 of this title;

(3) applications under Chapter 332 of this title (relating to Composting);

(4) applications under Chapter 122 of this title (relating to Federal Operating Permits);

(5) applications under Chapter 116, Subchapter F of this title (relating to Standard Permits);

(6) applications under Chapter 106 of this title, except for concrete batch plants specified in §39.403(b)(10) of this title (relating to Applicability).

(7) applications under §39.15 of this title (relating to Public Notice Not Required for Certain Types of Applications) without regard to the date of administrative completeness;

(8) applications for minor amendments under §305.62 (c)(2) of this title (relating to Amendment). Notice for minor amendments shall comply with the requirements of §39.17 of this title (relating to Notice of Minor Amendment) without regard to the date of administrative completeness;

(9) applications for Class 1 modifications of industrial or hazardous waste permits under §305.69(b) (relating to Solid Waste Permit Modification at the Request of the Permittee). Notice for Class 1 modifications shall comply with the requirements of §39.105 of this title (relating to Application for a Class 1 Modification of an Industrial Solid Waste, Hazardous Waste, or Municipal Solid Waste Permit), without regard to the date of administrative completeness, except that text of notice shall comply with §39.411 of this title (relating to Text of Public Notice) and §305.69(b) of this title;

(10) applications for Class I modifications of municipal solid waste permits under §305.70 of this title (relating to Municipal Solid Waste Class I Modifications). Notice for Class I modifications shall comply with the requirements of §39.105 of this title, without regard to the date of administrative completeness, except that text of notice shall comply with §39.411 of this title;

(11) applications for Class 2 modifications of industrial or hazardous waste permits under §305.69(c) (relating to Solid Waste Permit Modification at the Request of the Permittee). Notice for Class 2 modifications shall comply with the requirements of §39.107 of this title (relating to Application for a Class 2 Modification of an Industrial or Hazardous Waste Permit), without regard to the date of administrative completeness, except that text of notice shall comply with §39.411 of this title and §305.69(c) of this title;

(12) applications for minor modifications of underground injection control permits under §305.72 of this title (relating to Underground Injection Control (UIC) Permit Modifications at the Request of the Permittee);

(13) applications for minor modifications of Texas Pollutant Discharge Elimination System (TPDES) permits under §305.62(c)(3) of this title; or

(14) applications for registration and notification of sludge disposal under §312.13 of this title (relating to Actions and Notice).

(d) Applications for initial issuance of voluntary emission reduction permits under Texas Health and Safety Code, §382.0519 and initial issuance of electric generating facility permits under Texas Utilities Code, §39.264 are subject only to §39.405 of this title (relating to General Notice Provisions), §39.409 of this title (relating to Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice and Comment Hearing), §39.411 of this title, §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit), §39.602 of this title (relating to Mailed Notice), §39.603 of this title (relating to Newspaper Notice), §39.604 of this title (relating to Sign-Posting), §39.605 of this title (relating to Notice to Affected Agencies), and §39.606 of this title (relating to Alternative Means of Notice for Voluntary Emission Reduction Permits), except that any reference to requests for reconsideration or contested case hearings in §39.409 of this title or §39.411 of this title shall not apply.

(e) Applications for Radioactive Materials Licenses under Chapter 336 of this title are not subject to §§39.405(c) and (e), 39.418, 39.419, 39.420, and certain portions of 39.413 of this title (relating to Mailed Notice).

§39.405. General Notice Provisions.

(a) Failure to Publish Notice. If the chief clerk prepares a newspaper notice that is required by Subchapters H-M of this chapter (relating to Applicability and General Provisions, Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications and Water Quality Management Plans, Public Notice of Air Quality Applications, Public Notice of Injection Well and Other Specific Applications, and Public Notice for Radioactive Material Licenses) or Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits) and the applicant does not cause the notice to be published within 45 days of mailing of the notice from the chief clerk, or for Notice of Receipt of Application and Intent to Obtain Permit, within 30 days after the executive director declares the application administratively complete, or fails to submit the copies of notices or affidavit required in subsection (e) of this

section, the executive director may cause one of the following actions to occur:

(1) the chief clerk may cause the notice to be published and the applicant shall reimburse the agency for the cost of publication; or

(2) the executive director may suspend further processing or return the application. If the application is resubmitted within six months of the date of the return of the application, it shall be exempt from any application fee requirements.

(b) Electronic Mailing Lists. The chief clerk may require the applicant to provide necessary mailing lists in electronic form.

(c) Mail or Hand Delivery. When Subchapters H-L of this chapter or Subchapter G of this chapter require notice by mail, notice by hand delivery may be substituted. Mailing is complete upon deposit of the document, enclosed in a prepaid, properly addressed wrapper, in a post office or official depository of the United States Postal Service. If hand delivery is by courier-receipted delivery, the delivery is complete upon the courier taking possession.

(d) Combined Notice. Notice may be combined to satisfy more than one applicable section of this chapter.

(e) Notice and Affidavit. When Subchapters H-L of this chapter or Subchapter G of this chapter require an applicant to publish notice, the applicant must file a copy of the published notice and a publisher's affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file a copy of the published notice which shows the date of publication and the name of the newspaper is 10 business days after the last date of publication. The deadline to file the affidavit is 30 calendar days after the last date of publication for each notice. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice. When the chief clerk publishes notice under subsection (a) of this section, the chief clerk shall file a copy of the published notice and a publisher's affidavit.

(f) Published Notice. When this chapter requires notice to be published under this subsection:

(1) the applicant shall publish notice in the newspaper of largest circulation in the county in which the facility is located or proposed to be located, except for air applications required to publish in a newspaper of general circulation in a municipality under §39.603 of this title (relating to Newspaper Notice); and

(2) for applications for solid waste permits and injection well permits, the applicant shall publish notice in the newspaper of largest general circulation that is published in the county in which the facility is located or proposed to be located. If a newspaper is not published in the county, the notice must be published in a newspaper of general circulation in the county in which the facility is located or proposed to be located. The requirements of this subsection may be satisfied by one publication if the newspaper is both published in the county and is the newspaper of largest general circulation in the county.

(g) The applicant shall make a copy of the application available for review and copying at a public place in the county in which the facility is located or proposed to be located. If the application is submitted with confidential information marked as confidential by the applicant, the applicant is required to indicate in the public file that there is additional information in a confidential file. The copy of the application shall comply with the following:

(1) A copy of the administratively complete application must be available for review and copying beginning on the first day of newspaper publication of Notice of Receipt of Application and Intent to Obtain Permit and remain available for the publications' designated comment period; and

(2) A copy of the complete application (including any subsequent revisions to the application) and executive director's preliminary decision must be available for review and copying beginning on the first day of newspaper publication required by this section and remain available until the commission has taken action on the application or the commission refers issues to SOAH.

§39.407. Mailing Lists.

The chief clerk shall maintain mailing lists of persons requesting notice of an application. Persons, including participants in past agency permit proceedings, may request in writing to be on a mailing list. The chief clerk may from time to time request confirmation that persons on a list wish to remain on the list, and may delete from the list the name of any person who fails to respond to such request.

§39.409. Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice and Comment Hearing.

Notice given under this chapter will specify any applicable deadline to file public comment specified under §55.152 of this title (relating to Public Comment) and, if applicable, any deadlines to file requests for reconsideration, contested case hearing, or notice and comment hearing. After the deadline, final action on an application may be taken under Chapter 50 of this title (relating to Action on Applications and Other Authorizations).

§39.411. Text of Public Notice.

(a) Applicants shall use notice text provided and approved by the agency. The executive director may approve changes to notice text before notice being given.

(b) When notice of receipt of application and intent to obtain permit by publication or by mail is required by Subchapters H-L of this chapter (relating to Applicability and General Provisions, Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications and Water Quality Management Plans, Public Notice of Air Quality Applications, and Public Notice of Injection Well and Other Specific Applications), Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits), or for Subchapter M of this chapter (relating to Mailed Notice for Radioactive Material Licenses), the text of the notice must include the following information:

(1) the name and address of the agency and the telephone number of an agency contact from whom interested persons may obtain further information;

(2) the name, address, and telephone number of the applicant and a description of the manner in which a person may contact the applicant for further information;

(3) a brief description of the location and nature of the proposed activity;

(4) a brief description of public comment procedures, including:

(A) a statement that the executive director will respond to comments raising issues that are relevant and material or otherwise significant; and

(B) a statement in the notice for any permit application for which there is an opportunity for a contested case hearing, that only disputed factual issues that are relevant and material to the

commissions's decision that are raised during the comment period can be considered if a contested case hearing is granted.

(5) a brief description of procedures by which the public may participate in the final permit decision and, if applicable, how to request a public meeting, contested case hearing, reconsideration of the executive director's decision, a notice and comment hearing, or a statement that later notice will describe procedures for public participation, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice. The notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or there is substantial public interest in the proposed activity;

(6) the application or permit number;

(7) if applicable, a statement that the application or requested action is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;

(8) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the application is available for review and copying;

(9) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application;

(10) for notices of air applications:

(A) at a minimum, a listing of criteria pollutants for which authorization is sought in the application which are regulated under national ambient air quality standards (NAAQS) or under state standards in Chapters 111, 112, 113, 115, and 117 of this title (relating to Control of Air Pollution from Visible Emissions and Particulate Matter, Control of Air Pollution from Sulfur Compounds, Control of Air Pollution from Toxic Materials, Control of Air Pollution from Volatile Organic Compounds, and Control of Air Pollution from Nitrogen Compounds);

(B) if notice is for applications described in §39.403(b)(11) or (12) of this title (relating to Applicability), a statement that any person is entitled to request a notice and comment hearing from the commission. If notice is for any other air application the following information which must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice:

(i) a statement that a person who may be affected by emissions of air contaminants from the facility or proposed facility is entitled to request a contested case hearing from the commission, ;

(ii) a statement that a contested case hearing request must include the requester's location relative to the proposed facility or activity;

(iii) a statement that a contested case hearing request should include a description of how the requestor will be adversely affected by the proposed facility or activity in a manner not common to the general public, including a description of the requestor's uses of property which may be impacted by the proposed facility or activity; and

(iv) and that only relevant and material issues raised during the comment period can be considered if a contested case hearing request is granted; and

(C) notification that a person residing within 440 yards of a concrete batch plant under an exemption from permitting or permit by rule adopted by the commission is an affected person who is entitled to request a contested case hearing;

(D) the statement: "The facility's compliance file, if any exists, is available for public review in the regional office of the Texas Natural Resource Conservation Commission;" and

(11) for notices of municipal solid waste applications, a statement that a person who may be affected by the facility or proposed facility is entitled to request a contested case hearing from the commission. This statement must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice; and

(12) any additional information required by the executive director or needed to satisfy public notice requirements of any federally authorized program; or

(13) for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), if applicable, a statement that a written environmental analysis on the application has been prepared by the executive director, is available to the public for review, and that written comments may be submitted.

(14) for Class 3 modifications of hazardous industrial solid waste permits the statement "The permittees compliance history during the life of the permit being modified is available from the agency contact person."

(c) Unless mailed notice is otherwise provided for under this section, the chief clerk shall mail Notice of Application and Preliminary Decision to those listed in §39.413 of this title (relating to Mailed Notice). When notice of application and preliminary decision by publication or by mail is required by Subchapters G-L of this chapter, the text of the notice must include the following information:

(1) the information required by subsection (b)(1)-(12) of this section;

(2) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted, or a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted. The public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(3) if the application is subject to final approval by the executive director under Chapter 50 of this title (relating to Action on Applications), a statement that the executive director may issue final approval of the application unless a timely contested case hearing request or a timely request for reconsideration (if applicable) is filed with the chief clerk after transmittal of the executive director's decision and response to public comment;

(4) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit; and

(5) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the complete application and the executive director's preliminary decision are available for review and copying;

(6) the deadline to file comments or request a public meeting. The notice should include a statement that a public meeting

will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or there is substantial public interest in the proposed activity;

(7) for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), if applicable, a statement that a written environmental analysis on the application has been prepared by the executive director, is available to the public for review, and that written comments may be submitted.

(d) When notice of a public meeting or notice of a hearing by publication or by mail is required by Subchapters G-L of this chapter, the text of the notice must include the following information:

(1) the information required by subsection (b)(1)-(3), (6)-(8), and (12) of this section;

(2) the date, time, and place of the meeting or hearing, and a brief description of the nature and purpose of the meeting or hearing, including the applicable rules and procedures;

(3) for notices of public meetings only, a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted and a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted.

§39.413. Mailed Notice.

Unless otherwise specified in Subchapters I-M of this chapter (relating to Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications and Water Quality Management Plans, Public Notice of Air Quality Applications, Public Notice of Injection Well and Other Specific Applications, and Public Notice for Radioactive Material Licenses), when this chapter requires mailed notice, the chief clerk shall mail notice to:

(1) the landowners named on the application map or supplemental map, or the sheet attached to the application map or supplemental map;

(2) the mayor and health authorities of the city or town in which the facility is or will be located or in which waste is or will be disposed of;

(3) The county judge and health authorities of the county in which the facility is or will be located or in which waste is or will be disposed of;

(4) the Texas Department of Health;

(5) the Texas Parks and Wildlife Department;

(6) the Texas Railroad Commission;

(7) if applicable, local, state and federal agencies for which notice is required in 40 Code of Federal Regulations (CFR), §124.10(c), as amended and adopted in the CFR through May 2, 1989 at 54 FedReg 18786;

(8) if applicable, persons on a mailing list developed and maintained in accordance with 40 CFR §124.10(c)(1)(ix);

(9) the applicant;

(10) if the application concerns an injection well, the Water Well Drillers Advisory Council;

(11) persons on a relevant mailing list kept under §39.407 of this title (relating to Mailing Lists);

(12) any other person the executive director or chief clerk may elect to include;

(13) if applicable, the secretary of the Coastal Coordination Council; and

(14) persons who filed public comment or hearing requests on or before the deadline for filing public comment or hearing requests.

§39.418. Notice of Receipt of Application and Intent to Obtain Permit.

(a) When the executive director determines that an application is administratively complete, the chief clerk shall mail this determination concurrently with the Notice of Receipt of Application and Intent to Obtain Permit to the applicant.

(b) Not later than 30 days after the executive director declares an application administratively complete:

(1) the applicant shall publish Notice of Receipt of Application and Intent to Obtain Permit once under §39.405(f)(1) of this title (relating to General Notice Provisions) and, for solid waste applications and injection well applications, also under §39.405(f)(2) of this title;

(2) the chief clerk shall mail Notice of Receipt of Application and Intent to Obtain Permit to those listed in §39.413 of this title (relating to Mailed Notice), and to:

(A) the state senator and representative who represent the general area in which the facility is located or proposed to be located; and

(B) the river authority in which the facility is located or proposed to be located if the application is under Texas Water Code, Chapter 26.

(3) for air applications, paragraphs (1) and (2) of this subsection do not apply. Instead the applicant shall provide notice as specified in Subchapter K of this chapter (relating to Public Notice of Air Quality Applications). Specifically, publication in the newspaper shall follow the requirements under §39.603 of this title (relating to Newspaper Notice), sign posting shall follow the requirements under §39.604 of this title (relating to Sign-Posting), and the chief clerk shall mail notice according to §39.602 of this title (relating to Mailed Notice); and

(4) the notice must include the applicable information required by §39.411(b) of this title (relating to Text of Public Notice).

§39.419. Notice of Application and Preliminary Decision.

(a) After technical review is complete, the executive director shall file the preliminary decision and the draft permit with the chief clerk, except for air applications under subsection (e)(1) of this section. The chief clerk shall mail the preliminary decision concurrently with the Notice of Application and Preliminary Decision. Then, when this chapter requires notice under this section, notice shall be given as required by subsections (b)-(e) of this section.

(b) The applicant shall publish Notice of Application and Preliminary Decision at least once in the same newspaper as the Notice of Receipt of Application and Intent to Obtain Permit, unless there are different requirements in this section or a specific subchapter in this chapter for a particular type of permit.

(c) Unless mailed notice is otherwise provided under this section, the chief clerk shall mail Notice of Application and Preliminary

Decision to those listed in §39.413 of this title (relating to Mailed Notice).

(d) The notice must include the information required by §39.411(c) of this title.

(e) For air applications:

(1) the applicant is not required to publish Notice of Application and Preliminary Decision, if:

(A) no hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain Permit;

(B) a hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain Permit and the request is withdrawn before the date the preliminary decision is issued;

(C) the application is for any amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted unless the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations; or

(D) the application is for initial issuance of a permit described in §39.403(b)(11) or (12) of this title (related to Applicability);

(2) If notice under this section is required, the agency shall mail notice according to §39.602 of this title (relating to Mailed Notice); and

(3) Notice of Application and Preliminary Decision shall be published as specified in Subchapter K of this chapter (relating to Public Notification of Air Quality Applications) for permits that are not exempt under paragraph (1)(A)-(C) of this subsection or are for the following federal preconstruction approvals:

(A) applications under Chapter 116, Subchapter B, Division 5 of this title (relating to Nonattainment Review);

(B) applications under Chapter 116, Subchapter B, Division 6 of this title (relating to Prevention of Significant Deterioration Review); and

(C) applications under Chapter 116, Subchapter C of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

§39.420. Transmittal of the Executive Director's Response to Comments and Decision

(a) When required by and subject to §55.156 of this chapter (relating to Public Comment Processing), after the close of the comment period, the chief clerk shall transmit to the people listed in subsection (b) of this section the following information:

(1) the executive director's decision;

(2) the executive director's response to public comments;

(3) instructions for requesting that the commission reconsider the executive director's decision; and

(4) instructions for requesting a contested case hearing.

(b) The following persons shall be sent the information listed in subsection (a) of this section:

(1) the applicant;

(2) any person who requested to be on the mailing list for the permit action;

(3) any person who submitted comments during the public comment period;

(4) any person who timely filed a request for a contested case hearing;

(5) Office of the Public Interest Counsel; and

(6) Office of Public Assistance.

(c) For air applications which meet the following conditions, items listed in subsection (a)(3) and (4) of this section are not required to be included in the transmittals:

(1) applications for initial issuance of voluntary emission reduction permits under Texas Health and Safety Code, §382.0519;

(2) applications for initial issuance of electric generating facility permits under Texas Utilities Code, §39.264;

(3) applications where a hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain Permit and the request is withdrawn before the date the preliminary decision is issued; or

(4) the application is for any amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted unless the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

§39.425. Notice of Contested Enforcement Case Hearing.

For any contested enforcement case hearing, the chief clerk shall mail notice to the statutory parties, respondents, and persons who have requested to be on a mailing list for the pleadings in the formal enforcement action no less than 13 days before a hearing in accordance with the APA, §2001.052. In addition, public notice and opportunity for comment before the commission regarding a proposed enforcement action shall be given under Chapter 10 of this title (relating to Commission Meetings).

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 3, 1999.

TRD-9905710
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter I. PUBLIC NOTICE OF SOLID WASTE APPLICATIONS

30 TAC §§39.501, 39.503, 39.509

STATUTORY AUTHORITY

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial solid waste and hazardous municipal waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

§39.501. Application for Municipal Solid Waste Permit.

(a) Applicability. This section applies to applications for municipal solid waste (MSW) permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication local review committee process. If an applicant for an MSW permit decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant must submit to the executive director a notice of intent to file an application, setting forth the proposed location and type of facility. The executive director shall mail notice to the county judge of the county in which the facility is to be located. If the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice shall also be mailed to the mayor of the municipality. The executive director shall also mail notice to the appropriate regional solid waste planning agency or council of government. The mailing shall be by certified mail.

(c) Notice of Receipt of Application and Intent to Obtain a Permit.

(1) On the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete:

(A) notice shall be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit) and, if a newspaper is not published in the county, then the applicant shall publish notice in a newspaper of circulation in the immediate vicinity in which the facility is located or proposed to be located. This notice must contain the text as required by §39.411(b)(1)-(9), (11), and (12) of this title (relating to Text of Public Notice);

(B) the chief clerk shall publish Notice of Receipt of Application and Intent to Obtain Permit in the *Texas Register;* and

(C) the executive director or chief clerk shall mail Notice of Receipt of Application and Intent to Obtain Permit, along with a copy of the application or summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located, and to the county judge and the health authority of the county in which the facility is located.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) shall be published once as required by §39.405(f)(2) of this title (relating to General Notice Provisions). The notice shall be published after the chief clerk has mailed the Notice of Application and Preliminary Decision to the applicant. The notice must contain the text as required by §39.411(c)(1)-(6) of this title.

(e) Notice of public meeting.

(1) If the application proposes a new facility, the agency shall hold a public meeting in the county in which the facility is to be located to receive public comment concerning the application. A public meeting is not a contested case proceeding under the APA. A public meeting held as part of a local review committee process under subsection (a) of this section meets the requirements of this subsection if public notice is provided under this subsection.

(2) The applicant shall publish notice of the public meeting, as required by §39.405(f)(2) of this title, once each week during the three weeks preceding a public meeting. The published notice shall be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters).

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice).

(f) Notice of hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) The applicant shall publish notice at least once under §39.405(f)(2) of this title.

(3) Mailed notice.

(A) If the applicant proposes a new facility, the applicant shall mail notice of the hearing to each residential or business address located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice shall be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the hearing. Within 30 days after the date of mailing, the applicant must file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(B) If the applicant proposes to amend a permit, the chief clerk shall mail notice to the persons listed in §39.413 of this title.

(4) Notice under paragraphs (2) and (3)(B) of this subsection shall be completed at least 30 days before the hearing.

§39.503. Application for Industrial or Hazardous Waste Facility Permit.

(a) Applicability. This section applies to applications for industrial or hazardous waste facility permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication requirements

(1) If an applicant for an industrial or hazardous waste facility permit decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant must submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. If the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice shall also be mailed to the mayor of the municipality. Mailed notice shall be by certified mail. When the applicant submits the notice of intent to the executive director, the applicant shall publish notice of the submission in a paper of general circulation in the county in which the facility is to be located.

(2) The requirements of this paragraph are set forth at 40 Code of Federal Regulations (CFR) §124.31(b)-(d), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417, and apply to all hazardous waste part B applications for initial permits for hazardous waste management units, hazardous waste part B permit applications for major amendments, and hazardous waste part B applications for renewal of permits, where the renewal application is proposing a significant change in facility operations. For the purposes of this paragraph, a "significant change" is any change that would qualify as a Class 3 permit modification under §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). The requirements of this paragraph do not apply to an application for minor amendment under §305.62 of this title (relating to Amendment), correction under §50.45 of this title (relating to Corrections to Permits), or modification under §305.69 of this title, or to an application that is submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility, unless the application is also for an initial permit for hazardous waste management unit(s), or the application is also for renewal of the permit, where the renewal application is proposing a significant change in facility operations.

(c) Notice of Receipt of Application and Intent to Obtain Permit.

(1) On the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located and to the persons listed in §39.413 of this title (relating to Mailed Notice). For all hazardous waste part B applications for initial permits for hazardous waste management units, hazardous waste part B permit applications for major amendments, and hazardous waste part B applications for renewal of permits, the chief clerk shall provide notice to meet the requirements of this subsection and 40 CFR §124.32(b), which is adopted by reference as

amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417, and the executive director shall meet the requirements of 40 CFR §124.32(c), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417. The requirements of this paragraph relating to 40 CFR §124.32(b)-(c) do not apply to an application for minor amendment under §305.62 of this title, correction under §50.45 of this title, or modification under §305.69 of this title, or to an application that is submitted for the sole purpose of conducting post- closure activities or post-closure activities and corrective action at a facility, unless the application is also for an initial permit for hazardous waste management unit(s), or the application is also for renewal of the permit.

(2) After the executive director determines that the application is administratively complete:

(A) notice shall be given as required by §39.418 of this title. Notice under §39.418 will satisfy the notice of receipt of application required by §281.17(d) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness).

(B) the executive director or chief clerk shall mail notice of this determination along with a copy of the application or summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located, and to the county judge and the health authority of the county in which the facility is located.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title shall be published once as required by §39.405(f)(2) of this title. In addition to the requirements of §39.419 of this title, the following requirements apply.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in each county which is adjacent or contiguous to each county in which the facility is located. One notice may satisfy the requirements of §39.405(f)(2) of this title and of this subsection, if the newspaper meets the requirements of both rules.

(2) If the application concerns a hazardous waste facility, the applicant shall broadcast notice of the application on one or more local radio stations that broadcast to an area that includes all of the county in which the facility is located. The executive director may require that the broadcasts be made to an area that also includes contiguous counties.

(3) The notice shall comply with §39.411 of this title. The deadline for public comments on industrial solid waste applications shall be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(e) Notice of public meeting.

(1) If the applicant proposes a new hazardous waste facility, the executive director shall hold a public meeting in the county in which the facility is to be located to receive public comment concerning the application. If the applicant proposes a major amendment of an existing hazardous waste facility permit, this subsection applies if a person affected files a request for public meeting with the chief clerk concerning the application before the deadline to file public comment or hearing requests. A public meeting is not a contested case proceeding under the APA. A public meeting held as part of a local review committee process under subsection (a) of this section meets the requirements of this subsection if public notice is provided under this subsection.

(2) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting. The applicant shall publish notice under §39.405(f)(2) of this title. The published notice shall be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters).

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title.

(f) Notice of hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (concerning Contested Case Hearings).

(2) Newspaper notice.

(A) The applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area which is adjacent or contiguous to each county in which the proposed facility is located.

(B) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.405(f)(2) of this title. The published notice shall be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters) or have a total size of at least 9 column inches (18 square inches). The text of the notice shall include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice shall be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The chief clerk shall mail notice to the persons listed in §39.413 of this title, except that the chief clerk shall not mail notice to the persons listed in paragraph (1) of that section. The notice must be mailed no more than 45 days and no less than 30 days before the hearing. Within 30 days after the date of mailing, the applicant must file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(B) If the applicant proposes to amend or renew an existing permit, the chief clerk shall mail notice to the persons listed in §39.413 of this title.

(4) If the application concerns a hazardous waste facility, the applicant shall broadcast notice of the hearing under subsection (d)(2) of this section.

(5) Notice under paragraphs (2)(A), (3), and (4) of this subsection shall be completed at least 30 days before the hearing.

(g) This section does not apply to applications for an injection well permit.

(h) Information repository. The requirements of 40 CFR §124.33(b)-(f), which is adopted by reference as amended and

adopted in the CFR through December 11, 1995, at 60 FedReg 63417, apply to all applications for hazardous waste permits.

§39.509. Application for a Class 3 Modification of an Industrial or Hazardous Waste Permit.

(a) Applicability. This section applies to applications for Class 3 modification of industrial or hazardous waste permits that are declared administratively complete on or after September 1, 1999.

(b) Notice shall be given under §39.418 of the this title (relating to Notice of Receipt of Application and Intent to Obtain Permit), instead of giving notice under §305.69(d)(2) of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). Notice shall also be given under §39.419 of the title (relating to Notice of Application and Preliminary Decision).

(c) Notice of the public meeting required by §305.69(d)(4) shall be included with the Notice of Receipt of Application and Intent to Obtain Permit under §39.418.

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 3, 1999.

TRD-9905711

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Effective date: September 23, 1999

Proposal publication date: July 16, 1999

For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter J. PUBLIC NOTICE OF WATER QUALITY APPLICATIONS AND WATER QUALITY MANAGEMENT PLANS

30 TAC §39.551, §39.553

STATUTORY AUTHORITY

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which es-

tablishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

§39.551. Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge.

(a) Applicability. This section applies to applications for wastewater discharge permits, including disposal of sewage sludge or water treatment sludge applications, that are declared administratively complete on or after September 1, 1999. This subchapter does not apply to registrations and notifications for sludge disposal under §312.13 of this title (relating to Actions and Notice).

(b) Notice of receipt of application and intent to obtain permit.

(1) Notice under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit) is required to be published no later than 30 days after the executive director deems an application administratively complete. This notice must contain the text as required by §39.411(b)(1)-(9) and (12) of this title (relating to Text of Public Notice). In addition to the requirements of §39.418 of this title, the chief clerk shall mail notice to the School Land Board if the application will affect lands dedicated to the permanent school fund. The notice shall be in the form required by Texas Water Code, §5.115(c).

(2) Mailed notice to adjacent or downstream landowners is not required for:

(A) an application to renew a permit; or

(B) an application for a new Texas Pollutant Discharge Elimination System (TPDES) permit for a discharge authorized by an existing state permit issued before September 14, 1998 for which the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title (relating to Amendment).

(c) Notice of application and preliminary decision. Notice under §39.419 of this title ((relating to Notice of Application and Preliminary Decision) is required to be published after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(b)(1)-(3), (5)-(7), (9), and (12), and (c)(2)-(6). In addition to §39.419 of this title, for all applications except applications to renew permits and those in subsection (c)(1) of this section, the following provisions apply.

(1) The applicant shall publish notice of application and preliminary decision at least once in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located and in each county affected by the discharge. The executive director shall provide to the chief clerk a list of the appropriate counties, and the chief clerk shall provide the list to the applicant.

(2) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice). For any application involving an average daily discharge of five million gallons or more, in addition to the persons listed in §39.413 of this title, the chief clerk shall mail notice to each county judge in the county or counties located within 100 statute miles of the point of discharge who has requested in writing that the commission give notice, and through which water into or adjacent to which waste or pollutants are to be discharged under the permit, flows after the discharge.

(3) The notice must set a deadline to file public comment with the chief clerk that is not less than 30 days after newspaper publication. However, the notice may be mailed to the county judges under paragraph (2) of this subsection no later than 20 days before the deadline to file public comment.

(4) For TPDES permits, the text of the notice shall include:

(A) everything that is required by §39.411(b)(1)-(3), (5)-(7), (9), and (12), and (c)(2)-(6) of this title;

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

(ii) the location of the sludge treatment works treating domestic sewage sludge; and

(iii) the use and disposal sites known at the time of permit application.

(d) Notice of application and preliminary decision for certain TPDES permits. For a new TPDES permit for which the discharge is authorized by an existing state permit issued before September 14, 1998, the following shall apply:

(1) If the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title (relating to Amendment), the following mailed and published notice is required.

(A) The applicant shall publish notice of the application and preliminary decision at least once in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located and in each county affected by the discharge. The executive director shall provide to the chief clerk a list of the appropriate counties, and the chief clerk shall provide the list to the applicant.

(B) The chief clerk shall mail notice of the application and preliminary decision, providing an opportunity to submit public comments, to request a public meeting, or to request a public hearing to those listed in §39.413 of this title.

(C) The notice must set a deadline to file public comment, or to request a public meeting, with the chief clerk that is at least 30 days after newspaper publication.

(D) The text of the notice shall include:

(i) everything that is required by §39.411(b)(1)-(3), (5)-(7), (9), and (12), and (c)(2)-(6) of this title;

(ii) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(iii) for applications concerning the disposal of sludge:

(I) the use and disposal practices;

(II) the location of the sludge treatment works treating domestic sewage sludge; and

(III) the use and disposal sites known at the time of permit application.

(2) If the application proposes any term or condition that would constitute a major amendment to the state permit under §305.62 of this title, the applicant must follow the notice requirements of subsection (b) of this section.

(e) Notice for other types of applications. Except as required by subsections (a), (b), and (c) of this section, the following notice is required for certain applications.

(1) For an application for a minor amendment to a permit other than a TPDES permit, or for an application for a minor modification of a TPDES permit, under Chapter 305, Subchapter D of this title (relating to Amendments, Modifications, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits), the chief clerk shall mail notice, that the executive director has determined the application is technically complete and has prepared a draft permit, to the mayor and health authorities for the city or town, and to the county judge and health authorities for the county in which the waste will be discharged. The notice shall state the deadline to file public comment, which shall be no earlier than ten days after mailing notice.

(2) For an application for a renewal of a confined animal feeding operation permit which was issued between July 1, 1974, and December 31, 1977, for which the applicant does not propose to discharge into or adjacent to water in the state and does not seek to change materially the pattern or place of disposal, no notice is required.

(3) For an application for a minor amendment to a TPDES permit under Chapter 305, Subchapter D of this title, the following requirements apply.

(A) The chief clerk shall mail notice of the application and preliminary decision, providing an opportunity to submit public comments and to request a public meeting to:

(i) the mayor and health authorities of the city or town in which the facility is or will be located or in which pollutants are or will be discharged;

(ii) the county judge and health authorities of the county in which the facility is or will be located or in which pollutants are or will be discharged;

(iii) if applicable, state and federal agencies for which notice is required in 40 Code of Federal Regulations (CFR) §124.10(c);

(iv) if applicable, persons on a mailing list developed and maintained according to 40 CFR §124.10(c)(1)(ix);

(v) the applicant;

(vi) persons on a relevant mailing list kept under §39.407 of this title (relating to Mailing Lists); and

(vii) any other person the executive director or chief clerk may elect to include.

(B) For TPDES major facility permits as designated by EPA on an annual basis, notice shall be published in the *Texas Register.*

(C) The text shall meet the requirements in §39.411(b)(1)-(4)(A), (6)-(7), (9), and (12), and (c)(4)-(6).

(D) The notice shall provide at least a 30-day public comment period.

(E) The executive director shall prepare a response to all relevant and material or significant public comments received by the commission under §55.152 of this title (relating to Public Comment Processing).

(f) Notice of contested case hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Not less than 30 days before the hearing, the applicant shall publish notice at least once in a newspaper regularly published or circulated in each county where, by virtue of the county's geographical relation to the subject matter of the hearing, a person may reasonably believe persons reside who may be affected by the action that may be taken as a result of the hearing. The executive director shall provide to the chief clerk a list of the appropriate counties.

(3) Not less than 30 days before the hearing, the chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice), except that mailed notice to adjacent or downstream landowners is not required for an application to renew a permit.

(4) For TPDES permits, the text of notice shall include:

(A) everything that is required by §39.411(d)(1) and (2) of this title;

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

(ii) the location of the sludge treatment works treating domestic sewage sludge; and

(iii) the use and disposal sites known at the time of permit application.

(g) Notice for discharges with a thermal component. For requests for a discharge with a thermal component filed pursuant to Clean Water Act, §316(a), 40 CFR Part 124, Subsection D, §124.57(a), public notice, which is in effect as of the date of TPDES program authorization, as amended, is adopted by reference. A copy of 40 CFR Part 124 is available for inspection at the library of the agency, Park 35, 12015 North Interstate 35, Austin.

§39.553. Water Quality Management Plan Updates.

(a) Applicability. This section applies to Water Quality Management Plan (WQMP) Updates.

(b) Notice of WQMP updates.

(1) The chief clerk shall publish notice of the WQMP update in the *Texas Register.*

(2) The chief clerk shall mail the notice of the WQMP update to persons known to the commission to be interested in the WQMP update, and to persons requesting notices of the WQMP identified on mailing lists maintained by the chief clerk, in accordance with §39.407 of this title (relating to Mailing Lists).

(3) Section 39.411 of this title (relating to Text of Public Notice) does not apply to WQMP updates. However, the notice of the WQMP update shall:

(A) include the name and address of the agency;

(B) provide an opportunity to submit written comments on the proposed WQMP update;

(C) describe the public comment procedures and the time and place of any public meeting; and

(D) include the name, address, and telephone number of an agency contact person from whom interested persons may obtain information.

(4) The notice shall provide at least a 30-day public comment period.

(5) Any public meeting shall be held and conducted in accordance with the requirements and procedures of §55.156 of this title (relating to Public Comment Processing).

(c) The executive director shall prepare a response to all significant public comments received by the commission before the end of the comment period. The executive director may revise the WQMP update based on public comment, if appropriate.

(d) As described in §50.133 of this title (relating to Executive Director Action on Application or WQMP Update), the executive director may certify the WQMP update.

(e) After the executive director certifies a WQMP update, the Chief Clerk shall mail a copy of the Response to Comments and certified WQMP update to all persons who submitted timely comments.

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 3, 1999.

TRD-9905712
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter K. PUBLIC NOTICE OF AIR QUALITY APPLICATIONS

30 TAC §§39.601-39.606

STATUTORY AUTHORITY

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to

adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.061, which establishes delegation of authority to the executive director; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

§39.601. Applicability.

Air applications or registrations that are declared administratively complete before September 1, 1999 are subject to the requirements of Chapter 116, Subchapter B, Division 3 (relating to Public Notification and Comment Procedures) (effective March 21, 1999) or §106.5 of this title (relating to Public Notice) (effective December 24, 1998). Air applications or registrations that are declared administratively complete by the executive director on or after September 1, 1999 are subject to this subchapter.

§39.602. Mailed Notice.

When this chapter requires notice for air applications, the chief clerk shall mail notice only to those persons listed in §39.413 (9), (11), (12), and (14) of this title (relating to Mailed Notice). When Notice of Receipt of Application and Intent to Obtain Permit is required, mailed notice shall be sent to the state senator and representative who represent the area in which the facility is or will be located.

§39.603. Newspaper Notice

(a) Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit) is required to be published no later than 30 days after the executive director declares an application administratively complete. This notice must contain the text as required by §39.411(b)(1)-(6) and (8)-(10) of this title (relating to Text of Public Notice).

(b) Notice of Application and Preliminary Decision under §39.419 of this title (relating to Notice of Application and Preliminary Decision) is required to be published within 33 days after the chief clerk has mailed the preliminary decision concurrently with the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(c)(1)-(6) of this title (relating to Text of Public Notice).

(c) General newspaper notice. Unless otherwise specified, when this chapter requires published notice of an air application, the applicant shall publish notice in a newspaper of general circulation in the municipality in which the facility is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility, as follows.

(1) One notice shall be published in the public notice section of the newspaper and shall comply with §39.411 of this title (relating to Text of Notice).

(2) Another notice with a total size of at least 6 column inches, with a vertical dimension of at least 3 inches and a horizontal dimension of at least 2 column widths, or a size of at least 12 square inches, shall be published in a prominent location elsewhere in the same issue of the newspaper. This notice shall contain the following information:

(A) permit application number;

(B) company name;

(C) type of facility;

(D) description of the location of the facility; and

(E) a note that additional information is in the public notice section of the same issue.

(d) Alternative language newspaper notice.

(1) This subsection applies whenever notice is required to be published under §39.418 of this title, §39.419 of this title, and this section and either the elementary or middle school nearest to the facility or proposed facility is required to provide a bilingual education program as required by Texas Education Code, Chapter 29, Subchapter B, and 19 TAC §89.1205(a) (relating to Required Bilingual Education and English as a Second Language Programs) and one of the following conditions is met:

(A) students are enrolled in a program at that school;

(B) students from that school attend a bilingual education program at another location; or

(C) the school that otherwise would be required to provide a bilingual education program waives out of this requirement under 19 TAC §89.1205(g).

(2) Elementary or middle schools that offer English as a second language under 19 TAC §89.1205(e), and are not otherwise affected by 19 TAC §89.1205(a), will not trigger the requirements of this subsection.

(3) The notice shall be published in a newspaper or publication that is published primarily in the alternative languages in which the bilingual education program is or would have been taught, and the notice must be in those languages.

(4) The newspaper or publication must be of general circulation in the municipality or county in which the facility is located or proposed to be located. Notice under this subsection shall only be required to be published within the United States.

(5) The requirements of this subsection are waived for each language in which no publication exists, or if the publishers of all alternative language publications refuse to publish the notice. If the alternative language publication is published less frequently than once a month, this notice requirement may be waived by the executive director on a case-by-case basis.

(6) Each alternative language publication shall follow the requirements of this chapter that are consistent with this section.

(7) If a waiver is received under this section, the applicant shall complete a verification and submit it as required under §39.605(3) of this title (relating to Notice to Affected Agencies).

(e) Alternative publication procedures for small businesses.

(1) The applicant does not have to comply with subsection (a)(2) of this section if all of the following conditions are met:

(A) the applicant and source meets the definition of a small business stationary source in §382.0365 of the Texas Health and Safety Code including, but not limited to, those which:

(i) are not a major stationary source for federal air quality permitting;

(ii) do not emit 50 tons or more per year of any regulated air pollutant;

(iii) emit less than 75 tons per year of all regulated air pollutants combined; and

(iv) are owned or operated by a person that employs 100 or fewer individuals; and

(B) if the applicant's site meets the emission limits in §106.4(a) of this title (relating to Requirements for Exemption from Permitting) it will be considered to not have a significant effect on air quality.

(2) The executive director may post information regarding pending air permit applications on its website, such as the permit number, company name, project type, facility type, nearest city, county, date public notice authorized, information on comment periods, and information on how to contact the agency for further information.

(f) If an air application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings), the applicant shall publish notice once in a newspaper as described in (c) of this section, containing the information under §39.411(d) of this title. This notice shall be published and affidavits filed with the chief clerk no later than 30 days before the scheduled date of the hearing.

§39.604. Sign-Posting.

(a) At the applicant's expense, a sign or signs shall be placed at the site of the existing or proposed facility declaring the filing of an application for a permit and stating the manner in which the commission may be contacted for further information. Such signs shall be provided by the applicant and shall substantially meet the following requirements:

(1) Signs shall consist of dark lettering on a white background and shall be no smaller than 18 inches by 28 inches and all lettering shall be no less than one and one-half inches in size and block printed capital lettering;

(2) Signs shall be headed by the words listed below:

(A) "PROPOSED AIR QUALITY PERMIT" for new permits and permit amendments; or

(B) "PROPOSED RENEWAL OF AIR QUALITY PERMIT" for permit renewals.

(3) Signs shall include the words "APPLICATION NO." and the number of the permit application. More than one application number may be included on the signs if the respective public comment periods coincide;

(4) Signs shall include the words "for further information contact";

(5) Signs shall include the words "Texas Natural Resource Conservation Commission," and the address of the appropriate commission regional office;

(6) Signs shall include the telephone number of the appropriate commission office;

(b) The sign or signs must be in place by the date of publication of the Notice of Receipt of Application and Intent to Obtain Permit and must remain in place and legible throughout that public comment period. The applicant must provide a The applicant must provide a verification that the sign posting was conducted according to this section.

(c) Each sign placed at the site must be located within ten feet of every property line paralleling a public highway, street, or road. Signs must be visible from the street and spaced at not more than 1,500-foot intervals. A minimum of one sign, but no more than three signs shall be required along any property line paralleling a public highway, street, or road. The executive director may approve variations from these requirements if it is determined that alternative sign posting plans proposed by the applicant are more effective in providing notice to the public. This section's sign requirements do not apply to properties under the same ownership which are noncontiguous or separated by intervening public highway, street, or road, unless directly involved by the permit application.

(d) The executive director may approve variations from the requirements of this subsection if the applicant has demonstrated that it is not practical to comply with the specific requirements of this subsection and alternative sign posting plans proposed by the applicant are at least as effective in providing notice to the public. The approval from the executive director under this subsection must be received before posting signs for purposes of satisfying the requirements of this section.

(e) Alternative language sign posting is required whenever alternative language newspaper notice would be required under §39.603 of this title (relating to Newspaper Notice). The applicant shall post additional signs in each alternative language in which the bilingual education program is taught. The alternative language signs shall be posted adjacent to each English language sign required in this section. The alternative language sign posting requirements of this subsection shall be satisfied without regard to whether alternative language newspaper notice is waived under §39.703(d)(5) of this title (relating to Newspaper Notice). The alternative language signs shall meet all other requirements of this section.

§39.605. Notice to Affected Agencies.

In addition to the requirements in §39.405(f) of this title (relating to General Notice Provisions):

(1) when newspaper notices are published under this section, the applicant shall furnish a copy of the notices and affidavit to:

(A) the EPA regional administrator in Dallas;

(B) all local air pollution control agencies with jurisdiction in the county in which the construction is to occur; and

(C) the air pollution control agency of any nearby state in which air quality may be adversely affected by the emissions from the new or modified facility;

(2) when sign posting is required under this section, the applicant shall furnish a copy of sign posting verification, within 10 business days after the end of the comment period associated with the notice under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit), to:

(A) the chief clerk;

(B) the executive director; and

(C) those listed in paragraph (1)(A)-(C) of this section; and

(3) when alternative language waiver verification are required under this section, the applicant shall furnish a copy to those listed in paragraph (2)(A)-(C) of this section.

§39.606. Alternative Means of Notice for Voluntary Emission Reduction Permits.

(a) An applicant for a voluntary emission reduction permit, under Texas Health and Safety Code, §382.05191, for a facility that constitutes or is part of a small business stationary source, as defined in Texas Health and Safety Code, §382.0365(g)(2), may request that the executive director approve an alternative means from the notice methods required under this subchapter.

(b) The executive director may approve the request upon a determination that the alternative means will result in equal or better communication with the public, considering the following factors:

(1) the effectiveness of the method of notice in reaching potentially affected persons;

(2) the cost of the method of notice; and

(3) whether the method is consistent with federal requirements.

(c) The applicant may not use the alternative means of notice until the executive director gives written approval.

(d) Notice of hearing. The applicant shall publish notice of the hearing in a newspaper of general circulation in the municipality in which the facility is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility. The notice must be published not less than 30 days before the hearing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 3, 1999.

TRD-9905713
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter L. PUBLIC NOTICE OF INJECTION WELL AND OTHER SPECIFIC APPLICATIONS

30 TAC §39.651, §39.653

STATUTORY AUTHORITY

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial solid waste and hazardous municipal waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state

senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

§39.651. Application for Injection Well Permit.

(a) Applicability. This subchapter applies to applications for injection well permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication local review committee process. If an applicant decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant must submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. In addition, if the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice shall be mailed to the mayor of the municipality.

(c) Notice of Receipt of Application and Intent to Obtain Permit.

(1) On the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete, notice shall be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain a Permit). This notice must contain the text as required by §39.411(b)(1)-(9) and (12) of this title (relating to Text of Public Notice). Notice under §38.418 of this title will satisfy the notice of receipt of application required by §281.17(d) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness).

(3) After the executive director determines that the application is administratively complete, in addition to the requirements of §39.418 of this title, the following persons shall be notified:

(A) the School Land Board, if the application will affect lands dedicated to the permanent school fund. The notice shall be in the form required by Texas Water Code, §5.115(c); and

(B) the persons who own mineral rights within the cone of influence, as that term is defined by §331.2 of this title (relating to Definitions).

(4) The chief clerk or executive director shall also mail a copy of the application or a summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located and to the county judge and the health authority of the county in which the facility is located.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Application and Preliminary Decision) shall be published once under §39.405(f)(2) of this title (relating to General Notice Provisions) after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(c)(1)-(6) of this title. In addition to the requirements of §39.419 of this title, the following requirements apply:

(1) The applicant shall publish notice at least once in a newspaper of general circulation in each county which is adjacent or contiguous to each county in which the proposed facility is located. One notice may satisfy the requirements of §39.405(f)(2) of this title and of this subsection, if the newspaper meets the requirements of both rules.

(2) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice), to the persons who own mineral rights within the cone of influence, as that term is defined by §331.2 of this title, and to local governments located in the county of the facility. "Local governments" shall have the meaning provided for that term in Texas Water Code, Chapter 26.

(3) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title (relating to Application for Industrial or Hazardous Waste Facility Permit).

(4) The deadline for public comments on industrial solid waste applications shall be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(e) Notice of public meeting.

(1) If the applicant proposes a new hazardous waste facility, the executive director shall hold a public meeting in the county in which the facility is to be located to receive public comment concerning the application. If the applicant proposes a major amendment of an existing hazardous waste facility permit, the executive director shall hold a public meeting if a person affected files with the chief clerk a request for public meeting concerning the application before the deadline to file public comment or requests for reconsideration or hearing. A public meeting is not a contested case proceeding under the APA. A public meeting held as part of a

local review committee process under subsection (a) of this section meets the requirements of this subsection if public notice is provided in accordance with this subsection.

(2) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting under §39.405(f)(2) of this title. The published notice shall be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters).

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title.

(f) Notice of contested case hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Newspaper notice.

(A) The applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area which is adjacent or contiguous to each county wherein the proposed facility is located.

(B) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.405(f)(2) of this title. The published notice shall be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters). The text of the notice shall include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) For all applications concerning underground injection wells, the chief clerk shall mail notice to persons listed in §39.413 of this title, and to the persons who own mineral rights within the cone of influence, as that term is defined by §331.2 of this title.

(B) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address, not listed under subparagraph (A) of this paragraph, located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice shall be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the contested case hearing. Within 30 days after the date of mailing, the applicant must file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(4) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title).

(5) Notice under paragraphs (2)(A), (3), and (4) of this subsection shall be completed at least 30 days before the contested case hearing.

§39.653. Application for Production Area Authorization.

(a) Applicability. This section applies to an application for a production area authorization under Chapter 331 of this title (relating to Underground Injection Control).

(b) Notice of Receipt of Application and Intent to Obtain Permit. After the executive director determines that the application is administratively complete, notice shall be given as required by §39.418 of this title (relating to Notice of Receipt and Intent to Obtain Permit). This notice must contain the text as required by §39.411(b)(1)-(9) and (12) of this title (relating to Text of Public Notice).

(c) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) shall be published once under §39.405(f)(2) of this title (relating to General Notice Provisions) after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(c)(1)-(6) of this title. The notice shall specify the deadline to file with the chief clerk public comment, which is 30 days after mailing.

(d) Notice of contested case hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) The applicant shall publish notice at least once under §39.405(f)(2) of this title.

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice).

(4) Notice under paragraphs (2) and (3) this subsection shall be completed at least 30 days before the hearing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 3, 1999.

TRD-9905714
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter M. PUBLIC NOTICE FOR RADIOACTIVE MATERIAL LICENSES

30 TAC §§39.701-39.703, 39.705, 39.707, 39.709, 39.711, 39.713

STATUTORY AUTHORITY

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applica-

bility that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

§39.701. Applicability

Any license application under Chapter 336 of this title (relating to Radioactive Substance Rules) that is declared administratively complete on or after September 1, 1999 is subject to this subchapter and applicable requirements under subchapter H of this chapter (relating to Applicability and General Provisions).

§39.705. Mailed Notice for Radioactive Material Licenses.

When notice by mail is required under this subchapter, the chief clerk shall mail notice under only §39.413(2), (3), (8), (9), and (12) of this title (relating to Mailed Notice), and to each owner of property adjacent to the proposed site. For purposes of determining the ownership of property adjacent to the proposed site under this subchapter, the applicant shall provide the chief clerk with the names of the landowners from the county tax rolls that are available no more than 30 days before the date of newspaper publication of the notice.

§39.709. Notice of Contested Case Hearing on Application.

(a) The requirements of this section apply when an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(b) For applications under Chapter 336, Subchapter F of this title (relating to Alternative Methods of Disposal of Radioactive Material), notice shall be mailed no later than 30 days before the hearing. For applications under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near- Surface Land Disposal of Radioactive Waste), notice shall be mailed no later than 31 days before the hearing.

(c) When notice is required under this section, the text of the notice must include the applicable information specified in §39.411(b)(13) and (d) of this title (relating to Text of Public Notice).

§39.711. Proof and Certification of Notice.

(a) Notice shall be mailed by certified mail, return receipt requested. Proof of mailing to the proper address on the return receipt shall be accepted as conclusive evidence of the fact of the mailing.

(b) The applicant shall file proof of publication with the chief clerk within 30 days after publication. Filing an affidavit executed by the publisher accompanied by a printed copy of the notice as published creates a rebuttable presumption of compliance with the requirement to publish notice.

(c) The applicant shall file proof of posting with the chief clerk within 30 days of posting. Proof of posting may be made by the return affidavit of the sheriff or constable, or, by the affidavit of a credible person made on a copy of the posted notice showing the fact of the posting.

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 3, 1999.

TRD-9905715
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Chapter 50. ACTION ON APPLICATIONS AND OTHER AUTHORIZATIONS

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§50.2, 50.13, and 50.31, and new §§50.102, 50.113, 50.115, 50.117, 50.119, 50.131, 50.133, 50.135, 50.137, 50.139, 50.141, 50.143, and 50.145 concerning action on applications. Sections §50.2, 50.13, 50.31, 50.102, 50.113, 50.115, 50.117, 50.119, 50.131, 50.133, 50.139, 50.141, and 50.143 are adopted with changes to the proposed text as published in the July 16, 1999 issue of the *Texas Register* (24 TexReg 5342). Sections 50.135, 50.137, and 50.145 are adopted without changes and will not be republished. Concurrently with this rulemaking, the commission is also adopting the rules review of and readopting the existing rules in Chapter 50, concerning Action on Applications in accordance with the rule review requirements of the General Appropriations Act, Article IX, §167, 75th Legislature, 1997.

BACKGROUND

Corrections to the proposed rules for Chapter 50 were published in the Texas Register on August 20, 1999, (24 TexReg 6573). The corrections were primarily of typographical errors and incorrect cross-references. The corrections are in the adopted rule text.

The primary purpose of the adopted amendments and new sections is to implement House Bill (HB) 801, and portions of Senate Bill (SB) 7, SB 211, SB 766, SB 1308, and HB 1479, 76th Legislature (1999). HB 801 establishes new procedures for public participation in environmental permitting proceedings. It establishes procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing for certain actions. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary to satisfy air quality federal program authorization requirements. These changes are implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122, and 305; changes for all of these chapters are published in this edition of the *Texas Register.* Changes to Chapters 55 and 321 also proposed on July 16, 1999 are not adopted at this time, but will be subject to future consideration by the commission. This adoption also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

OVERVIEW OF HB 801 AND IMPLEMENTATION

HB 801, enacted by the 76th Legislature, revises the commission's procedures for public participation in environmental permitting procedures of the commission by adding new Texas Water Code, Chapter 5, Subchapter M; revising Texas Health and Safety Code, Solid Waste Disposal Act, §361.088; revising the Texas Clean Air Act (TCAA), Texas Health and Safety Code, §382.056; and revising Texas Government Code, §2003.047. The changes in law made by HB 801 only apply to applications declared administratively complete on or after September 1, 1999 and former law is continued in effect for applications declared administratively complete before September 1, 1999. Generally, the amendments made by this law are procedural in nature and are not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for hearing are provided.

More specifically, HB 801 encourages early public participation in the environmental permitting process and is intended to streamline the contested case hearing process. For example, it requires an applicant to publish newspaper notice of intent to obtain a permit and notice of the executive director's preliminary decision on the application. It also requires the applicant to place a copy of the application and the executive director's preliminary decision at a public place in the county and authorizes the executive director to hold public meetings. The executive director is also required to respond to relevant and material public comment received in response to the notices or at public meetings, and file the responses with the chief clerk. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary to satisfy federal program authorization requirements. Contested case hearing procedures are also revised. The scope of proceedings and discovery is limited by the new law. These changes are implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122, and 305. Most of these chapters also contain changes necessary for the consolidation of the procedural rules of the agency and to improve consistency among the permitting programs as well as changes to clarify and update agency rules and changes necessary to facilitate permit processing. Changes for all of these chapters are published in this edition of the *Texas Register.* Changes to Chapters 55 and 321 also proposed on July 16, 1999 are not adopted at this time, but will be subject to future consideration by the commission.

OVERVIEW OF SB 7 AND IMPLEMENTATION

SB 7, also enacted by the 76th Legislature, restructures electric utility service in Texas. Owners of grandfathered facilities that generate electric energy for compensation are required to apply for an electric generating facility permit from the commission by September 1, 2000. These permits are subject to notice under §382.056 of the Texas Health and Safety Code. SB 7 provides that initial issuance of these permits requires notice and comment proceedings. However, renewal of these permits requires notice, comment, and opportunity for contested case hearing.

The notice provisions for electric generating facility permits are implemented through changes to Chapters 39 and to a limited extent, to Chapter 50. Renewals are subject to Chapters 50 and 80 as amended. Additional implementation of the requirements of SB 7 is expected in future rulemaking by the commission.

OVERVIEW OF SB 766 AND IMPLEMENTATION

SB 766, enacted by the 76th Legislature, also amends TCAA, Chapter 382 by, among other things: (1) requiring the commission to establish procedures to authorize standard permits and permits by rule; (2) dividing the current category of exemptions from permitting into two categories: permits by rule for construction of facilities with insignificant air emissions, and exemptions from permitting for changes to certain existing facilities with insignificant air emissions; and (3) creating a voluntary emission reduction permit (VERP) for grandfathered facilities that must be applied for by September 1, 2001. Notice requirements for these changes are implemented in the changes to Chapter 39 because of the critical nature of the timing of the permit program. Public participation requirements applicable to VERPs under SB 766 are included in these chapters, specifically §§39.403(b)(11), 39.403(d), and 39.606. Additional implementation of the requirements of SB 766 is expected to occur in future rulemaking by the commission.

OVERVIEW OF SB 1308 AND IMPLEMENTATION

SB 1308 allows the executive director to approve water quality management plans (WQMP) and revisions, so long as an opportunity for public participation has been provided. This bill, which amends Texas Water Code, §26.037, also requires rules to provide for commission review of the executive director's decision on a plan approval or revision. This adoption incorporates these requirements through §§39.401, 39.403, and 39.553.

OVERVIEW OF HB 1479 AND IMPLEMENTATION

HB 1479 amended §26.028 of the Texas Water Code and allows the commission to approve an application to renew or amend a permit without the necessity of a public hearing if: (1) the applicant is not applying to increase significantly the quantity of waste authorized to be discharged or change materially the pattern or place of discharge; (2) the activities to be authorized will maintain or improve the quality of waste; (3) the applicant's compliance history raises no issues regarding the applicant's ability to comply with a material term of its permit; and (4) for Texas pollutant discharge elimination system (TPDES) permits, notice and opportunity to comment is provided in accordance with federal program requirements. This adoption implements these provisions.

OVERVIEW OF SB 211 AND IMPLEMENTATION

SB 211 amends §2001.142(c) of the Texas Government Code, relating to notice of decision in an administrative hearing, and provides that a party is presumed to have been notified on the third day after notice has been mailed. This requirement has been implemented and has guided rule drafting in Chapters 39, 50, and 80.

ORGANIZATION OF CHAPTER

HB 801 applies only to certain applications that are administratively complete on or after September 1, 1999. Thus, in the adopted rules in Chapter 50, subchapters A-C are amended to apply only to applications that were administratively complete *before* September 1, 1999. Subchapter D is not used here; it is reserved for future rulemaking. At the same time, new Subchapters E-G apply only to applications that are administratively complete *on or after* September 1, 1999. Generally, new Subchapters E-G are duplicated versions of the existing rules in Subchapters A-C, modified to incorporate substantive changes either related to HB 801 implementation, implementation of other bills, or other changes adopted under this chapter. While HB 801 continues former law in effect for applications administratively complete before September 1, 1999, the commission recognizes that it may be a year or more before all of those applications have been acted on, especially those that go to contested case hearing. Therefore, the commission has chosen this parallel subchapter structure because the commission believes it is useful for the public to have easy access to rules for older applications as well as for new ones. Once all applications that were administratively complete before September 1, 1999, have been processed, the commission can delete the subchapters that apply to those applications.

In this adoption publication, only the applicability sections of Subchapters A-C are reproduced. For Subchapters E-G, the entire new subchapters are printed. Many of the sections of Subchapters E-G are the same or very similar to sections in Subchapters A-C. Where possible, section numbers are parallel; for example, §50.13 (Action on Applications) is similar to §50.113 (Applicability and Action on Applications). Nonetheless, since Subchapters E-G are entirely new, it may be difficult to quickly see the differences between those new and existing subchapters. In this preamble, the agency has tried to point out any important differences. Additionally, to facilitate review, the agency will make copies of the rule available, which will show the differences between old and new subchapters. Copies may be obtained by calling Casey Vise, in the Office of Environmental Policy, Analysis, and Assessment, at (512) 239-1932 and on the commission's website at: http://www.tnrcc.state.tx.us/oprd/forum.html#hb801.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the 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 the definition of a "major environmental rule" as defined in the Texas Government Code. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

"Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and establishes procedures associated with actions on permit applications, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the rule is a major environmental rule, a draft regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law. This adoption does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules

of practice; and Texas Water Code, Chapter 5, Subchapter M, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with Texas Water Code, §5.551, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program. This adoption does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., Texas Water Code, Chapter 5, Subchapter M, and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

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 primary purpose of the amendments and new sections is to revise the commission's rules to establish procedures for public participation in certain permitting proceedings as required by HB 801, and other legislation. The adoption relates to procedures for providing public notice, providing opportunity for public comment, and providing opportunity for requesting public hearing. The rule would also consolidate already existing notice procedures for some of the air quality permitting programs; correct, clarify, and/or update the air quality permit amendment process, requirements relating to sign posting for concrete batch plants, and clarification of requirements relating to bilingual education notices; and consolidate commission procedural rules. The adopted rules will substantially advance these stated purposes by providing specific provisions on the aforementioned matters. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the adopted language consists of amendments and new sections relating to the commission's procedural rules.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The adopted actions concern only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (Title 31 Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40, et seq.).

HEARING AND COMMENTERS

A public hearing on the proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. Oral comments were provided by an individual and Locke, Liddell and Sapp, L.L.P. (Locke Liddell). The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999. Written comments were submitted by Baker & Botts, L.L.P. (Baker & Botts), on behalf of the Texas Industry Project; Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll), on behalf of the Texas Chemical Council, Texas Association of Business and Chambers of Commerce, and Texas Oil and Gas Association; Brown, Potts & Reilly, L.L.P. (Brown, Potts), on behalf of Merco Joint Venture, L.L.C.; City Public Service (CPS-San Antonio) of San Antonio, Texas; Dow Chemical Company (Dow); Eastman Chemical Company, Texas Eastman Division (Eastman); Exxon Chemical Company's Baytown Chemical Plant, Baytown Olefins Plant, and Mont Belvieu Plastics Plant (Exxon Chemical); Exxon Company, U.S.A., Baytown Refinery (Exxon Company); Henry, Lowerre, Johnson, Hess & Frederick, Attorneys at Law (Henry, Lowerre), on behalf of Blackburn and Carter, Clean Water Action, Consumers Union, Environmental Defense Fund, Henry, Lowerre, Johnson & Frederick, National Wildlife Federation, Public Citizen, Sierra Club, Lone Star Chapter, Texas Center for Policy Studies, and Texas Committee on Natural Resources; Jackson Walker L.L.P. (Jackson Walker); Jenkens & Gilchrist, P.C. (Jenkens & Gilchrist); Public Interest Counsel, Texas Natural Resource Conservation Commission (PIC); Roller and Allensworth, L.L.P. (Roller and Allensworth), on behalf of the Greenbelt Municipal and Industrial Water Authority; Small Business Compliance Advisory Panel (SBCAP); Texas Association of Business & Chambers of Commerce (TABCC); Texas Cattle Feeders Association (TCFA); Texas Cotton Ginners' Association (TGCA); Texas Instruments Incorporated (TI); Thompson & Knight, L.L.P. (Thompson & Knight); and the United States Environmental Protection Agency Region 6 Office (EPA).

ANALYSIS OF COMMENTS AND ADOPTED RULES

Public Hearing

The commission held a public hearing on this rulemaking on August 10, 1999. Two people commented, one individual and one attorney from the law firm Locke Liddell & Sapp (LLS). The individual's comments related to notice and are addressed in the preamble to Chapter 39. LLS's comments related to contested case hearings, and are addressed specifically in the analysis of §50.115 and §80.152.

General Comments on Chapter 50

Brown McCarroll observed that the commission has undertaken a quadrennial review of the commission's procedural rules in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997, while simultaneously adopting new rules to implement HB 801. The commenter stated that the quadrennial review should not be a bar to future consideration of necessary changes to the new rules following adoption. The commenter recommended that the commission clearly indicate that the rules will be revisited after their implementation to address any problems resulting from the "fast track" time line for this rulemaking.

The commission agrees with the commenter that the new procedural rules being adopted should be subject to review to correct any deficiencies which may become apparent following adoption. The quadrennial review applied only to the existing Chapters 39, 50, and 80 of the commission's rules. The fact that the existing procedural rules have undergone the statutorily required quadrennial review, and the commission has determined that those rules continue to be necessary, will not prevent the commission from revisiting the procedural rules following implementation of HB 801.

Chapter 50 Generally

In this preamble, the reasons for adopting each section are discussed individually, along with responses to relevant com-

ments. Certain changes have been made throughout the rule. They include correcting references to chapter and subchapter, renumbering where subsections have been added or deleted, and revising for readability. Additionally, each applicability section has been revised to mention only "application" rather than "permit application" or "application to issue, amend, modify, renew, correct, endorse, or transfer a permit, license, registration, or other authorization or approval." This change is not meant to make a substantive change to the rule. Rather, it is made to enhance readability. This is not a substantive change because the term "application," which is defined in Chapter 3 of the TNRCC rules, is broad enough to cover all types of actions on applications. Finally, numerous other grammatical and organizational changes were made to enhance readability.

Section 50.2

Section 50.2 (Applicability) states that Subchapters A-C apply to any application that is declared administratively complete before September 1, 1999, and that the similar Subchapters E-G apply to any application that is declared administratively complete on or after September 1, 1999. Section 50.2(c) clarifies that this chapter does not apply to federal operating permits, which continue to be regulated under the provisions of Chapter 122 (Federal Operating Permits). Section 50.2 was amended from the proposed version to reflect that only Subchapters A-C, and not the whole chapter, apply to applications that are declared administratively complete before September 1, 1999. Proposed §50.2(a) was also amended to reflect that Subchapters E-G apply to applications that are administratively complete on or after September 1, 1999. In one other change, which is made consistently throughout the applicability sections of Chapter 50, the phrase "application to issue, amend, modify, renew, correct, endorse, or transfer a permit, license, registration, or other authorization or approval" was changed to read simply "application." This change is not meant to make a substantive change to the rule. Rather, it is made to enhance readability. This is not a substantive change because the term "application," which is defined in Chapter 3 of the TNRCC rules, is broad enough to cover all types of actions on applications. The adopted subsection is revised from the proposal to enhance readability.

Section 50.13

Section 50.13 (Action on Application) reiterates that Subchapter B applies to any application that is declared administratively complete before September 1, 1999, and that Subchapter F applies to any application that is declared administratively complete on or after September 1, 1999. The term "application" is now used, rather than "permit application" because the term "application," which is defined in Chapter 3 of the TNRCC rules, is broad enough to cover all types of applications. This change is not meant to make a substantive change to the rule. Rather, it is made to enhance readability. Cross-references were also corrected.

Section 50.31(b)

§50.31(b) (Purpose and Applicability) provides that Subchapter C applies to any application for a permit that is declared administratively complete before September 1, 1999, and that Subchapter G applies to any application that is declared administratively complete on or after September 1, 1999. This section was revised for readability. Further, as explained above, the term "application" is used rather than a complete list of actions on applications. This is not a substantive change because the term "application," which is defined in Chapter 3 of the TNRCC rules, is broad enough to cover all types of actions on applications. No substantive changes were made to this section since proposal.

Section 50.102

Section 50.102 (Applicability), which parallels §50.2, specifies that applications declared administratively complete on or after September 1, 1999 are subject to the requirements of Subchapters E-G; while those declared administratively complete before September 1, 1999 are subject to Subchapters A-C. Proposed subsection (b) was deleted because the term "application" is now used throughout this chapter rather than a complete list of types of applications and actions on applications. This is not a substantive change because the term "application," which is defined in Chapter 3 of the TNRCC rules, is broad enough to cover all types of actions on applications. New subsection (b) (proposed (c)) specifies that only Subchapters E-G apply to water quality management plan updates. Adopted 50.102(c) (proposed (d)) lists the sections of this chapter that apply to voluntary emission reduction permits or electric generating facility permits.

Adopted §50.102(e) provides that Subchapters E-G do not apply to air quality applications for federal operating permits, which continue to be regulated under Chapter 122 of this title (Federal Operating Permits). Voluntary emission reduction permits under §382.0519 of the Texas Health and Safety Code, and emission reduction permits for electric generating facilities under §39.264 of the Texas Utilities Code, are only subject to §§50.117, 50.131, 50.133, 50.135, and 50.145 of this chapter. This section has been revised for readability; several sections have been renumbered, and references to chapters and subchapters have been corrected.

Section 50.102. Generally.

Brown, Potts suggested that TNRCC exclude Chapter 312 registrations and any other similar agency authorizations from coverage under Chapter 50 because Chapter 50 provides for requests for reconsideration, and delegation of authority, to the executive director in certain circumstances. Chapter 312 already provides for motions for reconsideration for registrations. The commenter indicated that the inclusion of Chapter 312 registrations under Chapter 50 is duplicative. Further, Brown, Potts noted that the Chapter 312 registration process has been reviewed by the legislature and approved by the courts. They suggested that Chapter 312 notification/registrations should not be subject to the new Chapter 50 requirements.

The commission agrees that Chapter 312 provides the applicable procedures for registrations, including notice and comment procedures and procedures for challenging the executive director's action. The changes to Chapter 50 are not intended to create new procedures for Chapter 312 registrations or any other registrations. The proposed changes to these rules are not generally intended to require new procedures for actions that do not require notice and opportunity for hearing. Chapter 5, Subchapter M, Texas Water Code, added by HB 801, expressly reflects this and the commission does not intend to expand or retract current requirements for such actions. Thus, the request for reconsideration process does not apply to registrations. To clarify these concepts in the rules, the commission added §50.113(b), as follows: "This chapter does not create a right to a contested case hearing where the opportunity for a contested case hearing does not exist under other law."

Section 50.102(a)

Baker & Botts noted that the phrase "applications that are" in the section should be "application that is." Baker & Botts and Brown McCarroll also suggested corrections to the references to "chapter" and "subchapter."

The commission recognizes that the construction in this section was not parallel. The commission has changed the second sentence to the plural form to make the sentences parallel. The commission has reviewed references to "chapters" and "subchapters" throughout the rulemaking package to assure consistency and correct usage.

Section 50.102(c)(3)

Brown McCarroll suggested that §50.102(d)(3) (§50.102(c)(3)) would subject initial applications for voluntary emissions reduction permits to the requirements of §50.133, concerning Executive Director action on applications for water quality management plan updates. They recommended the agency delete that requirement.

The commission has made no changes in response to this comment. The commenter appears to have misread the title for §50.102(c)(3) (Executive Director Action on Application or WQMP Updates) by substituting "for" where it should correctly be read as "or."

Section 50.111

Brown McCarroll suggested adding a new §50.111: "Any permit application that is declared administratively complete on or after September 1, 1999 is subject to this subchapter."

The commission agrees that an applicability section would be useful, and has added one to §50.113(a). The commission is not adding a new section, as suggested by the commenter, because Texas Register rules do not allow adding a new section at the time of adoption.

Section 50.113

New §50.113 (Applicability and Action on Application) generally parallels current §50.13 (Action on Application), but also introduces the request for reconsideration provided by HB 801. As discussed further in this preamble, the adopted rule adds an applicability section and two subsections regarding when the opportunity for contested case hearing is not provided by other law (discussed further below). The rule has been renumbered accordingly. Additionally, the list of types of applications that the commission can act on without holding a hearing, in adopted §50.113(d), has been amended to add applications for initial issuance of air voluntary emission reduction or electric generating facility permits.

Requests for reconsideration are considered on the same schedule as hearing requests, so in most sections where a hearing request is mentioned in current rules, provision for requests for reconsideration is added. Under §50.113 (Action by the Commission) the commission may act on an application without holding a contested case hearing: (1) when no timely hearing requests have been received; (2) when all timely filed requests for reconsideration or contested case hearing have been withdrawn or denied; or (3) when an application has been remanded because of a settlement. Additionally, adopted §50.113(c)(4) departs from current §50.13 by adding the HB 801 provisions that allow the commission to act on certain applications without a contested case hearing only if the commission finds that: (1) there are no issues involving disputed questions of fact; (2) that were raised during the comment period; and (3) that are relevant and material to the decision on the application.

Section 50.113(c)

TI and Brown, Potts suggested that listing specific types of applications on which the commission can act without a hearing implies that those are the only applications that the TNRCC can grant without a contested case hearing. They suggested including a §50.113(c) that expressly states that Chapter 50 is a procedural chapter only and does not create a right to a contested case hearing.

The commission agrees with this clarification because this is mainly a procedural rulemaking and does not create new rights to hearing. HB 801 expressly states that it does not expand or restrict the types of commission actions for which public notice an opportunity for public comment and an opportunity for public hearing are provided. Therefore, the commission is adding §50.113(b) which reads as follows: "This chapter does not create a right to a contested case hearing where the opportunity for a contested case hearing does not exist under other law." In addition, the commission adds §50.113(a) to clarify the applicability of this subchapter and current §50.113(a) was renumbered as §50.113(c).

Seciton 50.113(c)(4)

Thompson Knight, TI, Baker & Botts, and Brown McCarroll raised comments relating to §50.113(c)(4) (proposed §50.113(a)(4)), regarding whether the commission should make findings on issues not referred to the State Office of Administrative Hearings (SOAH).

The commission responds that findings of fact and conclusions of law are appropriate only where an evidentiary hearing has been held. Since the commission will not take evidence on issues not referred to SOAH, findings of fact are not appropriate. Moreover, HB 801 does not provide for such a requirement. Therefore, the commission has made not changes in response to these comments.

Section 50.113(d)

Section 50.113(d) lists types of applications on which the commission may act without a contested case hearing. Adopted §50.113(d)(1) deletes the proposed sentence "This does not include applications that involve a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations." This sentence was deleted because the statutory requirement, from §382.056(o), Texas Health and Safety Code, does not prohibit the commission from acting without a hearing in those circumstances. Rather, it allows the commission to hold a hearing where otherwise the opportunity for hearing is not allowed.

Section 50.113(d)(2) was added at adoption for clarification based on the statutory requirements of SB 766 and SB7. Adopted §50.113(d)(3) implements Texas Health and Safety Code, §361.088, as amended by Section 4 of HB 801, allowing the commission to act without a contested case hearing on hazardous waste permit renewals under §305.631(a)(8). Similarly, implementing HB 1479, §50.113(d)(4) allows the commission to

act without a hearing on wastewater discharge permit renewals or amendments under §26.028(d) of the Texas Water Code. While Texas Water Code, §26.028 has long allowed the commission to act on certain permit amendments without offering the opportunity for a hearing, the amendment to §26.028 in HB 1479 granted that option to renewal applications. This section was renumbered from the proposal.

Section 50.113(d)(5)

Baker & Botts and TI recommended that, as with §50.133(a)(5)(E), the rules should expressly allow the commission to act on an application where a contested case hearing request has been filed but no opportunity for hearing is provided by law. TI further pointed out that there are several other types of applications that the commission may act on without holding a contested case hearing. They also provided a list of various types of applications.

The commission agrees and has added §50.113(d)(5), which parallels §50.133(a)(5)(E), and allows the commission to act on an application where a hearing request has been filed but no opportunity for hearing is provided by law. This reflects current commission practice. Further, the changes to Chapter 50 are not intended to expand or contract those types of applications that receive notice or contested case hearing. Therefore, the rule now explicitly states that the commission may act on applications without a hearing where a contested case hearing request has been filed but no opportunity for a hearing is provided by law.

Section 50.113(d)

Brown McCarroll pointed out that voluntary emission reduction permits under Texas Health and Safety Code, §382.0519 are not subject to contested case hearings. They recommended that the commission add a new subsection (4) adding these air quality applications to the list of those which may be issued without a contested case hearing.

The commission agrees that, as specified in SB 766, Section 5, adding Texas Health and Safety Code, §382.05191, initial applications for voluntary emission reduction permits are not subject to the contested case hearing process. The commission also recognizes that under SB 7 initial applications for electric generating facility permits are not subject to the contested case hearing process. Section 50.113(d)(2) has been added to clarify that the commission may act on these applications without granting a contested case hearing.

Sections 50.113(c)(4) and 50.115(c)(4)

Henry, Lowerre suggested adding a new subsection (D) to §50.113(c)(4) (proposed §50.113(b)(4)) and a new subsection (4) to §50.115(c) (proposed §50.115(b)) to read: "(D) involve a disputed issue of law." The commenter goes on to suggest that the commission may want the administrative law judge (ALJ) to: 1) develop a factual record on a matter in dispute or on the implications for future decisions, or 2) provide a recommendation on how the law could be interpreted. The commenter also stated that a request for hearing based on a legal issue is a request for a contested case hearing according to the Texas Administrative Procedures Act (APA) and should be treated as such. The commission itself can hold the hearing to prepare the findings and conclusions.

The commission declines to adopt this recommendation. If there are disputed issues of fact that are relevant and material, the commission will refer them to SOAH for a hearing. If there is a dispute over a pure issue of law, the commission has the authority to decide that issue themselves, without the assistance of a SOAH judge. The commission notes that a hearing request that raises an issue of law is a hearing request under the APA, and the commission will decide whether a contested case hearing is appropriate in the specific case.

Sections 50.113(c) and 50.115(c)

Henry, Lowerre suggested adding a new subsection (E) to 50.113(c)(4) (proposed §50.113(a)(4)) and a new subsection (4) to §50.115(c) (proposed §50.115(b)) to read: "the public interest does not warrant the holding of a hearing." The commenter referred to §5.556 (f)of Texas Water Code (HB 801) and pointed out that Chapter 27 (and perhaps other law) also allows the commission to consider the public interest when issuing a permit for an injection well.

The commission declines to adopt this recommendation. HB 801, amending Texas Water Code, §5.556(f), allows the commission to hold a hearing if the public interest warrants doing so, even where the requirements for relevant and material issues raised during the comment period are not met. This provision is an exception to the limitation on which applications the commission may send to hearing. It does not require that the commission decide in each case whether the public interest warrants holding a hearing. HB 801 and these sections state explicitly the criteria that the commission must consider before acting on an application or refers a matter to SOAH. The commission has discretion to decide when to exercise it's authority to grant a hearing in the public interest even when no qualifying hearing request has been submitted.

Seciton 50.115. Scope of Contested Case Hearings

Adopted §50.115 (Scope of Contested Case Hearing) parallels current §50.15, but is substantially changed to implement the requirements of HB 801. Section 50.115 requires the commission to specify the number and scope of issues that may be referred to hearing. Most of proposed subsection (e) was moved to subsection (a), because it was about applicability, and appropriately comes first. The remaining subsections have been renumbered accordingly. In §50.115(b) the word "it" was changed to "the commission."

Implementing Texas Water Code, §5.556, added by HB 801, §50.115(c) provides that the commission may refer an issue for contested case hearing if the commission determines that the issue involves a disputed question of fact which is relevant and material to a decision on the application and which was raised during the public comment period. Again implementing HB 801, Section 6, amending Texas Government Code, §2003.047, §50.115(d) requires the commission to estimate the maximum expected duration of each hearing. Further, the rule specifies that the maximum duration, even for the most complex hearings, should not exceed one year from the preliminary hearing until the judge issues the proposal for decision. Less complex hearings should take less time.

Section 50.115(e) mirrors the language in current §50.15, and §50.115(e)(2) incorporates existing statutory requirements from Texas Health and Safety Code, §382.055. Finally, adopted subsection (f) applies to those applications that are not under Chapters 26 and 27 of the Texas Water Code or Chapters 361 or 382 of the Texas Health and Safety Code (HB 801, amending Texas Water Code, Chapter 5, Subchapter M and Texas Health

and Safety Code, §382.056). Section 50.115(f) implements Texas Government Code, §2003.047, as amended by Section 6 of HB 801 and requires the commission to submit a list of disputed issues. The rule proposes, for those programs that are not under Chapters 26 and 27 of the Texas Water Code or Chapters 361 or 382–such as water rights or water utilities– that the list of disputed issues shall be those issues defined by the law governing those applications. It does not appear to be the intent of HB 801 to include those applications in all of the procedures required by HB 801.

Section 50.115 - title of subchapter

Brown McCarroll suggested that §50.115 should be renamed to "Scope of Contested Case Hearing" because it would be more informative.

The commission agrees that this change would add clarity and has retitled the section and changed the appropriate language in §50.115(e) to read "scope of contested case hearing," instead of "proceeding." Further, for clarity, the words "contested case" were inserted in several places before the word "hearing" in §50.115.

Section 50.115(c)(1)

LLS suggested that only disputed issues of fact should be sent to SOAH and recommended that the commission define "disputed issue of fact."

The commission agrees that HB 801 requires that the commission should only send an issue to hearing when it involves a disputed question of fact (unless the commission finds it would be in the public interest to hold a hearing anyway). The commission, however, declines to define the phrase "disputed issue of fact" at this time until further consideration of the issues associated with the amendments to Chapter 55 implementing HB 801.

Section 50.115(d)

Henry, Lowerre suggested that the one year "default" time for hearings in §50.115 is an arbitrary guideline that could do harm to applicants and protestants. The commenter went on to recommend the TNRCC develop data on its hearings to give the commission guidance on this issue.

HB 801, amending Texas Government Code, §2003.047, requires the commission to limit the length of hearings by setting the maximum expected duration. Historical data on the length of numerous hearings show that most hearings last less than one year. (See letter dated June 18, 1999, from Bill Newchurch, Director Natural Resource Division, SOAH, to Duncan Norton, General Counsel, TNRCC). Of those that exceed one year, a number were stayed at the applicant's request. The commission believes that with the additional efficiency added by HB 801–limiting the issues and setting a docket control order appropriate to the maximum expected duration of the hearing–there will no longer be a reason to have even the most complex hearings take more than one year. Additionally, having the one-year limit in the rule will give the public fair notice of the commission's intention to keep hearings to a reasonable length. Finally, the judge has the power to extend the hearing, under §80.4(c)(17) if a party would be deprived of due process or another constitutional right.

Section 50.115(d)

For §50.115(d), (proposed §50.115(c)) Brown McCarroll commented that most contested case hearings should require no more than *six months* rather than one year. They go on to suggest the commission should set the time limit accordingly.

The commission does not agree with the suggested change and declines to adopt a six-month limit for contested case hearings. While most hearings take less than one year, there may be cases where the number and complexity of issues require longer than six months. The commission should retain the flexibility to set an appropriate maximum expected duration for contested case hearings, which may be more or less than six months. The adopted subsection is revised from the proposal for readability.

Section 50.115(e)

Baker & Botts and TI suggested that the commission should limit issues in permit amendment actions to only those portions of a permit for which changes are requested and should limit the scope of a proceeding to the portions of a permit for which the applicant requests action that satisfy the threshold established in §50.115(b) (i.e., relevant and material disputed issue of fact raised during the comment period).

The commission declines to impose this limitation because it is not required by HB 801. The commission does not believe it appropriate to limit commission authority in this way since it may be important to consider other factors, such as compliance history, in determining the scope of a proceeding. Nonetheless, §50.115(e) gives the commission the discretion to limit the scope of the proceeding if it deems appropriate.

Section 50.115(f)

Jenkens Gilchrist suggested that the language of §50.115(e) (now §50.115(f)) is inconsistent with existing commission authority to limit issues referred to SOAH. In current commission rules, at 30 TAC §80.5(b), the commission is authorized to limit the issues or areas to be addressed by an administrative law judge at SOAH. The commenter suggested that fact that 801 *requires* the commission to limit issues does not change the commission's preexisting authority.

The commission agrees that they may, by order, limit the issues in cases on applications to which Texas Water Code, §5.556 and Texas Health and Safety Code, §382.056 (Sections 2 and 5 of HB 801) do not apply. Adopting language slightly different than the suggested language, §50.115(f) is modified to read, "...For hearings on these applications, the disputed issues are deemed to be those defined by law governing these applications, unless the commission orders otherwise under §80.5(b)..."

Section 50.117. Commission Actions

Section 50.117(a)-(e) mirror the current §50.17 (Commission Actions). Additionally, the commission adopts §50.117(f) (Commission Actions) to provide that the commission shall consider all timely public comments on an application and shall either adopt the executive director's response to comments or prepare its own response. This is done to comply with Texas Water Code, §5.555, and Texas Health and Safety Code, §382.056(p), as amended by HB 801 and with the requirements of federally authorized programs.

The commission has changed §50.117(f) from the proposal to clarify that the commission may adopt all or part of the executive director's response to comments. The adopted section also clarifies the reference to the commission's response to com-

ments. To reflect the necessity of having a specific deadline for comments, to ensure that all timely comments are properly responded to, and to ensure separation of the public comment process and the contested case hearing process, adopted §50.117(f) also adds the word "timely" in referring to the public comment that the commission must consider. This is also important because it reflects the intent of HB 801 to encourage early public participation. However, this change does not prohibit the commission from considering other public comment.

The commission has added new §50.117(g) to reflect the commission's understanding of the intent of HB 801 regarding contested case hearings on limited issues. This section reflects that when limited issues are sent to contested case hearing, after a proposal for decision is issued, the commission shall issue a single decision that encompasses the decision on the issues considered at SOAH, as well as the response to comments.

Section 50.117 (f)

Baker and Botts commented that requiring the commission to adopt the executive director's response to public comments or prepare its own response is overly burdensome and not required by HB 801. The commenter also indicated that this section limits the commission's flexibility in making permitting decisions.

The commission does not agree to the suggested change to §50.117. The commission disagrees that adopting or modifying the executive director's response to comments limits the commission's decision making flexibility. Further, when a member of the public makes a timely comment to the commission, it is incumbent upon the commission to respond. Additionally, under the TPDES, Resource Conservation and Recovery Act (RCRA), and underground injection control (UIC) permitting programs, the commission, as the permit issuing authority, must respond to all timely public comment.

Section 50.117(f) and (g)

Henry, Lowerre provided recommended language to revise §50.117(f) concerning the separation of the comments and response to comments from the contested case hearing process.

The commission believes that most of the issues raised in the suggested language are already covered elsewhere in the rules. Further, the commission has added §50.117(g), which states that "After the conclusion of the contested case hearing, if the commission issues a final decision on an application rather than remanding, continuing, or referring the case back to SOAH, the commission shall issue a single decision on the application." The commission made no changes to §50.117(f) in response to the comment.

Section 50.119

Section 50.119 (Notice of Commission Action, Motion for Rehearing) substantially parallels current § 50.19, but §50.119(a) adds persons who submit timely requests for reconsideration to the list of people who get notice of a commission action. The phrase "otherwise transmit" has been added to §50.119(a), to reflect the language in Texas Water Code, §5.555(b), added by Section 2, HB 801. Section 50.119(b) provides that a person is presumed to have been notified of the commission's decision three days after the decision is mailed by first Class mail, in conformity with Texas Government Code, §2001.42(c), which was enacted by SB 211.

Section 50.119(a)

Henry, Lowerre suggested revising §50.119(a) to provide for the mailing of the order, the posting of the order on the Internet or other publication of the order (with the response to comments). They suggest that it is not sufficient to send just a notice of the action. The commenter noted that Texas and federal law require the commission to respond to comments, including providing a copy of the response to the person commenting by mail or by publishing the response in a location where the person can get easy access to the response. They recommended that TNRCC make it clear that it will not require a request for a copy of the order or response to comments under the Texas Public Information Act, with the resulting costs of research and copying.

The commission agrees with this comment and has modified §50.119 to require the chief clerk to mail or transmit a copy of the Commission's Order along with the notice of the commission's decision on an application. This is current agency practice. It is reasonable, however, that the chief clerk send only one copy to the spokesperson of an organization or group of petitioners on behalf of the members. Further, if the commission adopts a response to comments that differs substantially from that of the executive director, then the chief clerk will also send the commission's response to public comments with the notice and order.

Section 50.119(a)

Brown McCarroll suggested amending §50.119(a) to require the chief clerk to mail notices on the same date and to include the date of mailing in the notice. The commenter believes this addition is crucial because the date of mailing (plus three days) is used to determine the 20-day period in which a motion for rehearing may be filed. The commenter noted that the mailing must occur on the same date, or else each recipient would have a different time line for filing a motion for rehearing.

The commission recognizes the dilemma with regard to timing. However, the commission believes that the additional three days added by SB 211 will alleviate this problem. Additionally, the commission does not believe it is necessary for the rule to require that the date of mailing appears in the notice. As a matter of practice, the chief clerk's transmittal letter is always dated. Therefore, the commission is not making the suggested changes.

Section 50.119(a)

Brown McCarroll suggested amending §50.119(a) to require the chief clerk to include the date of mailing in the notice. This addition is crucial because the date of mailing is used to determine the 20-day period in which a motion for rehearing may be filed.

The commission declines to adopt this recommendation. The date of the mailing in the notice is unnecessary because the postmark date indicates when mailing occurred and accurately reflects the day of mailing. The proposed language reflects the precise language of the statute and there is no need to make this section more explicit. Further, as a matter of practice, the chief clerk's transmittal letter is always dated. Therefore, the commission is not making the suggested changes.

Subchapter G

Adopted Subchapter G of Chapter 50 parallels current Subchapter C (Action by the Executive Director). Baker & Botts and Brown McCarroll pointed out that the title of Subchapter G

was inadvertently labeled "Action by the Executive Order" instead of "Action by the Executive Director."

The commission agrees that there was a typographical error and has changed the title of Subchapter G to read "Action by the Executive Director" rather than "Action by the Executive Order."

Section 50.131

Section 50.131 (Purpose and Applicability) parallels current §50.31, except in three respects. First, § 50.131(b) delegates to the executive director the authority to certify WQMP updates, implementing Texas Water Code, §26.037(a), amended by Section 2, SB 1308. Second, §50.131(c) does not contain the statement that this subchapter does not apply to air federal operating permits under Chapter 122. This was deleted because §50.2 and §50.102 are adopted to contain a statement that none of Chapter 50, except §50.17 and §50.117, apply to federal operating permits. Third, the reference to §50.39 in current §50.31(d) is changed in new §50.139 to the parallel cite to §50.131(d). SB 7 and SB 766 are effective September 1, 1999 and therefore the VERPs and electric generating facility (EGF) permits are listed in §50.102(c), to show the limited situations when the commission and executive director can act.

Proposed subsection 50.131(c)(5)–which provides that emergency or temporary orders and temporary authorizations are not subject to this subchapter–was deleted at adoption because they are already excluded from the entire chapter, in §50.102(e). The rule was renumbered accordingly.

Section 50.131(a) and (b)

Brown, Potts suggested that §50.131(a) and (b) may create conflicts between TNRCC regulations, since it could be inferred that if a particular application is not mentioned in either subsections 50.131(b) or (c), then the executive director does not have the delegated authority to act. They suggested that TNRCC should add the following language: "This subchapter does not affect the executive director's authority to grant or deny an application where the authority is delegated in other laws or regulations."

The commission accepts the suggestion. This rulemaking generally, and Texas Water Code, §5.551(a), added by Section 2, HB 801, specifically do not expand or contract the types of applications for which notice and the opportunity for contested case hearing are available (except where specifically listed). Nor is this rulemaking meant to change those applications for which the executive director has delegated authority to act. Therefore, the commission has added the suggested language at the end of §50.131(a).

Section 50.131(b)

TI suggested that the commission delegate to the executive director authority to act on petitions for single property designations filed under §101.2(b) of the TNRCC's rules.

The commission declines to adopt the recommendation. As noted above, delegation of commission authority is beyond the scope of this rulemaking package.

Section 50.131(b)

Brown McCarroll suggested adding language to the applicability section of §50.131(b).

The commission agrees that this will make the rules easier to follow and has revised §50.131 (b) to read: "This subchapter applies to applications that are declared administratively complete on or after September 1, 1999 and to certifications of Water Quality Management Plan (WQMP) updates." In addition to adding the suggested language, we have edited this section to remove the references to "renew, modify, amend, correct, endorse or transfer" permits. The definitions of "permit" and "application" in Chapter 3 of the TNRCC rules are broad enough to encompass all of these types of permit actions. The commission believes that this change makes this rule easier to use, and makes the language consistent with many other applicability sections.

Section 50.133

Section 50.133 (Executive Director Action on Application and WQMP Update) parallels current §50.33 and lists the circumstances under which the executive director may act on an application. New §50.133 differs slightly from existing §50.33 because it implements certain provisions of HB 801 and SB 1308 (amending Texas Water Code, §26.037(a)). Adopted §50.133(a)(1) adds the requirement that the executive director must consider public comment and prepare a response before acting on an application. New language is added to adopted §50.133(a)(5)(D) and (E) and §50.133(a)(6), to provide that an application is also considered uncontested if: (1) it has been remanded because of a settlement, or a contested case hearing request has been filed but no opportunity for hearing is provided by law, or (2) it is an application for renewal, modification or amendment of an air permit that would not result in an increase in emissions or the emission of a new contaminant.

Section 50.133(b) and (c) mirror current §50.33(b) and (c), which describe how persons who submit timely comments will be notified of the executive director's action and the opportunity to file a motion for reconsideration.

In §50.133(a)(6), the word "application" appearing after the word "renewal" in the proposed rule was a typographical error and has been deleted at adoption. Section 50.133(b) was also amended to clarify that the chief clerk mails the notice of executive director action. Section 50.133(d)(2) was corrected for clarity and grammar: the word "period" was added immediately after the phrase "end of the comment" and the phrase "the executive director's" was inserted before the word "staff."

Section 50.133

Henry, Lowerre suggested that the commission require public notices to state when there is no opportunity for a hearing.

The commission declines to make any change in response to this comment. The purpose of notices is to inform the public of the action and of their rights and opportunities to participate in the permitting process. The purpose is not to inform the public of nonexistent opportunities. Because it would likely be more confusing than helpful, the commission has made not changes in response to this comment.

Section 50.133(a)

Henry, Lowerre suggested that the commission revise §50.133(a) by renumbering (5) as (6)adding a new (5) and revising (6) as follows: "5) the executive director has prepared responses to any public comments."

The commission agrees that the executive director may not act on an application until the response to comments has been prepared and sent to all commenters. However, §50.133(a) does not need to be changed because this is already satisfied

by the terms of §50.133(a)(1), which requires the executive director to consider public comment and file a response before acting on an application.

Section 50.133(a)

Henry, Lowerre suggested that the commission revise §50.133(a)(5) as follows: "the application is not subject to a request for hearing or a request for reconsideration because..."

The commission declines to adopt this change because the commission must act on all contested applications, so it is important to retain the concept that the application is uncontested. Further, the commission believe that the original language is easier to read. Therefore, the suggested change was not made.

Section 50.133(a)(5)(A)

Henry, Lowerre suggested that the commission revise §50.133(a)(5)(A) as follows: "no timely requests have been filed and no request for extension of the time for filing such requests has been filed with the chief clerk..."

The commission declines to adopt this change. This suggestion appears to create an additional process not contemplated by HB 801. HB 801 provides no mechanism for extensions to request a hearing or reconsideration and the commission believes sufficient notice and opportunity for comment as well as to request a hearing are provided by the rules.

Section 50.133(a)(5)(B) and (C)

Henry, Lowerre suggested that the word "timely" be deleted from §50.133(a)(5)(B) and (C), which would make an application contested if late hearing requests or requests for reconsideration were received, and would thus prevent the executive director from acting on the application.

The commission declines to adopt this recommendation. Section 2 of HB 801 (Texas Water Code, §5.556(a)) specifically requires that requests must be filed during the period provided by commission rule. Additionally, Section 5 of HB 801, amending Texas Health and Safety Code, §382.056(m)(4), refers to timely hearing requests. Therefore, the commission believes that the legislature intended that an application is uncontested if no timely hearing requests or requests for reconsideration are submitted.

Section 50.133(a)(5)(B) and (C)

Brown McCarroll suggested that the commission clarify the reference to "requests" in §50.133(a)(5)(B) and (C) by adding the phrase "for reconsideration or contested case hearing" after the word "request."

The commission agrees that this parallel construction adds clarity regarding the type of requests and has amended the two subparts to §50.133(a)(5) to include the suggested phrase.

Section 50.133(a)(5)(D)

Henry, Lowerre recommends adding the phrase "with all parties" to §50.133(a)(5)(D), for a settlement reached in a contested case hearing.

The commission declines to add this phrase because often, when applications are sent to contested case hearing, the cases settle before parties are officially named.

Section 50.133(a)(5)(D)

Henry, Lowerre suggested that §50.133(a)(5)(D) be amended to add "and the application has been remanded from SOAH such that subsections (1)-(5) above are still satisfied and no significant change has been made to the executive director's preliminary decision that would require new notice."

The commission does not believe the additional language is necessary. Whenever the executive director acts on an application, all of the requirements of this section must be met, regardless of whether the application has been remanded from SOAH. The commission agrees, however, that if a change is made that would constitute a major amendment, then new notice may be appropriate. Nonetheless, this section is not about notice, and the suggested language is not appropriate here.

Section 50.133(a)(5)(E)

Henry, Lowerre suggested deleting §50.133(a)(5)(E), which provides that the executive director may act on an application if a hearing request has been filed but no opportunity for hearing is provided by law. The commenter believes this subsection should be deleted because the commission must have the opportunity to grant a hearing even if there is no right or opportunity for a hearing.

The commission declines to adopt this recommendation. This section merely clarifies that the executive director may act on an application that is uncontested because there is no opportunity for hearing provided by law. This section does not change the commission's discretionary authority to grant a contested case hearing. Under HB 801, and other law, the commission has the authority to hold a hearing in the public interest even where there is no express opportunity for the public to request a hearing.

Section 50.133(a)(6)

Henry, Lowerre commented that §50.133(a)(6) should provide clearly the trap door compliance language.

The commission assumes that by "trap door compliance language" the commenter means Texas Health and Safety Code, §382.056(o), which allows the commission to hold a hearing on an air application if the applicant has an egregious compliance history. This subsection allows the commission to refer an application to hearing because of a facility's bad compliance history, when no hearing would normally be authorized. Nonetheless, it is not necessary to put this language in §50.133(a)(6). This subsection allows the executive director to act on certain air applications, but it does not require him to do so. If an applicant's compliance history is particularly bad, the case can be referred to hearing, as allowed under Texas Health and Safety Code, §382.056(o). Appropriate references to this authorization are in §55.201(i)(3) and §55.211(d)(2).

Section 50.133(b)

Brown McCarroll suggested that §50.133(b) should be amended to require that the notice be mailed to everyone the same date.

The commission recognizes the dilemma with regard to timing. However, the commission believes that the additional three days added by SB 211 will alleviate this problem. Additionally, the commission does not believe it is necessary for the rule to require that the date of mailing appears in the notice. As a matter of practice, the chief clerk's transmittal letter is always dated. Therefore, the commission is not making the suggested changes.

Section 50.133(b)

Brown McCarroll suggest amending §50.133(b) to require the chief clerk to include the date of mailing in the notice. This addition is crucial because the date of mailing is used to determine the 20-day period in which a motion for rehearing may be filed.

The commission declines to adopt this recommendation. The date of the mailing in the notice is unnecessary because the postmark date indicates when mailing occurred and accurately reflects the day of mailing. The proposed language reflects the precise language of the statute and there is no need for making this section more explicit.

Section 50.133(d)

Section 50.133(d) allows the executive director to certify a WQMP update after notice and, if appropriate, after revisions have been made to the WQMP in response to those comments. Additionally, the title of the section is proposed to be amended to include a reference to WQMP updates. These proposed changes implement requirements in Texas Water Code, §26.037(a), amended by Section 2, SB 1308.

Section 50.135

Section 50.135 (Effective Date of Executive Director Action) parallels current §50.35, providing that a permit is effective when signed by the executive director. This section adds the phrase "unless otherwise specified in the permit" to the end of the sentence to allow flexibility.

Section 50.135

Henry, Lowerre commented that HB 801 requires a change to the effective date of a permit, so that a permit is not effective until after all motions for reconsideration have been acted on or overruled. They further suggest that it is not a reasonable process if a person can act under a permit or other approval while the matter is: 1) not final; 2) cannot be appealed; and 3) could be reversed by the commission. Henry, Lowerre also stated that to make the effective date the date of action biases the process and that such a process could deny access to the courts. They also proposed suggested language.

The commission declines to accept the recommendation. The commenter did not explain how HB 801 requires the commission to postpone the effective date of permits, nor is the commission able to find such a requirement in the bill. The commission also believes that adopting the recommendation would add time and complexity to the permitting process. Further, in this rulemaking, the commission did not propose to change the effective date of permits. Before making this change, which would affect every permittee, the commission believes that the change should be raised in a rule proposal so that everyone has a full opportunity to comment. See also, the response to the Henry, Lowerre comment on §50.139(d).

Section 50.137

New §50.137 (Remand for Action by Executive Director), mirrors current §50.37, except for the addition of the phrase "request for reconsideration," to implement HB 801. This section states that an application subject to this subchapter may be remanded to the executive director if all timely filed requests for reconsideration and requests for hearing are withdrawn or denied.

Section 50.139

New §50.139 (Motion to Overturn Executive Director's Decision) parallels §50.39 (Motion for Reconsideration), and allows a motion to overturn the executive director's decision on an application or WQMP update certification. This section identifies the manner in which an interested person may seek commission review of an executive director's action on a WQMP update. The title of the motion is changed from "motion for reconsideration" to "motion to overturn executive director's decision" to avoid confusion between this motion and the new "request for reconsideration" created by HB 801. A Motion to Overturn the Executive Director's Decision is filed in response to the executive director's final action on an application, as opposed to a *Request* for Reconsideration, which must be filed before an application is acted on. A *Request* for Reconsideration is filed after the executive director's response to comments is issued, but before a permit is issued; a *Motion* to Overturn Executive Director's Decision is filed after the executive director issues the permit. A *Request* for Reconsideration is not a prerequisite to a *Motion* to Overturn Executive Director's Decision.

A motion to overturn the executive director's decision must be filed no later than 20 days after notice of the executive director's action is mailed. Persons who file timely comments on WQMP update certifications, and who wish to file a motion to overturn, must do so within 20 days after the executive director's response to comments is mailed. The executive director's action on an application is not affected by a motion to overturn, unless the commission otherwise orders. To further clarify, procedures relating to motions for rehearing–which are filed after the commission acts on an application–do not apply to motions for reconsideration.

Section 50.139

Baker & Botts and TI suggest that only those persons who submitted timely public comment should be allowed to request reconsideration of the executive director's action. They further suggest that the TNRCC should require parties that are interested in a particular permit action to respond after public notice is issued and not wait until the last possible opportunity to question a permitting decision.

Baker & Botts and TI are commenting on §50.139, which deals with *motions* for reconsideration. Although their comments use the term "request" for reconsideration, the commission believes that they mean "motion" for reconsideration since they are commenting on the section dealing with motions for reconsideration.

The commission recognizes that it is easy to confuse the terms "request for reconsideration," "motion for reconsideration," and "motion for rehearing." Therefore, the commission has changed the name of "motion for reconsideration" to "motion to overturn" the executive director's decision. To clarify, a "request for reconsideration" is submitted after the executive director's response to comments is sent to those who commented or requested to be on the mailing list. This is before the permit is issued. In contrast, a "motion to overturn" is submitted after the executive director issues the permit. Finally, a "motion for rehearing" is submitted only if the *commission* acts on an application, and is submitted after the commission issues or denies an application.

Regarding the comment that the rules should limit who may file a motion to overturn of the executive director's decision, the commission does not agree that this limitation should be added to the rules. Nothing in HB 801 limits the people who may file a motion to overturn. In addition, defects in the public

notice are often raised in a motion to overturn. Therefore, the commission does not believe it is appropriate to limit who may file a motion for reconsideration of the executive director's action on an application.

Regarding the change from the term "motion for reconsideration" to the term "motion to overturn," the commission wishes to emphasize that this is not intended to make a substantive change. Rather, it is intended solely to avoid confusion with the new "request for reconsideration." Additionally, where other commission rules continue to refer to "motion for reconsideration," that term should be considered interchangeable with the term "motion to overturn" for purposes of these rules. Section 50.139(a) has been changed accordingly.

Section 50.139(b) and (c)

Brown McCarroll pointed out that §50.139(b) and (c) should be amended to add the presumption that notice is received three days after mailing, which is consistent with Texas Government Code, §2001.142(c), as amended by SB 211, and with proposed §50.119(b), which concerns motions for rehearing of commission decisions. The commenter noted that it would be confusing to apply the three day "mailbox" rule to decisions of the commission but fail to apply it to actions of the executive director.

The commission agrees that it would be helpful to apply the precepts of SB 211 to all final decisions, whether made by the commission or the executive director. Thus, §50.139 is amended to reflect a presumption that notice is received three days after mailing.

Section 50.139(d)

Henry, Lowerre recommended that the commission strike §50.139(d) because it is not a reasonable process if a person can act under a permit or other approval while the approval could still be reversed by the commission or a court. They believe that making an approval effective on the date of action biases the process. They also suggest that such a process could deny access to the courts. Further, the commenters pointed out that there is no process for the commission to issue an order staying the effectiveness of an approval until the commission has considered the motion for reconsideration.

The rule has not been changed in response to this comment. A review of commission files shows that the commission considers motions for reconsideration only in unusual or compelling circumstances, such as when the notice requirements have not been met or when there is an error in the permit. The permitting process can be lengthy, and the commission does not believe that it is necessary to further extend the process for every application. The commission must balance competing concerns for efficiency and public participation in the permitting process. Under the new process set out by HB 801, the public is afforded ample opportunity to become involved in the permitting process early to express their concerns. If their concerns are not addressed, they may file a hearing request or request for reconsideration, either of which will be considered by the commission. Only when no one files public comment and no one files a hearing request or a request for reconsideration will the executive director issue a permit. And only when the executive director issues a permit is a motion for reconsideration appropriate.

The commission is does not believe this process denies access to the courts. Further, if the commission decides it is appropriate to change or reverse an approval, only a short time will have elapsed during which the approval will have been effective. Therefore, no changes have been made in response to this comment.

Section 50.139(g)

Henry, Lowerre suggested striking subsection (g), which provides guidance for motions to overturn the executive director's decision, because it is contrary to the APA.

The commenter did not explain why they believe subsection (g) is contrary to the APA. The commission believes that the subsection complies with the APA. The commission has revised subsection (g) to make it easier to read and understand, without changing the meaning. The commission has also changed the title of "motion for reconsideration" to "motion to overturn," to avoid confusion with the new "request for reconsideration" added by HB 801.

Section 50.139(g)

Jenkens Gilchrist suggested that proposed §50.139(g) appears to have an error. The reference in the proposed rule to "subsection (e)" should more appropriately be a reference to "subsection (f)."

The commission agrees and has changed the reference in §50.139(g) to refer to "subsection (f)" rather than "subsection (e)." This subsection has also been reorganized for readability.

Section 50.141

Section 50.141 parallels existing §50.41, but deletes language pertaining to the pendency of delegation of the National Pollutant Discharge Elimination System authority because the commission received authorization to operate the program on September 14, 1998.

Section 50.142

Henry, Lowerre suggested that the commission create a new §50.142 to allow direct referrals to SOAH by the executive director or the applicant when there is agreement on the issues and timing.

The commission agrees that it may be most efficient to allow direct referral of a case to hearing when all potential parties agree on the issues and maximum expected duration. Rather than creating a new section, however, the commission has modified §55.254(g) to allow direct referral under these circumstances. Texas Register requirements prohibit the creation of a new section that was not part of the proposed rulemaking.

Section 50.143

Section 50.143 is unchanged from current §50.43 except for the removal of a sentence allowing the agency to return classified or confidential portions of an application to an applicant. This change conforms to changes to 30 TAC §1.5 (Records of the Agency) and to the Texas Public Information Act.

Section 50.143

Baker & Botts suggested that, consistent with 30 TAC §1.5(d), this section should be amended to provide for the return of classified or confidential information to the applicant upon withdrawal of a permit application. They suggested adding the following: "The agency may return to the applicant the classified or confidential portion of the application under §1.5(d) (relating to Records of the Agency)."

The commission declines to make this change. Section 1.5(d)(2), which concerns confidentiality of information, previously allowed the agency to return confidential information to an applicant upon request. However, that subsection was amended, effective April 29, 1999, and commission rules no longer allow for return of classified or confidential documents. The Public Information Act and the Records Retention Act prohibit the return of documents that have been submitted to the agency and thus, have become public records. Please note that this does not imply that confidential information submitted by an applicant may automatically be disclosed to the public. If an applicant submits confidential information, and a member of the public submits an open records request to view the information, that request will be submitted to the Attorney General's office for a determination on whether the information can be withheld.

Section 50.143

Brown McCarroll recommended changing the cross-reference in this rule from §55.255 to §55.209(h).

The commission recognizes that the reorganization of Chapter 55 has changed the sections where certain requirements are located. Therefore, the commission has corrected the cross-reference in §50.143 to §55.209(h) (Processing Requests for Reconsideration and Contested Case Hearing) rather than §55.255 (Commission Action on Hearing Request).

Section 50.145

Section 50.145 (Corrections to Permits) mirrors existing §50.45 of this title, and includes no substantive changes. This section, like many others, is added solely so that, after all applications that were administratively complete before September 1, 1999, have been processed, Subchapters A-C may be repealed. At that time, Subchapters E-G will contain all of the then-current rules for Action by the Executive Director.

Subchapter A. PURPOSE, APPLICABILITY, AND DEFINITIONS

30 TAC §50.2

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and Texas Health and Safety Code, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the Texas Water Code under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the Texas Health and Safety Code include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rule; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

§50.2. Applicability.

(a) Subchapters A-C of this chapter (relating to Purpose, Applicability, and Definitions; Action by the Commission; and Action by Executive Director) apply to any application that is declared administratively complete before September 1, 1999. Any application that is declared administratively complete on or after September 1, 1999 is subject to subchapters E-G of this chapter (relating to Purpose,

Applicability, and Definitions, Action by the Commission; and Action by Executive Director).

(b) This chapter does not apply to applications for emergency or temporary orders or temporary authorizations.

(c) Subchapters A-C of this chapter do not apply to air quality applications under Chapter 122 of this title (relating to Federal Operating Permits) except for §50.17 of this title (relating to Commission Actions).

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 3, 1999.

TRD-9905716
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter B. ACTION BY THE COMMISSION

30 TAC §50.13

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, Chapter 5, subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and Texas Health and Safety Code, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the Texas Water Code under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the Texas Health and Safety Code include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rule; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

§50.13. Action on Application.

Any application that is declared administratively complete before September 1, 1999 is subject to this subchapter. Any application that is declared administratively complete on or after September 1, 1999 is subject to subchapter F of this chapter (relating to Action by the Commission). After the time for filing a hearing request as provided in §55.21 of this title (relating to Requests for Contested Case Hearings, Public Comment), the commission may act on an application without holding a contested case hearing when:

(1) no timely hearing request has been received;

(2) all timely hearing requests have been withdrawn or denied by the commission; or

(3) a judge has remanded the application because of settlement.

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 3, 1999.

TRD-9905717
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter C. ACTION BY THE EXECUTIVE DIRECTOR

30 TAC §50.31

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and Texas Health and Safety Code, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the Texas Water Code under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the Texas Health and Safety Code include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.061, which establishes delegation of authority to the executive director; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rule; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

§50.31. Purpose and Applicability.

(a) The purpose of this subchapter is to delegate authority to the executive director and to specify applications on which the executive director may take action on behalf of the commission.

(b) This subchapter applies to any application that is declared administratively complete before September 1, 1999. Any application that is declared administratively complete on or after September 1, 1999 is subject to subchapter G of this chapter (relating to Action by the Executive Director). Except as provided by subsection (c) of this section, this subchapter applies to:

(1) air quality permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(2) appointments to the board of directors of districts created by special law;

(3) certificates of adjudication;

(4) certificates of convenience and necessity;

(5) district matters under Chapters 49-66 of the Texas Water Code;

(6) districts' proposed impact fees, charges, assessments, or contributions approvable under Local Government Code, Chapter 395;

(7) extensions of time to commence or complete construction;

(8) industrial and hazardous waste permits;

(9) municipal solid waste permits;

(10) on-site waste water disposal system permits;

(11) radioactive waste or radioactive material permits or licenses;

(12) rate matters for water and wastewater utilities under Texas Water Code, Chapters 11, 12, or 13;

(13) underground injection control permits;

(14) water rights permits;

(15) wastewater permits;

(16) weather modification measures permits;

(17) driller licenses under Texas Water Code, Chapter 32;

(18) pump installer licenses under Texas Water Code, Chapter 33;

(19) irrigator or installer registrations under Texas Water Code, Chapter 34; and

(20) municipal management district matters under Local Government Code, Chapter 375.

(c) This subchapter does not apply to:

(1) air quality standard permits under Chapter 116 of this title;

(2) air quality permits under Chapter 122 of this title (relating to Federal Operating Permits);

(3) air quality standard exemptions;

(4) consolidated proceedings covering additional matters not within the scope of subsection (b) of this section;

(5) district matters under Texas Water Code, Chapters 49-66, as follows:

(A) an appeal under Texas Water Code, §49.052 by a member of a district board concerning his removal from the board;

(B) an application under Texas Water Code, Chapter 49, subchapter K, for the dissolution of a district;

(C) an application under Texas Water Code, §49.456 for authority to proceed in bankruptcy;

(D) an appeal under Texas Water Code, §54.239, of a board decision involving the cost, purchase, or use of facilities;

(E) an application under Texas Water Code, §49.351 for approval of a fire department or fire-fighting services plan; or

(F) an application under Texas Water Code, §54.030 for conversion of a district to a municipal utility district;

(6) emergency or temporary orders or temporary authorizations;

(7) actions of the executive director under Chapters 101, 111, 112, 113, 114, 115, 117, 118, and 119 of this title (relating to General Rules; Control of Air Pollution From Visible Emissions and Particulate Matter; Control of Air Pollution From Sulfur Compounds; Control of Air Pollution From Toxic Materials; Control of Air Pollution From Motor Vehicles; Control of Air Pollution From Volatile Organic Compounds; Control of Air Pollution From Nitrogen Compounds; Control of Air Pollution Episodes; and Control of Air Pollution From Carbon Monoxide);

(8) all compost facilities authorized to operate by registration under Chapter 332 of this title (relating to Composting);

(9) concentrated animal feeding operations (CAFOs) under Chapter 321, Subchapter K of this title (relating to Concentrated Animal Feeding Operations);

(10) an application for creation of a municipal management district under Local Government Code, Chapter 375; and

(d) Notwithstanding subsections (b) or (c) of this section, when the rules governing a particular type of application allow a motion for reconsideration, §50.39(b)-(f) of this title (relating to Motion for Reconsideration) applies. If the rules under which the executive director evaluates a registration application provide criteria for evaluating the application, the commission's reconsideration will be limited to those criteria.

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 3, 1999.

TRD-9905718
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter E. PURPOSE, APPLICABILITY, AND DEFINITIONS

30 TAC §50.102

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and Texas Health and Safety Code, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the Texas Water Code under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's

authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the Texas Health and Safety Code include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rule; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

§50.102. Applicability.

(a) Subchapters E - G of this chapter (relating to Purpose, Applicability and Definitions; Action by the Commission; and Action by the Executive Director) apply to any applications that are declared administratively complete on or after September 1, 1999, except as described below. Any applications that are declared administratively complete before September 1, 1999 are subject to Subchapters A - C of this chapter (relating to Purpose, Applicability and Definitions; Action by the Commission; and Action by Executive Director).

(b) Subchapters E - G of this chapter apply to certification of water quality management plan (WQMP) updates.

(c) Only the following sections of this chapter apply to initial applications for voluntary emission reduction permits under §382.0519 of the Texas Health and Safety Code or electric generating facility permits under §39.264 of the Texas Utilities Code:

(1) §50.117 of this title (relating to Commission Actions);

(2) §50.131 of this title (relating to Purpose and Applicability);

(3) §50.133 of this title (relating to Executive Director Action on Application or WQMP update);

(4) §50.135 of this title (relating to Effective Date of Executive Director Action); and

(5) §50.145 of this title (relating to Corrections to Permits)

(d) This chapter does not apply to applications for emergency or temporary orders or temporary authorizations.

(e) Subchapters E - G of this chapter do not apply to air quality applications under Chapter 122 of this title (relating to Federal Operating Permits) except for §50.117 of this title (relating to Commission Actions).

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 3, 1999.

TRD-9905719
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter F. ACTION BY THE COMMISSION

30 TAC §§50.113, 50.115, 50.117, 50.119

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and Texas Health and Safety Code, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the Texas Water Code under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which estab-

lishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the Texas Health and Safety Code include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rule; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

§50.113. Applicability and Action on Application.

(a) Applicability. This subchapter applies to applications that are declared administratively complete on or after September 1, 1999. Applications that are declared administratively complete before September 1, 1999 are subject to Subchapter B of this chapter (relating to Action by the Commission.

(b) This chapter does not create a right to a contested case hearing where the opportunity for a contested case hearing does not exist under other law.

(c) After the deadline for filing a request for reconsideration or contested case hearing *u*nder §55.201 of this title (relating to Requests for Reconsideration or Contested Case Hearing), the commission may act on an application without holding a contested case hearing or acting on a request for reconsideration, if:

(1) no timely request for reconsideration or hearing has been received;

(2) all timely requests for reconsideration or hearing have been withdrawn, or have been denied by the commission;

(3) a judge has remanded the application because of settlement; or

(4) for applications under Chapters 26 and 27 of the Texas Water Code and 361 and 382 of the Texas Health and Safety Code, the commission finds that there are no issues that:

(A) involve a disputed question of fact;

(B) were raised during the public comment period; and

(C) are relevant and material to the decision on the application.

(d) Without holding a contested case hearing, the commission may act on:

(1) an application for any air permit amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted;

(2) an application for any initial issuance of an air permit for a voluntary emission reduction or electric generating facility;

(3) an application for a hazardous waste permit renewal under §305.631(a)(8) of this title (relating to Renewal);

(4) an application for a wastewater discharge permit renewal or amendment under §26.028(d) of the Texas Water Code, unless the commission determines that an applicant's compliance history for the preceding five years raises issues regarding the applicant's ability to comply with a material term of its permit; and

(5) other types of applications where a contested case hearing request has been filed but no opportunity for hearing is provided by law.

§50.115. Scope of Contested Case Hearings.

(a) Subsections (b)-(d) of this section apply to applications under Chapters 26 and 27 of the Texas Water Code and Chapters 361 and 382 of the Texas Health and Safety Code. Subsection (e)(1) of this section applies to all applications under this subchapter. Subsections (e)(2) and (f) of this section apply as stated in the subsection.

(b) When the commission grants a request for a contested case hearing, the commission shall issue an order specifying the number and scope of the issues to be referred to SOAH for a hearing.

(c) The commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue:

(1) involves a disputed question of fact;

(2) was raised during the public comment period; and

(3) is relevant and material to the decision on the application.

(d) Consistent with the nature and number of the issues to be considered at the contested case hearing, the commission by order shall specify the maximum expected duration of the hearing by stating the date by which the judge is expected to issue a proposal for decision. No hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. A judge may extend any hearing if the judge determines that failure to grant an extension will deprive a party of due process or another constitutional right.

(e) The commission may limit the scope of a contested case hearing:

(1) to only those portions of a permit for which the applicant requests action through an amendment or modification. All terms, conditions, and provisions of an existing permit remain in full force and effect during the proceedings, and the permittee shall comply with an existing permit until the commission acts on the application; and

(2) to only those requirements in §382.055 of the Texas Health and Safety Code for the review of a permit renewal.

(f) When referring a case to SOAH, for applications other than those filed under Chapters 26 and 27 of the Texas Water Code and Chapters 361 and 382 of the Texas Health and Safety Code, the commission or executive director shall provide a list of disputed issues. For hearings on these applications, the disputed issues are deemed to be those defined by law governing these applications, unless the commission orders otherwise under §80.6(d) of this title (relating to Referral to SOAH).

§50.117. Commission Actions.

(a) The commission may grant or deny an application in whole or in part, suspend the authority to conduct an activity or dispose of waste for a specified period of time, dismiss proceedings, amend or modify a permit or order, or take any other appropriate action.

(b) For applications involving hazardous waste under the Texas Solid Waste Disposal Act, the commission may issue or deny a permit for one or more units at the facility. The interim status of any facility unit compliant with the provisions of Texas Health and Safety Code, §361.082(e), and §335.2(c) of this title (relating to Permit Required) for which a permit has not been issued or denied is not affected by the issuance or denial of a permit to any other unit at the facility.

(c) If the commission directs a person to perform or refrain from performing any act or activity, the order shall set forth the findings on which the directive is based. The commission may set a reasonable compliance deadline in its order in which to:

(1) terminate the operation or activity;

(2) cease disposal, handling, or storage of any waste;

(3) conform to the permit requirements, including any new or additional conditions imposed by the commission; or

(4) otherwise comply with the commission's order.

(d) For good cause, the commission may grant an extension of time to a compliance deadline upon application by the permittee.

(e) For applications involving radioactive material licenses under the Texas Radiation Control Act, the commission may incorporate in any license at the time of issuance, or thereafter by appropriate rule or order, additional requirements and conditions as it deems appropriate or necessary to:

(1) protect and minimize danger to public health and safety or the environment;

(2) require reports and the keeping of records and to provide for inspections of activities under the license as may be appropriate or necessary; and

(3) prevent loss or theft of radioactive material subject to this subchapter.

(f) Consistent with Chapter 5, Subchapter M of the Texas Water Code (for applications under Chapter 26 or 27 of the Texas Water Code and Chapter 361 of the Texas Health and Safety Code), and for applications under Chapter 382 of the Texas Health and Safety Code, the commission shall consider all timely public comment in making its decision and shall either adopt the executive director's response to public comment in whole or in part or prepare a commission response.

(g) After the conclusion of the contested case hearing, if the commission issues a final decision on an application rather than remanding, continuing, or referring the case back to SOAH, the commission shall issue a single decision on the application.

§50.119. Notice of Commission Action, Motion for Rehearing.

(a) If the commission acts on an application, the chief clerk shall mail or otherwise transmit the order and notice of the action to the applicant, executive director, public interest counsel, and to other persons who timely filed public comment, or requests for reconsideration or contested case hearing. The notice shall explain the opportunity to file a motion under §80.271 of this title (relating to Motion for Rehearing). If the commission adopts a response to comments that is different from the executive director's response to comments, the chief clerk shall also mail the final response to comments. The chief clerk need not mail notice of commission action to persons submitting public comment or requests for reconsideration or contested case hearing who have not provided a return mailing address. The chief clerk may mail the information to a representative group of persons when a substantial number of public comments have been submitted.

(b) If the commission acts on an application, §80.271 of this title applies. A motion for rehearing must be filed within 20 days after the date the person is notified of the commission's final decision or order on the application. A person is presumed to have been notified on the third day after the date that the decision or order is mailed by first class mail. If the motion is denied under §80.271 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) the commission's decision is final and appealable under Texas Water Code, §5.351 or Texas Health and Safety Code, §§361.321, 382.032, or 401.341.

(c) Motions for rehearing may be filed on

(1) an issue that was referred to SOAH for contested case hearing, or an issue that was added by the judge;

(2) issues that the commission declined to send to SOAH for hearing; and

(3) the commission's decision on an application.

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 3, 1999.

TRD-9905720
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter G. ACTION BY THE EXECUTIVE DIRECTOR

30 TAC §§50.131, 50.133, 50.135, 50.137, 50.139, 50.141, 50.143, 50.145

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and Texas Health and Safety Code, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the Texas Water Code under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the Texas Health and Safety Code include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.061, which establishes delegation of authority to the executive director; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rule; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

§50.131. Purpose and Applicability.

(a) The purpose of this subchapter is to delegate authority to the executive director and to specify applications on which the executive director may take action on behalf of the commission. This subchapter does not affect the executive director's authority to act on an application where that authority is delegated elsewhere.

(b) This subchapter applies to applications that are administratively complete on or after September 1, 1999 to certifications of Water Quality Management Plan (WQMP) updates. Applications that are administratively complete before September 1, 1999 are subject to Subchapter B of this chapter. Except as provided by subsection (c) of this section, this subchapter applies to:

(1) air quality permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(2) appointments to the board of directors of districts created by special law;

(3) certificates of adjudication;

(4) certificates of convenience and necessity;

(5) district matters under Chapters 49 - 66 of the Texas Water Code;

(6) districts' proposed impact fees, charges, assessments, or contributions approvable under Texas Local Government Code, Chapter 395;

(7) extensions of time to commence or complete construction;

(8) industrial and hazardous waste permits;

(9) municipal solid waste permits;

(10) on-site wastewater disposal system permits;

(11) radioactive waste or radioactive material permits or licenses;

(12) rate matters for water and wastewater utilities under Texas Water Code, Chapters 11, 12, or 13;

(13) underground injection control permits;

(14) water rights permits;

(15) wastewater permits;

(16) weather modification measures permits;

(17) driller licenses under Texas Water Code, Chapter 32;

(18) pump installer licenses under Texas Water Code, Chapter 33;

(19) irrigator or installer registrations under Texas Water Code, Chapter 34; and

(20) municipal management district matters under Texas Local Government Code, Chapter 375.

(c) In addition to those things excluded from coverage under this chapter in §50.102 of this title (relating to Applicability), this subchapter does not apply to:

(1) air quality standard permits under Chapter 116 of this title;

(2) air quality exemptions from permitting and permits by rule under Chapter 106 of this title (relating to Exemptions from Permitting) except for concrete batch plants which are not contiguous or adjacent to a public works project;

(3) consolidated proceedings covering additional matters not within the scope of subsection (b) of this section;

(4) district matters under Texas Water Code, Chapters 49 - 66, as follows:

(A) an appeal under Texas Water Code, §49.052 by a member of a district board concerning his removal from the board;

(B) an application under Texas Water Code, Chapter 49, Subchapter K, for the dissolution of a district;

(C) an application under Texas Water Code, §49.456 for authority to proceed in bankruptcy;

(D) an appeal under Texas Water Code, §54.239, of a board decision involving the cost, purchase, or use of facilities;

(E) an application under Texas Water Code, §49.351 for approval of a fire department or fire- fighting services plan; or

(F) an application under Texas Water Code, §54.030 for conversion of a district to a municipal utility district;

(5) actions of the executive director under Chapters 101, 111, 112, 113, 114, 115, 117, 118, and 119 of this title (relating to General Rules; Control of Air Pollution From Visible Emissions and Particulate Matter; Control of Air Pollution From Sulfur Compounds; Control of Air Pollution From Toxic Materials; Control of Air Pollution From Motor Vehicles; Control of Air Pollution From Volatile Organic Compounds; Control of Air Pollution From Nitrogen Compounds; Control of Air Pollution Episodes; and Control of Air Pollution From Carbon Monoxide);

(6) all compost facilities authorized to operate by registration under Chapter 332 of this title (relating to Composting);

(7) concentrated animal feeding operations (CAFOs) under Chapter 321, Subchapter K of this title (relating to Concentrated Animal Feeding Operations); and

(8) an application for creation of a municipal management district under Texas Local Government Code, Chapter 375.

(d) Notwithstanding subsections (b) or (c) of this section, when the rules governing a particular type of application allow a motion for reconsideration, §50.139(b)-(f) of this title (relating to Motion to Overturn Executive Director's Decision) applies. If the rules under which the executive director evaluates a registration application provide criteria for evaluating the application, the commission's reconsideration will be limited to those criteria.

§50.133. Executive Director Action on Application or WQMP Update.

(a) The executive director may act on an application subject to this subchapter if:

(1) public notice requirements have been satisfied and the executive director has considered the public comment and filed a response;

(2) the application meets all relevant statutory and administrative criteria;

(3) the application does not raise new issues that require the interpretation of commission policy;

(4) the executive director's staff and public interest counsel do not raise objections; and

(5) the application is uncontested because:

(A) no timely requests for reconsideration or contested case hearing are filed with the chief clerk;

(B) the applicant and the persons who filed timely requests for reconsideration or contested case hearing have agreed in writing to the action to be taken by the executive director;

(C) any timely requests for reconsideration or contested case hearing have been withdrawn in writing or have been denied;

(D) a settlement was reached in a contested case hearing, and the application has been remanded from SOAH; or

(E) a contested case hearing request has been filed but no opportunity for hearing is provided by law.

(6) the application is for any air permit amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.

(b) If the executive director acts on an application, the chief clerk shall mail or otherwise transmit notice of the action and an explanation of the opportunity to file a motion under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision), if applicable. The chief clerk shall mail this notice to the applicant, the public interest counsel, and to other persons who timely filed public comment in response to public notice. The chief clerk need not mail notice of executive director action to persons submitting public

comment who have not provided a return mailing address. The chief clerk may mail the information to a representative group of persons when a substantial number of public comments have been submitted. If there were timely filed hearing requests that the commission denied, the chief clerk should also mail to the persons who timely filed hearing requests.

(c) If an application does not meet the requirements of subsection (a) of this section, the executive director shall refer the application to the chief clerk. The chief clerk shall schedule the application for consideration and action by the commission.

(d) The executive director may certify a water quality management plan (WQMP) update if:

(1) public notice has been issued as required by law and commission rules; and

(2) all significant comments received by the end of the comment period are considered by the executive director's staff and, if appropriate, revisions are made to the WQMP in response to those comments.

§50.139. Motion to Overturn Executive Director's Decision.

(a) The applicant, public interest counsel or other person may file with the chief clerk a motion to overturn of the executive director's action on an application or water quality management plan (WQMP) update certification. Wherever other commission rules refer to a "motion for reconsideration, that term should be considered interchangeable with the term "motion to overturn executive director's decision."

(b) A motion to overturn must be filed no later than 20 days after the signed permit, approval, or other written notice of the executive director's action is mailed to the applicant. The chief clerk shall mail notice of the action to the applicant, public interest counsel and to other persons who timely filed public comment in response to public notice. A person is presumed to have been notified on the third day after the date the notice of the executive director's action is mailed by first class mail.

(c) For WQMP updates, a motion to overturn must be filed no later than 20 days after the response to comments and the WQMP update, certified by the executive director, is mailed to persons who timely commented on the WQMP update. A person is presumed to have been notified on the third day after the date the notice of the executive director's action is mailed by first class mail.

(d) An action by the executive director under this subchapter is not affected by a motion to overturn filed under this section unless expressly ordered by the commission.

(e) Extension of time limits. With the agreement of the parties or on their own motion, the commission or the general counsel may, by written order, extend the period of time for filing motions for reconsideration and for taking action on the motions so long as the period for taking action is not extended beyond 90 days after the date the signed permit, approval, or other written notice of the executive director's action is mailed to the applicant.

(f) Disposition of motion.

(1) Unless an extension of time is granted, if a motion to overturn is not acted on by the commission within 45 days after the date the signed permit, approval, or other written notice of the executive director's action is mailed to the applicant, the motion is denied.

(2) In the event of an extension, the motion to overturn 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 signed permit, approval, or other written notice of the executive director's action is mailed to the applicant.

(g) When a motion to overturn is denied under subsection (f) of this section, a motion for rehearing does not need to be filed as a prerequisite for appeal. Section 80.271 of this title (relating to Motion for Rehearing) and Texas Government Code, §2001.146, regarding motions for rehearing in contested cases do not apply when a motion to overturn is denied. If applicable, the commission decision may be subject to judicial review under Texas Water Code, §5.351, or the Texas Health and Safety Code, §§361.321, 382.032, or 401.341.

§50.141. Eligibility of Executive Director.

The executive director may issue Texas pollutant discharge elimination system (TPDES) permits or other TPDES-related approvals only if he or she does not receive, and has not during the previous two years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(1) For the purposes of this section:

(A) "Significant portion of income" means 10% or more of gross personal income for a calendar year, except that it means 50% or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement pension, or similar arrangement.

(B) "Permit holders or applicants for a permit" does not include any department or agency of a state government, such as a Department of Parks or a Department of Fish and Wildlife.

(C) "Income" includes retirement benefits, consultant fees, and stock dividends.

(2) For purposes of this section, income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

§50.143. Withdrawing the Application.

Upon a request by the applicant at any time before the application is referred to SOAH, the executive director shall allow the withdrawal of the application and shall file a written acknowledgment of the withdrawal with the chief clerk. If the application has been scheduled for a commission meeting, the chief clerk shall remove it from the commission's agenda. For purposes of this rule, an application is referred to SOAH when the commission votes during a public meeting for referral or when the executive director or the applicant file a request to refer with the chief clerk under §55.209(h) of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 3, 1999.

TRD-9905721
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Chapter 80. CONTESTED CASE HEARINGS

Subchapter A. GENERAL RULES

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§80.1, 80.3, 80.5, 80.17, 80.105, 80.109, 80.251, and 80.271; new §§80.4, 80.6, 80.152, 80.252, and 80.272; and the repeal of §80.7, §80.111, 80.201, 80.203, 80.205, 80.207, 80.209, 80.213, and 80.215, concerning Contested Case Hearings. Sections 80.3, 80.4, 80.5, 80.6, 80.17, 80.105, 80.152, and 80.252 are adopted with changes from the proposed rules as published in the July 16, 1999 issue of the *Texas Register* (24 TexReg 5376). Sections 80.1, 80.7, 80.109, 80.111, 80.201, 80.203, 80.205, 80.207, 80.209, 80.213, 80.215, 80.251, 80.271, and 80.272 are adopted without changes to the proposed text and will not be republished. Concurrently with this rulemaking, the commission is also adopting the rules review of and readopting the existing rules in Chapter 80, concerning Contested Case Hearings, in accordance with the rule review requirements of the General Appropriations Act, Article IX, §167, 75th Legislature, 1997.

BACKGROUND

The primary purpose of the adopted amendments and new sections is to implement House Bill (HB) 801, and portions of Senate Bill (SB) 7, SB 211, SB 766, SB 1308, and HB 1479, 76th Legislature (1999). HB 801 establishes new procedures for public participation in environmental permitting proceedings. It establishes procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing for certain actions. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary to satisfy air quality federal program authorization requirements. These changes are implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122, and 305; changes for these chapters are published in this issue of the *Texas Register*. Changes to Chapters 55 and 321 also proposed on July 16, 1999 are not adopted at this time, but will be subject to future consideration by the commission. The commission is withdrawing the proposed amendment to 80.137. This adoption also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

OVERVIEW OF HB 801 AND IMPLEMENTATION

HB 801, enacted by the 76th Legislature, revises the commission's procedures for public participation in environmental permitting by adding new Texas Water Code (TWC), Chapter 5, Subchapter M; revising Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.088; revising Texas Clean Air Act (TCAA), THSC, §382.056; and revising Texas Government Code, §2003.047. Except for the changes required under Texas Government Code, §2003.047, the new and amended statutory provisions expressly apply to the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for public hearing are provided for under TWC, Chapters 26 and 27, and THSC, Chapters 361 and 382. The changes in law made by HB 801 only apply to applications declared administratively complete on or after September 1, 1999 and former law is continued in effect for applications declared administratively complete before September 1, 1999. Generally, the amendments made by this law are procedural in nature and are not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for hearing are provided.

More specifically, HB 801 encourages early public participation in the environmental permitting process and is intended to streamline the contested case hearing process. For example, it requires an applicant to publish newspaper notice of intent to obtain a permit and notice of the executive director's preliminary decision on the application. It also requires the applicant to place a copy of the application and the executive director's preliminary decision at a public place in the county and authorizes the executive director to hold public meetings. The executive director is required to prepare responses to relevant and material public comment. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing necessary to satisfy federal program authorization requirements. Contested case hearing procedures are also revised. The scope of proceedings and discovery is limited by the new law. These changes are adopted in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122, and 305. Most of these chapters also contain changes necessary for the consolidation of the procedural rules of the agency and to improve consistency among the permitting programs as well as changes to clarify and update agency rules and changes necessary to facilitate permit processing. Changes for all of these chapters are published in this issue of the *Texas Register*. Changes to Chapter 321 were also proposed on July 16, 1999, but are not adopted at this time.

OVERVIEW OF SB 211 AND IMPLEMENTATION

SB 211 amends §2001.142(c) of the Texas Government Code, relating to notice of decision in an administrative hearing, and provides that a party is presumed to have been notified on the third day after notice has been mailed. This requirement has been implemented and has guided rule drafting in Chapters 39, 50, and 80.

EXPLANATION OF ADOPTED RULES

The primary purpose of the changes to Chapter 80 is to modify commission procedures governing contested case hearings to conform with new requirements in HB 801. The most substantive changes in this chapter occur in Subchapter A, General Rules, and in Subchapter D, Discovery.

HB 801 applies only to certain applications that are administratively complete on or after September 1, 1999. Thus, the commission has created new §§80.4, 80.6, 80.252, and 80.272 to apply specifically to those applications. Similarly, new §80.152 contains only new requirements that apply to those applications. Meanwhile, existing §§80.3, 80.5, 80.251 and 80.271 are amended to apply only to applications that were administratively complete before September 1, 1999. While HB 801 continues former law in effect for applications administratively complete before September 1, 1999, the commission recognizes that it may be a year or more before all of those applications have been acted on, especially those that go to contested case hearing. Therefore, the commission has chosen to create this parallel section structure because the commission believes

it is useful for the public to have easy access to rules for older applications as well as for new ones. Once all applications that were administratively complete before September 1, 1999 have been processed, the commission can delete the subchapters that apply to those applications. Overall, the commission is maintaining most of the current procedures for applications that are declared administratively complete before September 1, 1999, but is changing some of those procedures for applications declared administratively complete on or after September 1, 1999.

Some changes to Chapter 80 are not directly related to SB 801 implementation. Proposed language in §80.4(c)(5) prohibits the alignment of the executive director and public interest counsel with any other party in contested case hearings. The adopted repeal of §80.7 regarding the substitution of judges is based on existing overlap between commission and State Office of Administrative Hearings (SOAH) rules. The commission's adopted repeal of Subchapter E is not directly related to HB 801 implementation, but the lack of use of Subchapter E, in addition to equivalent coverage in other HB 801 changes made the subchapter unnecessary. In addition, the change to the notification requirements under adopted rule §80.272(b) incorporates provisions in SB 211.

Two other distinctions appear in the rules in Chapter 80. The first relates to applications under Chapters 26 and 27 of TWC, and Chapters 361 and 382 of THSC. The amendments to those chapters in §2 and §5 of HB 801 apply only to applications under those chapters. Thus, Chapter 80 contains certain rules that apply only to those applications, and not to applications under other chapters, such as those under TWC, Chapter 11 or Chapter 16. Some rules apply to all types of applications. Additionally, there are a number of applications that are not subject to contested case hearing, according to other rules and statutes. Thus, Chapter 80 will generally not apply to those applications.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the 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 the definition of a "major environmental rule" as defined in the Texas Government Code. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

"Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and establishes procedures associated with actions on permit applications, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the rule is a major environmental rule, a draft regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law. This adoption does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and TWC, Chapter 5, Subchapter M, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with TWC, §5.551, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program. This adoption does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., TWC, Chapter 5, Subchapter M, and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these adopted rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific primary purpose of the amendments and new sections is to revise the TNRCC rules to establish procedures for public participation in certain permitting proceedings as required by HB 801, and other legislation. The adoption relates to procedures for providing public notice, providing opportunity for public comment, and providing opportunity for requesting contested case hearings as well as specific procedures for hearings. The rule would also consolidate already existing notice procedures for some of the air quality permitting programs, correct, clarify, and/or update the air quality permit amendment process, requirements relating to sign posting for concrete batch plants, and clarification of requirements relating to bilingual education notices; and consolidate commission procedural rules. The adopted rules will substantially advance these stated purposes by providing specific provisions on the aforementioned matters. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the language consists of amendments and new sections relating to the commission's procedural rules rather than substantive requirements.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The actions concern only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (31 TAC Chapter 505, 30 TAC §§281.40, et seq.).

HEARING AND COMMENTERS

A public hearing on the proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. Oral comments were provided by an individual and Locke, Liddell and Sapp, L.L.P.. The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999. Written comments were submitted by Baker & Botts, L.L.P., on behalf of the Texas Industry Project; Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll), on behalf

of the Texas Chemical Council, Texas Association of Business and Chambers of Commerce (TABCC), and Texas Oil and Gas Association; Brown, Potts & Reilly, L.L.P., on behalf of Merco Joint Venture, L.L.C.; City Public Service (CPS) of San Antonio, Texas; Dow Chemical Company (Dow); Eastman Chemical Company, Texas Eastman Division (Eastman); Exxon Chemical Company's Baytown Chemical Plant, Baytown Olefins Plant and Mont Belvieu Plastics Plant (Exxon Chemical); Exxon Company, U.S.A., Baytown Refinery (Exxon); Henry, Lowerre, Johnson, Hess & Frederick, Attorneys at Law (Henry, Lowerre), on behalf of Blackburn and Carter, Clean Water Action, Consumers Union, Environmental Defense Fund, Henry, Lowerre, Johnson & Frederick, National Wildlife Federation, Public Citizen, Sierra Club, Lone Star Chapter, Texas Center for Policy Studies, and Texas Committee on Natural Resources; Jackson Walker L.L.P.; Jenkens & Gilchrist, PIC; Public Interest Counsel, Texas Natural Resource Conservation Commission (PIC); Roller and Allensworth, L.L.P., on behalf of the Greenbelt Municipal and Industrial Water Authority; Small Business Compliance Advisory Panel (CAP); Texas Association of Business & Chambers of Commerce (TABCC); Texas Cattle Feeders Association (TCFA); Texas Cotton Ginners' Association; Texas Instruments Incorporated (TI); Thompson & Knight, L.L.P.; and the United States Environmental Protection Agency Region 6 Office (EPA).

COMMENTS REQUESTED

In the proposed rule preamble, the commission requested comments on four questions related to complex issues involving HB 801. The commission received a number of thoughtful comments on these questions. These comments have been very helpful to the agency in developing a framework for the new process. The comments, as well as commission thoughts on those comments are summarized below. In addition, many of these comments relate to specific sections of the rule, and responses are provided in the discussions of those sections.

Question 1. When the commission certifies only a limited number of issues to SOAH after reviewing the public comments, executive director response to comments, and the hearing requests, HB 801 appears to relieve the applicant of any burden of presenting evidence on any other issues arising out of the application. Should §80.17 or §80.137 be amended to reflect this new procedure? Is there a way to use the Summary Disposition procedure to generate a ruling by the judge on the non-contested portion of the application and draft permit? If parties do not object to the absence of issues during the contested case hearing, can there be a presumption that the applicant has met his burden of proof on all uncontested issues and that adequate evidence exists to support findings to that effect?

a. Summary of Comments

Baker & Botts, Brown McCarroll, TI and Thompson Knight provided comments that responded to Question 1. The commenters agreed that HB 801 substantially narrows the scope of a contested case hearing. They were emphatic that a protestant is not granted a contested case hearing on the entire permit application; that a hearing is granted only on disputed issues that are referred to SOAH or that are added by the administrative law judge (ALJ).

b. Responses to Question 1

The commission generally agrees with observations made by the commenters. Specific responses to comments on the various sections of the chapter confirm the approach that HB 801 creates a new hearing process for environmental permit applications, under which only specific issues, not an entire application, are referred to a contested case hearing. The commission will consider all timely received public comments in determining what, if any, issues to refer for hearing. Issues not referred for contested case hearing will be those that can be decided without taking further evidence. Therefore, the applicant is not under a burden to prove up the entire application during the SOAH hearing. The commission agrees that the summary disposition process will be available only for those issues referred to SOAH. The SOAH judge will be expected to accept evidence only on those issues referred by the commission or formally added by the judge at the hearing. The judge's proposal for decision and proposed order need address only those issues considered at the hearing. The commission will then consider the proposal for decision, the proposed order, the executive director's response to comments and will then issue a decision on the application and draft permit.

Question 2. Is the possible absence of evidence in the record on those issues attackable on appeal under the substantial evidence standard of review? Are the application, technical review documents, the public comments and executive director's response to those comments part of the agency administrative record on appeal?

a. Summary of Comments

Brown McCarroll commented that the absence of evidence in the record on *uncontested* issues is not attackable on appeal under the substantial evidence standard of review. The substantial evidence requirement in Administrative Procedure Act (APA), §2001.174 applies only to *fact findings*, for which *evidence* is required. *Evidence* only comes in an evidentiary hearing, that is, in a contested case hearing. Brown McCarroll, Locke Liddell and Thompson Knight commented on the contents of the administrative record. Brown McCarroll noted that the application, the technical review documents, the public comments, and the executive director's response to those comments *are* part of the agency's overall administrative record but they are not parts of the more limited record to which the substantial evidence standard of review is applied. Baker & Botts and Thompson Knight concurred that it seems unlikely that a court would set aside the entire process crafted by the legislature to require the development of further evidence on facts not involved in the contested case process.

b. Responses to Question 2

The commission appreciates these comments regarding appellate review. No changes have been made to the rules in response to these comments with the expectation that, given the lack of specificity in HB 801, judicial guidance harmonizing HB 801 and the APA will be forthcoming. The commission agrees that the overall administrative record will consist of the SOAH record as well as the response to comment record. Should future guidance be received on how commission decisions will be reviewed under §5.351 of the TWC alone *and* in conjunction with §2001.171 of the Texas Government Code, either through additional statutory changes or judicial interpretation, the commission will undertake additional rulemaking as appropriate.

3. Can only those issues litigated at SOAH be the subject of a motion for rehearing or may parties raise issues that the commission either refused to certify or that parties neglected

to request to be certified? At what point in the process is or should the commission's refusal to certify an issue become appealable? Should the commission's order certifying a matter to SOAH contain findings of fact and conclusions of law on those matters that will not be part of the contested case hearing or should that occur only after the proposal for decision (PFD) is considered by the commission?

a. Summary of Comments

Brown McCarroll commented that parties to the contested hearing should be able to raise in a motion for rehearing issues of *law* challenging the commission's refusal to certify issues which they originally requested to be tried at the contested hearing. The commission should never, upon certification of issues to SOAH or upon final decision, make findings of fact and conclusions of law on matters not part of the contested case hearing. Thompson & Knight likewise commented that a party should only be permitted to raise the issues referred to or added by the ALJ on a motion for rehearing. The refusal to certify an issue should be appealable with the final decision of the commission. Of course, the standard of review and the record for review will be different. They also suggest there is no need for detailed findings of fact and conclusions of law on issues not referred. Baker & Botts suggests that the refusal to refer an issue to SOAH should only be subject to appeal after the conclusion of any contested case hearing and the issuance of a final decision.

b. Responses to Question 3

The commission declines to adopt a rule limiting what may be raised in a motion for rehearing. Nothing in HB 801 requires or suggests such a limitation. The commission's refusal to certify an issue is, in the opinion of the commission, an interlocutory order and becomes appealable only after the conclusion of the contested case hearing, if one is held. Although findings of fact for purposes of substantial evidence review may be limited to those issues litigated at SOAH, the final commission decision will consist of both the contested case order and the commission's response to comments. On motions for rehearing, the commission will consider points properly raised both by commenters and by participants in the SOAH hearing. The commission believes that persons who participated in the SOAH proceeding may proceed under §2001.171 of the Texas Government Code but the commission does not read HB 801 to prevent commenters from appealing a final commission decision under §5.351 of the TWC. Harmonizing the two avenues and deciding upon the appropriate standard of review will be the subject of future judicial consideration, should the situation arise.

Question 4. Are there provisions that could be added to the commission rules that might provide certainty to parties and guidance to the judiciary on these questions concerning judicial review of orders issued under the new HB 801 procedures?

a. Summary of Comments

Brown McCarroll commented that additional and clearer provisions probably could be included in these rules to provide certainty to the parties, predictability to the commission's interpretation of them, and guidance to the judiciary. However, Brown McCarroll felt that most of the rules are about as good as any that could be written on such short notice. Thompson & Knight commented that the commission should adopt a rule clearly stating the status of all facts not referred as issues to SOAH. All facts associated with the permit application which are not referred to SOAH by the commission or added as fact issues by SOAH, should be deemed established in a manner consistent with the decision of the executive director.

b. Responses to Question 4

The commission appreciates these thoughtful responses and agrees that the rules are sufficient, especially given the short implementation time frame. As the responses to the comments on the first three questions reflect, the commission will revisit these rules for possible additional rulemaking when experience or *judicial guidance* indicates change is needed on these matters. The commission believes that the judicial process, with all the benefits of full arguments and briefing by all parties that the adversary system can provide, may be a better forum to harmonize the various statutes than this initial rulemaking.

ANALYSIS OF COMMENTS AND ADOPTED RULES

Public Hearing

The commission held a public hearing on this rulemaking on August 10, 1999. Two people commented, one individual and one attorney from the law firm Locke Liddell & Sapp. The individual's comments related to notice and are addressed in the preamble to Chapter 39. Locke Liddell's comments related to contested case hearings, and are addressed specifically in the analysis of §§50.115 and 80.152, as well as Chapter 55.

General Comments on Chapter 80

Brown McCarroll observed that the commission has undertaken a quadrennial review of the commission's procedural rules in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997, while simultaneously adopting new rules to implement HB 801. The commenter stated that the quadrennial review should not be a bar to future consideration of necessary changes to the new rules following adoption. The commenter recommended that the commission clearly indicate that the rules will be revisited after their implementation to address any problems resulting from the "fast track" time line for this rulemaking.

The commission agrees with the commenter that the new procedural rules being adopted should be subject to review to correct any deficiencies which may become apparent following adoption. The quadrennial review applied only to the existing Chapters 39, 50, and 80 of the commission's rules. The fact that the existing procedural rules have undergone the statutorily required quadrennial review, and the commission has determined that those rules continue to be necessary, will not prevent the commission from revisiting the procedural rules following implementation of HB 801.

Chapter 80; Contested Case Hearings

Thompson Knight, TI, and Baker & Botts commented that the rules should be amended to make it clear that the applicant is under no burden to offer evidence on aspects of the application that are not referred to SOAH or added by the Judge. They also believe that facts not placed in issue and not referred to SOAH must be deemed to be established without the development of an evidentiary record.

The commission agrees that the applicant has no burden to offer evidence on aspects of the application not considered by the judge, and has modified §50.115(e), and added §50.117(g) and §80.6(d) for that purpose. When a matter is referred to SOAH,

only the limited issues referred by the commission or issues added by the judge will be considered in the hearing. The applicant is required to put on evidence only on issues referred to SOAH or added by the judge. Likewise, the judge shall provide findings of facts and conclusions of law only on issues referred to SOAH or added by the judge. The commission will not make evidentiary findings on aspects of the application not considered by the judge.

The commission has not added a rule saying that facts not placed in issue and not referred to SOAH must be deemed to be established without the development of an evidentiary record. Findings of fact and conclusions of law are appropriate only where an evidentiary hearing has been held. Since no evidence will be taken on issues not referred to SOAH, findings of fact are not appropriate. Moreover, HB 801 does not provide for such a requirement.

Chapter 80 Generally

Brown McCarroll suggested changing "permit application" to "application" in §§80.3(a), 80.4(a)(1), 80.6(a), 80.152(a), 80.252(a).

The commission agrees that Texas Government Code, §2003.047, as amended by §6 of HB 801, applies to all applications and that §80.252(a) should parallel §80.251(a). Therefore, the term "permit application" has been changed to the more inclusive term "application."

Chapter 80 Generally

The PIC pointed out that, regardless of the date of administrative completeness, the PIC prefers to see SOAH judges continue to accept public comment at preliminary hearings in cases where no public meeting has been held in the local area. However, the PIC is willing to provide that the executive director has no obligation to prepare responses to comments received after the close of the comment period following the publication of Notice of Application and Preliminary Decision. This proposal could be set forth in Subchapter E of Chapter 55

The commission responds that under the public comment procedures in Chapter 55, the commission anticipates that all public comment should be received during the designated public comment period so that it will be properly considered by the executive director and the commissioners when making determinations on permit actions and hearing requests. Further, under HB 801, when there is significant public interest in an application, the executive director is required to hold a public meeting. These are typically held in the local area. Once the commission refers a matter to SOAH for a contested case hearing, the public comment period is over and there is no further opportunity to provide comment on the record.

Section Chapter 80; General Comments

Baker & Botts commented that refusal to refer an issue to SOAH should only be subject to appeal after the conclusion of any contested case hearing and the issuance of a final decision. They also suggested that any person who failed to file comments, failed to request a contested case hearing, or failed to participate in any hearing held on the permit application should be precluded from seeking rehearing of a final decision.

The commission agrees that if it declines to refer an issue to SOAH, then the issue should be appealable only with the final decision of the commission. This will ensure that a final commission decision on the application has been reached before a court can be asked to intervene. This procedure is consistent with the procedure for appealing denials of hearing requests. The commission modified §55.211(e) to reflect this comment.

The commission disagrees with the suggested limitation on motions for rehearing. HB 801 does not limit who may file a motion for rehearing. Because a motion for rehearing is a prerequisite for appeal, interested persons must be allowed to submit a motion for rehearing. Moreover, §55.201(h) currently provides that such persons may file a motion to overturn the executive director's decision "are limited to the differences between the draft permit and the final decision." The commission declines to further limit public participation because HB 801 contains no such limit. A motion for rehearing can be filed for: (a) issues referred to hearing and on which a hearing was held; (b) issues raised in hearing requests but which the commissioners declined to refer to hearing; or (c) any final decision by the commission.

The commission points out that the term "motion for reconsideration" has been changed to "motion to overturn executive director's decision" or simply "motion to overturn." Section 50.139(a) of this title makes clear that wherever commission rules refer to a "motion for reconsideration, that term should be considered interchangeable with the term "motion to overturn executive director's decision." The purpose of this change is to avoid confusion with the new term "request for reconsideration," created by HB 801.

Chapter 80 Generally

The PIC did not believe that the proposed revisions apply to applications declared administratively complete before September 1, 1999.

The commission agrees that §7 of HB 801 provides that the provisions of the bill apply only to applications that are administratively complete on or after September 1, 1999.

§80.1; Applicability and Purpose

The commission has added the phrase "Except as provided in this chapter" to §80.1 to reflect the changes in applicability of various sections of Chapter 80. To implement HB 801, the commission has added new §80.4, which parallels existing §80.3.

§80.3; Judges

Existing §80.3 is amended to apply only to applications declared administratively complete before September 1, 1999, while §80.4 applies to applications declared administratively complete on or after September 1, 1999. Section 80.3(c)(5) has been amended to prohibit the judge from aligning the executive director and the public interest counsel with any other party. This provision is not required by HB 801, but is being incorporated because the executive director and public interest counsel are statutory parties and must maintain independent judgment in contested case hearings.

§80.4; Judges

New §80.4, relating to SOAH judges and their authority, mirrors existing §80.3, except that it applies to applications declared administratively complete on or after September 1, 1999. It also has several changes required by HB 801. Section 80.4(c)(5) prohibits the judge from aligning the executive director and the public interest counsel with any other party. This provision is not required by HB 801, but is being incorporated because

the executive director and public interest counsel are statutory parties and must maintain independent judgment in contested case hearings. Section 80.4(c)(16) allows a judge to consider issues in addition to those provided on the commission's list of disputed issues referred to SOAH under Chapter 55. However, under Texas Government Code, §2003.047, as amended by §6 of HB 801, any additional issue considered by a judge must be material and supported by evidence. Moreover, before a judge considers an additional issue, §80.4(c)(16)(C) requires a judicial finding that there are "good reasons" for the failure of an interested person to supply available information regarding that issue during the public comment period. New §80.4(c)(17)(A) and (B) give judges the authority to extend the proceeding if they determine that not doing so would deprive a party of due process or some other constitutional right, or if the parties to the proceeding agree to the extension. Sections 80.4(c)(16) and 80.4(c)(17) are based on requirements in Texas Government Code, §2003.047, as amended by §6 of HB 801.

§80.4(d)

The commission has added new §80.4(d), which provides that a judge is not required to accept public comment into the evidentiary record. This subsection effectuates the intent of HB 801 to keep the public comment process and the contested case hearing process separate. As discussed in response to the comment on §80.127(f), this subsection supercedes §80.127(f).

§80.5 and §80.6; Referral to SOAH

The commission amends §80.5 to specify that this section applies to any permit applications declared administratively complete before September 1, 1999. New §80.6 mirrors existing §80.5, except that it applies to all permit applications declared administratively complete on or after September 1, 1999, and includes other changes based on TWC, §5.556(e), added by §2 of HB 801, as follows. Section 80.6(b)(5) requires the chief clerk to send to SOAH the commission's list of disputed issues and its determination on the maximum expected duration of the hearing, as required under Chapter 55. Section 80.6(b) does not require the commission to provide a list of issues or areas to be addressed by the judge because those requirements are included in Chapter 55. Section 80.6(c) retains the provision from §80.5(b) that the EDPR (Executive Director's Preliminary Report) shall serve as the list of issues for an enforcement case.

§80.6; Referral to SOAH

Jenkens & Gilchrist suggested that current §80.5 appears to contain language that is appropriate to any application, whether filed before, on, or after September 1, 1999. Jenkens & Gilchrist suggested that the commission delete §80.6.

The commission disagrees with deleting §80.6 because §7 of HB 801 states the changes in law apply only to applications which are administratively complete on or after September 1, 1999. Applications that are administratively complete before this date are governed by the former law, and that law is continued in effect for that purpose. As a result, the commission is using parallel sections in Chapter 80 to distinguish between applications administratively complete prior to September 1, 1999 (the effective date of HB 801) from those administratively complete after this time.

§80.7; Substitution of Judges

The commission is repealing §80.7 regarding the substitution of judges. This section is no longer necessary because SOAH has existing authority to substitute judges under its rules in 1 TAC §155.17(c).

§80.17; Burden of Proof

On §80.17, Brown McCarroll and Henry, Lowerre commented that the commission should not shift the burden of proof on an issue to the person requesting a hearing. Conversely, Baker & Botts commented that the protestants must carry the burden of proof on those issues referred to hearing.

The commission has determined that it is not appropriate to add the proposed phrase "or otherwise provided by the commission" to §80.17. Further, the commission declines to shift the burden of proof in a contested case hearing. Nothing in HB 801 explicitly requires the burden of proof to shift from the current practice of requiring the applicant to show that the application complies with all requirements. While there may be circumstances when the burden of proof is appropriately on the protestants–as when a protestant demonstrates that it is an affected person– it is not appropriate to make such a sweeping change to current practice. Thus, an applicant will continue to carry the burden to demonstrate that an application meets applicable rules related to issues that are the subject of the hearing. The commission is also amending §80.17 by making grammatical changes to §80.17(a).

§80.17

Brown McCarroll commented that the commission would err if it were to decide that the final commission order *may* incorporate findings on issues not submitted to SOAH for hearing. They believe that under the APA, it is clear that the commission may not properly include findings of fact on issues not submitted to SOAH. Brown McCarroll suggested that §80.17 should not be changed in a way that would suggest that a party could have a burden of proof on issues not referred to SOAH.

The commission agrees that a final commission order should not incorporate findings of fact on issues not referred to SOAH. Therefore, as explained above, except for a grammatical change, §80.17 is not changed in this rulemaking. Issues that are not referred to SOAH will not be subject to §80.17.

§80.105; Preliminary Hearings

To incorporate changes to public comment procedures required by HB 801 and to maintain consistency with proposed changes to Chapter 55, the commission is amending and repealing certain sections of Chapter 80. The commission amends §80.105, to change how SOAH conducts preliminary hearings, by repealing the requirement that judges accept public commentary at the preliminary hearing. In addition, the amendment to §80.109 removes language in subsection (a) which allows a judge to take written or oral comments from persons who are not parties to the proceeding. Finally, the commission repeals current §80.111 to clarify the separation between the public comment and contested case hearing processes.

Section 80.111 allowed persons not designated as parties to register protests or make comments orally or in writing. Under the public comment procedures in Chapter 55, the commission anticipates that all public comment should be received during the designated public comment period so that it will be properly considered by the executive director and the commissioners when making determinations on permit actions and hearing

requests. Once the commission refers a matter to SOAH for a contested case hearing, the public comment period is over and there is no further opportunity to provide comment on the record.

§80.105(b)(2)

The PIC suggested the following revision to §80.105(b)(1): "accept public commentary only in accordance with the provisions of Chapter 55 of this title, and name parties." A corresponding change to §80.109(a) would be to revise the sentence proposed to be stricken as follows: "At the discretion of the judge, and only in accordance with the provisions of Chapter 55 of this title, persons who are not parties may be permitted to make or file statements." The PIC also suggested revising §80.111 in accordance with revisions to §80.105 and §80.109. Also, the PIC believes there is no need to revise the §80.111 provision allowing persons to submit questions for the judge to consider asking of witnesses, as this provision is unrelated to notice and comment procedures and does not conflict with 801.

To reflect the intent of HB 801, the commission wishes to distinguish between the public comment process and the contested case hearing process. The public comment process and the contested case hearing process are two separate phases of the permitting process. Under HB 801, the public comment period ends before the start of the contested case hearing. During the public comment period, the public will have ample opportunity to submit comments. Under HB 801, two public notices will be provided: (1) at administrative completeness (Notice of Receipt of Application and Intent to Obtain Permit); and (2) after technical review (Notice of Application and Preliminary Decision) (except that there may be only one notice for certain air applications).

Public comment will be solicited, and the executive director will consider all comments before reaching a decision on the application. Public meetings may also be held to receive additional comment. Indeed, if there is a significant degree of public interest, the agency is required to hold a public meeting when there is a substantial or significant degree of public interest in an application. A public meeting will typically be held in the local area. The executive director will then prepare a response to the comments, which will be distributed to the commenters. This is the end of the public comment process.

Then, people who are still unsatisfied may request reconsideration or a contested case hearing. If issues are sent for contested case hearing, then a judicial process begins. Only affected persons may participate in this judicial process, if they are admitted as parties to the hearing. Because, under HB 801, the public comment process is over, it is appropriate that only properly admitted parties participate in the contested case hearing.

§80.105(b)(1)

Henry, Lowerre suggested that the rule retain the existing language requiring the judge to accept public commentary during a contested case hearing.

The commission agrees in part, and disagrees in part. Under the new HB 801 process, the commission does not believe that it is appropriate for SOAH to take public comment during the contested case hearing process for applications. The commission wishes to distinguish between public comment and the hearing process. Under HB 801, the public comment period ends before the start of the contested case hearing process. The commission will have received and responded to all public comment before the time for the public to request a contested case hearing. The purpose of this timing is to try to resolve issues during the comment process, so that a contested case hearing may not be necessary. Raising issues early will provide the applicant the opportunity to resolve them before the contested case hearing process has begun, possibly avoiding a hearing and thus saving time and expense for all. Therefore, the commission declines to require the judge to accept public comment at contested case hearings on applications.

However, because the HB 801 public comment process does not apply to enforcement proceedings, public comment will continue to be accepted in enforcement hearings. Therefore, the commission has amended proposed §80.105(b)(1) to continue to require the judge to accept public comment at the hearing.

§80.105(b)(2)

Baker & Botts suggested that §80.105(b)(2) should be amended in the rulemaking to conform to HB 801's requirement that "the administrative law judge shall establish a docket control order designed to complete the proceeding by the date specified by the commission."

The commission agrees that Texas Government Code, §2003.047, as amended by §6 of HB 801, requires that SOAH judges enter a docket control order. Section 80.105(b)(2) has been modified to require a judge to enter a docket control order to ensure that the contested case hearing does not exceed the commission's maximum expected duration.

§80.109(a); Designation of Parties

Henry, Lowerre suggested that the rule retain the existing language regarding public statements noting that the judge should have that discretion. The commenter also noted that the public hearing may be the only opportunity that the public has had to express their positions in the area where they live.

Under the new HB 801 process, the commission does not believe that it is appropriate for SOAH to take public comment at the preliminary hearing. The commission wishes to distinguish between the public comment process and the hearing process. Under HB 801 the public comment process ends before the start of the contested case hearing process. Under §55.154, if there is significant or substantial public interest in an application, the executive director or Office of Public Assistance shall hold a public meeting. Thus, where there is a high level of interest in an application, the public will have the opportunity to provide public comment in the area where they live.

§80.109(b)

Baker & Botts suggested that §80.109(b) should be revised to establish a mandatory requirement that a requestor must have participated in the public comment period in order to seek to be admitted as a party to a SOAH hearing.

The commission has not made any changes to Chapter 80 in response to this comment. The issue raised by the commenter has a bearing on the standards to be used by the commission in referring an issue for hearing to the State Office of Administrative Hearing consistent with §5.556(d) of the Texas Water Code as added by HB 801. The commissions' implementation of this requirement will be addressed in future amendments to Chapter 55. However, the admission of parties to a proceeding once the commission has referred a matter to SOAH and a hearing has already been set is not related to the standards used by the commission to grant a hearing request. Therefore,

the commission does not believe that it would be appropriate to limit the judge's designation of parties in the manner suggested by the commenter.

§80.109(b)

Baker & Botts suggested that a requestor should only be admitted as a party to a SOAH hearing if he is an affected person with an interest that may be impacted by the issues to be covered at the hearing.

The commission believes that only affected persons can be admitted as parties to SOAH hearings.

§80.109(b)(3)

Baker & Botts suggested that the reference to §55.29 should be corrected to refer to §55.203 or §55.256.

The commission has modified §80.109 to appropriately refer to both §55.203 and §55.256, rather than to §55.29. In this rulemaking, Chapter 55 has been reorganized in an attempt to make the chapter easier to use. Also, because most of HB 801 applies only to certain applications, parallel subchapters have been created for applications that are subject to §§2-5 of HB 801, and those that are not subject to those sections. Existing §80.109 refers to §55.29 (Determination of Affected Person). Because of the reorganization, the new sections, §55.203 (in Subchapter F) and §55.256 (in Subchapter G) now both are titled Determination of Affected Person.

§80.111; Persons Not Parties

Henry, Lowerre recommended that the commission not repeal §80.111 (Persons Not Parties). They believe that judges should have discretion to allow non-parties to provide information or identify important issues–just as district judges have such discretion.

The commission disagrees and has repealed §80.111. Under HB 801, the public comment process ends before the start of the contested case hearing process. Only people who are admitted as parties should be allowed to participate in the contested case hearing process, which is a formal judicial process. There will be ample opportunity early in the permitting process for people to make public comment. Under HB 801, neither parties nor non-parties may bring up new issues at the hearing (except in limited circumstances). Further, if evidence on broader issues needs to be brought before the judge, both the protestants who have been admitted as parties and the public interest counsel will have the opportunity to present evidence on those issues.

§80.127(f); Evidence (Public Comment) The commission solicited comments on whether §80.127(f) should be repealed. Brown McCarroll commented it should be repealed. They believe that allowing public comment into the evidentiary record, with the possibility than this would be construed to allow findings of fact and conclusions of law to be based on the comments, threatens the applicant's due process rights and may be contrary to the APA. They also point out that §80.127(f) is in conflict with the letter and spirit of HB 801, with its required separation between the public comment and contested case hearing processes. They believe that §80.127(f) was never required by the Resource Conservation and Recovery Act (RCRA), or the federal Clean Water Act, and that its repeal could in no way jeopardize the delegation of these programs.

Because §80.127(f) was not opened in this rulemaking, the commission instead adopts a change to §80.4. The commission agrees that §80.127(f) should be deleted because the public comment process should be kept separate from the contested case hearing process. That subsection specifically applied to contested case hearings on permits under the Resource Conservation and Recovery Act, the Texas Injection Well Act, and the Texas Pollutant Discharge Elimination System. Subsection (f) required that all public comment on permit applications received by the commission during the comment period and the executive director's responses to comments be admitted into the evidentiary record. HB 801 keeps the public comment and contested case hearing processes separate, and only specific issues are to be considered at hearing. Thus, public comment and the executive director's response to comments should not be admitted into the evidentiary record. In making a recommendation to the commission, the judge should consider only evidence on issues referred to SOAH or added by the judge. Since §80.127(f) was not formally proposed to be changed, the commission will not repeal it in this rulemaking. However, the commission has adopted new §80.4, which provides that a judge is not required to accept public comment into evidence. This new section supercedes §80.127(f), for applications declared administratively complete after September 1, 1999.

§80.137; Summary Disposition

Regarding §80.137, Brown McCarroll commented that there is no justifiable reason to resort to a creatively manufactured Summary Disposition procedure to generate rulings by a judge on noncontested portions of the application and draft permit.

The commission agrees that only disputed issues are referred to SOAH. Issues that are not referred to SOAH and portions of an application that are not before the judge cannot be subject to summary disposition. Accordingly, the commission has deleted the following proposed sentence from the end of §80.137(c): "The record of the commission's consideration and disposition of public comment, requests for reconsideration, and request for contested case hearing may be used to support summary disposition on uncontested matters." Therefore, the commission is withdrawing the proposed amendment to §80.137.

§80.137

Brown McCarroll suggested that only issues litigated at SOAH should be proper subjects of a motion for rehearing.

The commission declines to limit the subjects of motions for rehearing. HB 801 does not expressly provide for such a limitation. Because a motion for rehearing is a prerequisite for appeal, interested persons must be allowed to submit a motion for rehearing. Moreover, §55.201(h) currently provides that such persons may file a motion to overturn the executive director's decision "are limited to the differences between the draft permit and the final decision." The commission declines to further limit public participation because HB 801 contains no such limit. A motion for rehearing can be filed for: (a) issues referred to hearing and on which a hearing was held; (b) issues raised in hearing requests but which the commissioners declined to refer to hearing; or (c) any final decision by the commission.

§80.137(c)

For 80.137(c), Baker & Botts suggested that proceedings should be strictly limited to disputed issues referred to or added by SOAH.

The commission agrees that a SOAH judge may only act on issues that are referred by the commission or that are added by the judge. Under §80.3(c)(16), a judge may only add issues that are material and supported by evidence, and if there are good reasons for the failure to supply available information regarding the issues during the public comment period. A judge may not consider issues or portions of the application that are not referred or added. The parties may not present evidence and the judge shall not prepare findings of fact and conclusions of law on issues that are not referred or added. Accordingly, we have modified §80.137(c) by deleting the last sentence which had read: "The record of the Commission's consideration and disposition of public comment, requests for reconsideration, and requests for contested case hearing may be used to support summary disposition on uncontested matters."

§80.152; Scope and Level of Discovery

New §80.152 defines the scope and level of discovery for applications declared administratively complete on or after September 1, 1999. Section 80.152(a) and (b) reflect the commission's determination that HB 801 amendments to Texas Government Code, §2003.047 apply to all contested case hearings, not just those hearings for permits issued under TWC, Chapters 26 and 27; and to permits under THSC, Chapters 361 and 382. Brown McCarroll commented that they agree with this determination.

Texas Government Code, §2003.047, as amended by §6 of HB 801, requires the commission to set the level of discovery for each case based on the levels defined in Texas Rules of Civil Procedure (TRCP), §§190.2, 190.3, and 190.4. As proposed, §80.152(c) set the level of discovery for all contested cases at Level 3, as that term is defined in TRCP, §190.4, except that oral depositions and interrogatories were limited to no more than allowed in TRCP, §190.3 (Level 2). Level 3 allows a judge to set a discovery schedule tailored to the circumstance of the specific case. Level 2 limits the number of hours of interrogatories to 25 per party and the hours of depositions to 50, with 6 more for each expert over 2. Using Level 3 allows a judge to limit discovery to the limits in Level 1 or Level 2 or to set other limits that better suit that case. Using the limits in Level 2 as maximums for interrogatories and depositions limits the judge's discretion in the interest of the greater efficiency contemplated by HB 801.

Henry, Lowerre commented that the proposed rule appears appropriate and that after some experience, a better approach will likely develop. Brown McCarroll suggested that the rule further clarify that the 50-hour deposition/25 interrogatory limits of Level 2 should be the *maximum* that the ALJ may allow, and that the ALJ may set the limit lower for less complex cases. This concern arises because, under Level 2 of the discovery rules, parties may be entitled to use the full 25 interrogatories and 50 deposition hours and the judge may not have the discretion to reduce this number.

In the proposal, the commission intended that the limits in Level 2 be the maximum that the judge could set, but also intended that the judge could set lower limits according to the needs of the case. To clarify that those limits are the maximum for interrogatories and depositions and that the judge may set lower limits, the adopted rule explicitly specifies the number of interrogatories and hours of depositions, rather than setting them at Level 2. The commission agrees with Brown McCarroll that the judge should have the flexibility to control discovery as appropriate to the complexity of the case and in a way that will allow them to complete the hearing within the maximum expected duration. Setting the level of discovery at Level 3 for all cases, while expressly limiting the maximum number of depositions and interrogatories, will achieve this goal while meeting the intent of HB 801.

§80.152

Section 80.152(a) specifies that discovery may be conducted on any matter reasonably calculated to lead to admissible evidence regarding an issue on the list of disputed issues referred to SOAH or on any issue the judge agrees to consider under § 80.4(c)(16). Discovery also includes the production of documents reviewed or relied on in the preparation of application materials or in the selection of the site and documents related to the ownership of the applicant or of the owner or operator of the facility or proposed facility.

Section 6 of HB 801, which amends Texas Government Code, §2003.047, could be read to limit the production of documents only to those specifically listed in §2003.047(g)(2). This would mean the applicant could not request documents from the protestants and the protestants could not obtain documents relating to the applicant's compliance history. The commission believes that the better interpretation of §2003.047(g) is that the listed documents are unquestionably discoverable, but that production of other documents may also be required.

In adoption of §80.152(b)(2)(B), the commission has also added the word "of" to the clause "relating to the ownership of the applicant or of the owner or operator of the facility or proposed facility." This clarifies that the phrase "relating to the ownership of" modifies both "the applicant" and "the owner or operator."

Thompson Knight and Locke Liddell suggested that there is some confusion over the scope of discovery intended by §6 of HB801. Thompson Knight suggested that the proposed language of subsections (g)(1) and (g)(2) from §2003.047 should be revised to comport with language of the statute. They pointed out that subsections (g)(1) and (2) are cumulative, and that subsection (g)(1) describes the scope of discovery, regardless of the form discovery takes. They said that subsection (g)(2) is intended to permit discovery of certain documents relating to a permit regardless of the issues referred by the commission or added by SOAH.

Conversely, Locke Liddell suggested that the discovery provisions in Texas Government Code, §2003.047, as amended by §6 of HB 801, were meant to be more narrow. They suggested that the only discovery that should be allowed is the production of the specified documents.

The commission agrees with Thompson Knight that under the specific language of HB 801 there are two separate categories of discoverable documents: (1) those related to matters reasonably calculated to lead to the discovery of admissible evidence; and (2) the production of certain documents related to the application or site selection, or to ownership of the applicant or facility.

Therefore, §80.152(b) has been revised, consistent with the statutory language, to make it clear that the second category (production of certain specified documents) operates independently of the first category (matters reasonably calculated). For example, even where certain documents related to site selection are not reasonably calculated to lead to admissible evidence, they must be produced under the second prong.

Moreover, the commission disagrees with Locke Liddell that discovery should be more limited. The plain language of the statute is clear that the two categories of discovery are cumulative. Therefore, the commission declines to limit discovery as suggested by the commenter.

Subchapter E; Freezing the Process

Henry, Lowerre suggested that the commission retain the freeze rules to allow time for the public to evaluate and comment on the benefits and problems with the rules. They commented that the rules do not need to be repealed now.

The commission disagrees with this suggestion. The purpose of the freeze rules was to streamline the hearing process for complicated permits. Texas Government Code, §2003.047, as amended by §6 of HB 801, and TWC, §5.556, as amended by §2 of HB 801, accomplishes the same objectives by limiting the issues that will be sent to hearing and by setting a maximum expected duration for the hearing. In addition, it would be unnecessarily complicated to apply the freeze rules in a future hearing, because the freeze rule process would have to be overlaid on the HB 801 process. For example, the freeze rules set out a very specific discovery process. At the same time, HB 801 requires that the commission limit discovery by setting the level of discovery according to the levels of the Texas Rules of Civil Procedure. Texas Government Code, §2003.047, as amended by §6 of HB 801. Texas Government Code, §2003.047, as amended by §6 of HB 801, and TWC, §5.556, as amended by §2 of HB 801, also requires the commission to limit the maximum expected duration of hearings, which serves the goal of expediting the hearing process, just as the freeze rules were intended to do. The rules were rarely used; therefore, the commission sees no need to retain Subchapter E. Moreover, under rules review, the commission is required to determine whether the reason for the rules still exists. Given the changes under HB 801, the commission has determined that Subchapter E is no longer necessary.

§80.251, §80.252; Judge's Proposal for Decision

Section 80.251 is amended to specify that any application declared administratively complete before September 1, 1999 is subject to this section, while an application declared administratively complete on or after September 1, 1999 is subject to §80.252. The existing subsections in §80.251 have been renumbered to accommodate new subsection (a). New §80.252 generally mirrors the provisions in §80.251, except that it applies to applications declared administratively complete on or after September 1, 1999.

Section 80.252 is retained separately from §80.251, because of a substantive change in §80.252(c). Section 80.252(c) does not contain the clause "and, in underground injection control, Texas Pollutant Discharge Elimination System, and Resource Conservation and Recovery Act permitting cases for which the commission's permitting authority is authorized by the federal government, proposed changes to the draft permit recommended by the judge in response to public comment." Because HB 801 creates a distinction between the public comment process and the contested case hearing process, it is not appropriate for the judge to consider public comment at a contested case hearing. Rather the judge should make a recommendation based on evidence presented on issues referred by the commission or added by the judge. Nonetheless, the commission will consider the comments when making a final decision on the application and will either adopt the executive director's response to comments or create its own response.

§80.252(b)

Henry, Lowerre commented that the commission should eliminate the thirty-day deadline for a judge to submit a proposal for decision, in adopted §80.252(b). The thirty day limit would eliminate the possibility of written final arguments or the filing of proposed findings of fact. Even without written argument, more than 30 days is often needed by an ALJ to evaluate the evidence and draft a proposal for decision (PFD). If TNRCC has data to support the position that 30 days is a reasonable deadline for a PFD, that information should have been provided in the preamble.

The commission generally agrees with the comment, and has changed the rule to require that the judge file the proposal for decision within the maximum expected duration set by the commission. This is consistent with HB 801, and the commission agrees that no additional deadlines are necessary. The judge is required to set a docket control order to ensure that the hearing is complete within the maximum expected duration. With this new limitation, the commission does not believe it is necessary to further limit the judge's flexibility in controlling the hearing.

§80.252(c)

Brown McCarroll suggested that the rule should be revised to make clear that the ALJ must make proposed findings of fact and conclusions of law only on those issues before the judge, including only those issues referred by the commission or added by the judge and any for which the ALJ expanded the hearing under HB801's amendment of Texas Government Code, §2003.047(f) and proposed §55.211(e) and §80.4(c)(16). They provided suggested language: "...If the proposal for decision is adverse to a party to the proceedings, it shall contain a statement of the reasons for the proposal as well as findings of fact and conclusions of law which support the proposal, on any contested issue referred by the commission or determined to be relevant and material or on which the judge admitted evidence at the contested hearing pursuant to §55.211(3) and §80.4(c)(16)."

The commission agrees that a PFD should only address issues that were referred to SOAH or added by the judge. A judge should not make recommendations on matters not considered in the evidentiary hearing. Thus, the commission has revised §80.252(c) as follows: ". . . If the proposal for decision is adverse to a party to the proceedings, it shall contain a statement of the reasons for this proposal as well as findings of fact and conclusions of law which support the proposal, on any issue referred by the commission or added by the judge."

§80.267; Decision

Brown McCarroll suggested this section should be amended to make crystal clear that the commission's ultimate findings of fact and conclusions of law are to encompass only *contested* issues, and that the commission should soon propose such a revision to 30 TAC §80.267.

The commission declines to adopt any amendments to this section at this time, since this section was not opened at proposal time. Texas Register requirements prohibit the creation of a new section that was not part of the proposed rulemaking. The commission decision will include findings of fact and conclusions of

law that encompass only issues referred to SOAH or added by the judge.

§80.271; Motion for Rehearing

The commission amends §80.271 to add subsection (a), specifying that any applications declared administratively complete before September 1, 1999 are subject to §80.271. The existing subsections in §80.271 have been renumbered. Subsection (b) is amended to implement SB 211, which adds 3 days to the date on which a party is presumed to have received mailed notice of a decision or order.

§80.272; Motion for Rehearing

The commission adopts new §80.272 to implement SB 211, which adds 3 days to the date on which a party is presumed to have received mailed notice of a decision or order. New §80.272 applies to any applications declared administratively complete on or after September 1, 1999. The rule retains the requirement that a Motion for Rehearing (MFR) be filed within 20 days after notification of the commission decision or order. Under §80.272(b), the commission presumes a party or attorney of record has received notice on the third day after the date the decision or order is mailed.

30 TAC §§80.1, 80.3, 80.4-80.6, 80.17

STATUTORY AUTHORITY

The amendments and new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

§80.3. Judges.

(a) Applicability and delegation.

(1) Any application that is declared administratively complete before September 1, 1999 is subject to this section.

(2) The commission delegates to SOAH the authority to conduct hearings designated by the commis- sion.

(b) The chief administrative law judge will assign judges to hearings. When more than one judge is assigned to a hearing, one of the judges will be designated as the presiding judge and shall resolve all procedural questions. Evidentiary questions will ordinarily be resolved by the judge sitting in that phase of the case, but may be referred by that judge to the presiding judge.

(c) Judges shall have authority to:

(1) set hearing dates;

(2) convene the hearing at the time and place specified in the notice for the hearing;

(3) establish the jurisdiction of the commission;

(4) rule on motions and on the admissibility of evidence and amendments to pleadings;

(5) designate and align parties and establish the order for presentation of evidence, except that the executive director and the public interest counsel shall not be aligned with any other party;

(6) examine and administer oaths to witnesses;

(7) issue subpoenas to compel the attendance of witnesses, or the production of papers and documents;

(8) authorize the taking of depositions and compel other forms of discovery;

(9) set prehearing conferences and issue prehearing orders;

(10) ensure that information and testimony are introduced as conveniently and expeditiously as possible, including limiting the time of argument and presentation of evidence and examination of witnesses without unfairly prejudicing any rights of parties to the proceeding;

(11) limit testimony to matters under the commission's jurisdiction;

(12) continue any hearing from time to time and from place to place;

(13) reopen the record of a hearing, before a proposal for decision is issued, for additional evidence where necessary to make the record more complete;

(14) impose appropriate sanctions;

(15) issue interim rate orders under Texas Water Code, Chapter 13;

(16) exercise any other appropriate powers necessary or convenient to carry out his responsibilities.

§80.4. Judges.

(a) Applicability and delegation is as follows:

(1) Any application that is declared administratively complete on or after September 1, 1999 is subject to this section.

(2) The commission delegates to SOAH the authority to conduct hearings designated by the commis- sion.

(b) The chief administrative law judge will assign judges to hearings. When more than one judge is assigned to a hearing, one of the judges will be designated as the presiding judge and shall resolve all procedural questions. Evidentiary questions will ordinarily be resolved by the judge sitting in that phase of the case, but may be referred by that judge to the presiding judge.

(c) Judges shall have authority to:

(1) set hearing dates;

(2) convene the hearing at the time and place specified in the notice for the hearing;

(3) establish the jurisdiction of the commission;

(4) rule on motions and on the admissibility of evidence and amendments to pleadings;

(5) designate and align parties and establish the order for presentation of evidence, except that the executive director and the public interest counsel shall not be aligned with any other party;

(6) examine and administer oaths to witnesses;

(7) issue subpoenas to compel the attendance of witnesses, or the production of papers and documents;

(8) authorize the taking of depositions and compel other forms of discovery;

(9) set prehearing conferences and issue prehearing orders;

(10) ensure that information and testimony are introduced as conveniently and expeditiously as possible, including limiting the time of argument and presentation of evidence and examination of witnesses without unfairly prejudicing any rights of parties to the proceeding;

(11) limit testimony to matters under the commission's jurisdiction;

(12) continue any hearing from time to time and from place to place;

(13) reopen the record of a hearing, before a proposal for decision is issued, for additional evidence where necessary to make the record more complete;

(14) impose appropriate sanctions;

(15) issue interim rate orders under Texas Water Code, Chapter 13;

(16) consider additional issues beyond the list referred by the commission when:

(A) the issues are material;

(B) the issues are supported by evidence; and

(C) there are good reasons for the failure to supply available information regarding the issues during the public comment period;

(17) extend the proceeding beyond the expected completion date if:

(A) the judge determines that failure to grant an extension would deprive a party of due process or another constitutional right; and

(B) by agreement of the parties;

(18) exercise any other appropriate powers necessary or convenient to carry out his responsibilities.

(d) For applications declared administratively complete on or after September 1, 1999, notwithstanding §80.127(f) of this title (relating to Evidence), the judge is not required to accept public comment into the evidentiary record. This subsection supercedes §80.127(f) of this title.

§80.5. Referral to SOAH.

(a) Any application that is declared administratively complete before September 1, 1999 is subject to this section. When a case is referred to SOAH, the chief clerk shall:

(1) file with SOAH a Request for Setting of Hearing form, or Request for Assignment of Administrative Law Judge form, whichever is appropriate;

(2) coordinate with SOAH to determine a time and place for hearing;

(3) issue public notice of the hearing as required by law and commission rules; and

(4) send a copy of the chief clerk's case file to SOAH.

(b) The commission shall provide to the judge a list of issues or areas that must be addressed. In addition, the commission may

identify and provide additional issues or areas that must be addressed to the judge, or may limit issues or areas to be addressed, at any time. In an enforcement case, the executive director's petition or EDPR shall serve as the list of issues or areas that must be addressed.

§80.6. Referral to SOAH.

(a) Any application that is declared administratively complete on or after September 1, 1999 is subject to this section.

(b) When a case is referred to SOAH, the chief clerk shall:

(1) file with SOAH a Request for Setting of Hearing form, or Request for Assignment of Administrative Law Judge form, whichever is appropriate;

(2) coordinate with SOAH to determine a time and place for hearing;

(3) issue public notice of the hearing as required by law and commission rules;

(4) send a copy of the chief clerk's case file to SOAH; and

(5) send the commission's list of disputed issues and maximum expected duration of the hearing to SOAH.

(c) In an enforcement case, the executive director's petition or Executive Director Preliminary Report shall serve as the list of issues or areas that must be addressed.

(d) When a case is referred to SOAH, only those issues referred by the commission or added by the judge under §80.4(c)(16) of this title (relating to Judges) may be considered in the hearing. The judge shall provide proposed findings of fact and conclusions of law only on those issues.

§80.17. Burden of Proof.

(a) The burden of proof is on the moving party by a preponderance of the evidence, except as provided in subsections (b) - (d) of this section.

(b) Section 291.12 of this title (relating to Burden of Proof) governs the burden of proof in a proceeding involving a proposed change of water and sewer rates not governed by Chapter 291, Subchapter I of this title (relating to Wholesale Water or Sewer Service).

(c) Section 291.136 of this title (relating to Burden of Proof) governs the burden of proof in a proceeding related to a petition to review rates changed pursuant to a written contract for the sale of water for resale filed under Texas Water Code, Chapter 11 or 12, and in an appeal under Texas Water Code, §13.043(f).

(d) In an enforcement case, the executive director has the burden of proving by a preponderance of the evidence the occurrence of any violation and the appropriateness of any proposed technical ordering provisions. The respondent has the burden of proving by a preponderance of the evidence all elements of any affirmative defense asserted. Any party submitting facts relevant to the factors prescribed by the applicable statute to be considered by the commission in determining the amount of the penalty has the burden of proving those facts by a preponderance of the evidence.

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 3, 1999.

TRD-9905723
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

30 TAC §80.7

STATUTORY AUTHORITY

The repeal is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within

facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

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 3, 1999.

TRD-9905724
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter C. HEARING PROCEDURES

30 TAC §80.105, §80.109

STATUTORY AUTHORITY

The amendments are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264

§80.105. Preliminary Hearings.

(a) After the required notice has been issued, the judge shall convene a preliminary hearing to consider the jurisdiction of the commission over the proceeding. A preliminary hearing is not required in an enforcement matter, except in those under federally authorized underground injection control (UIC) or Texas Pollutant Discharge Elimination System (TPDES) programs.

(b) If jurisdiction is established, the judge shall:

(1) name the parties and, for enforcement hearings only, accept public comment;

(2) establish a docket control order designed to complete the proceeding within the maximum expected duration set by the commission. The order should include a discovery and procedural schedule including a mechanism for the timely and expeditious resolution of discovery disputes; and

(3) allow the parties an opportunity for settlement negotiations.

(c) When agreed to by all parties in attendance at the preliminary hearing, the judge may proceed with the evidentiary hearing on the same date of the first preliminary hearing.

(d) One or more preliminary hearings may be held to discuss:

(1) formulating and simplifying issues;

(2) evaluating the necessity or desirability of amending pleadings;

(3) all pending motions;

(4) stipulations;

(5) the procedure at the hearing;

(6) specifying the number and identity of witnesses;

(7) filing and exchanging prepared testimony and exhibits;

(8) scheduling discovery;

(9) setting a schedule for filing, responding to, and hearing of dispositive motions; and

(10) other matters that may expedite or facilitate the hearing process.

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 3, 1999.

TRD-9905725

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Effective date: September 23, 1999

Proposal publication date: July 16, 1999

For further information, please call: (512) 239-1932

♦ ♦ ♦

30 TAC §80.111

STATUTORY AUTHORITY

The repeal is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264

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 3, 1999.

TRD-9905727
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter D. DISCOVERY

30 TAC §80.152

STATUTORY AUTHORITY

The new section is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264

§80.152. Scope and Level of Discovery.

(a) Any application that is declared administratively complete on or after September 1, 1999 is subject to this section.

(b) The scope of permissible discovery in contested case hearings is limited to:

(1) any matter reasonably calculated to lead to the discovery of admissible evidence regarding any issue referred to the administrative law judge by the commission or that the administrative law judge has agreed to consider; and

(2) production of documents:

(A) reviewed or relied on in preparing application materials or selecting the site of the proposed facility; or

(B) relating to the ownership of the applicant or of the owner or operator of the facility or proposed facility.

(c) The level of discovery for all contested case hearings shall be Level 3 under Texas Rules of Civil Procedure (TRCP) 190.4. However, the administrative law judge shall set an appropriate limit on the time for depositions and the number of interrogatories, provided that the total time per side for oral depositions may not exceed 50 hours and the total number of written interrogatories that any party may serve on any other party may not exceed 25. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated.

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 3, 1999.

TRD-9905728
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter E. FREEZING THE PROCESS

30 TAC §§80.201, 80.203, 80.205, 80.207, 80.209, 80.213, 80.215

STATUTORY AUTHORITY

The repeals are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264

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 3, 1999.

TRD-9905729
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter F. POST HEARING PROCEDURES

30 TAC §§80.251, 80.252, 80.271, 80.272

STATUTORY AUTHORITY

The amendments and new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for

notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264

§80.252. Judge's Proposal for Decision.

(a) Any application that is declared administratively complete on or after September 1, 1999 is subject to this section.

(b) Judge's proposal for decision. After closing the hearing record, the judge shall file a written proposal for decision with the chief clerk no later than the end of the maximum expected duration set by the commission and shall send a copy by certified mail to each party.

(c) Proposal for decision: adverse to a party. A proposal for decision shall be filed by the judge who conducted the hearing or by a substitute judge who has read the record. If the proposal for decision is adverse to a party to the proceeding, it shall contain a statement of the reasons for the proposal as well as findings of fact and conclusions of law which support the proposal on any issue referred by the commission or added by the judge. If any party has filed proposed findings of fact upon the judge's request, the judge shall include with the proposal for decision recommended rulings on all findings of fact so proposed. Where more than one judge has been assigned to hear a particular proceeding, the presiding judge will issue the proposal for decision and the other assigned judge or judges may file comments.

(d) Proposal for decision: not adverse to any party. If the proposal for decision is not adverse to any party to the proceeding, the judge may informally dispose of the matter by proposing to the commission an order which need not contain findings of fact, conclusions of law, or reasons for the proposal. If the proposal for decision is not adverse to any party and a permit is to be issued, the judge need not propose an order to the commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 3, 1999.

TRD-9905730
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Chapter 106. EXEMPTIONS FROM PERMITTING

Subchapter A. GENERAL REQUIREMENTS

30 TAC §106.5, §106.13

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §106.5, concerning Public Notice; and new §106.13, concerning Permits by Rule. Section 106.5 is adopted with changes to the proposed text as published in the July 16, 1999, issue of the *Texas Register* (24 TexReg 5410). Section 106.13 is adopted without changes and will not be republished.

BACKGROUND

The primary purpose of the adopted amendments and new section is to implement House Bill (HB) 801, and Senate Bill (SB) 766, 76th Legislature, (1999). Certain portions of the adopted amendments and new section are adopted to clarify the

applicability of existing notice provisions, to correct, clarify, and update certain public notice rules with regard to notices for air quality applications. Certain actions concerning a portion of the adoption will constitute a revision to the state implementation plan (SIP). The adoption also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs. Notices relating to certain air quality permit and permit exemption public notification and public participation requirements, currently under Chapters 116 and 106, are now incorporated into Chapter 39 and will be incorporated into future amendments to Chapter 55 .

OVERVIEW OF HB 801 AND IMPLEMENTATION

HB 801, enacted by the 76th Legislature, revises the commission's procedures for public participation in environmental permitting by adding new Texas Water Code (TWC), Chapter 5, Subchapter M; revising Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.088; revising THSC, Texas Clean Air Act (TCAA), §382.056; and revising Texas Government Code (TGC), §2003.047. Except for the changes required under TGC, §2003.047, the new and amended statutory provisions apply to applications under TWC, Chapters 26 and 27, and THSC, Chapters 361 and 382. The changes in law made by HB 801 only apply to permit applications declared administratively complete on or after September 1, 1999, and former law is continued in effect for applications declared administratively complete before September 1, 1999. Generally, the amendments made by this law are procedural in nature and are not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for hearing are provided.

More specifically, HB 801 encourages early public participation in the environmental permitting process and is intended to streamline the contested case hearing process. For example, it requires an applicant to publish newspaper notice of intent to obtain a permit and notice of the executive director's preliminary decision on the application. It also requires the applicant to place a copy of the application and the executive director's preliminary decision at a public place in the county and authorizes the executive director to hold public meetings. The executive director is also required to prepare responses to relevant and material public comment. It requires the commission to prescribe alternative cost- effective procedures for newspaper publication for small business stationary sources seeking air emissions authorization that will not have a significant effect on air quality. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary to satisfy federal program authorization requirements. Contested case hearing procedures are also revised. The scope of proceedings and discovery is limited by the new law. These changes are implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted to Chapters 106, 116, 122, and 305. Most of these chapters also contain changes necessary for the consolidation of the procedural rules of the agency and to improve consistency among the permitting programs, as well as changes to clarify and update agency rules and changes necessary to facilitate permit processing. Changes for all of these chapters are published in this edition of the *Texas Register*. Changes to Chapters 55 and 321 also proposed on July 16, 1999 are not adopted at this time, but will be subject to future consideration by the commission.

OVERVIEW OF SB 766 AND IMPLEMENTATION

SB 766, enacted by the 76th Legislature, also amends TCAA, Chapter 382 by, among other things: (1) requiring the commission to establish procedures to authorize standard permits and permits by rule; (2) dividing the current category of exemptions from permitting into two categories: permits by rule for construction of new facilities with insignificant air emissions, and exemptions from permitting for changes to existing facilities with insignificant air emissions; and (3) creating a voluntary emission reduction permit for grandfathered facilities that must be applied for by September 1, 2001. Notice requirements for these changes are implemented in the changes to Chapter 39 because of the critical nature of the timing of the permit program. Public participation requirements applicable to permit applications under SB 766 are included in the chapters published in this edition of the *Texas Register*. Additional implementation of the requirements of SB 766 is expected to occur in future rulemaking proposals by the commission.

EXPLANATION OF ADOPTED RULES

New §106.5(a) states that registrations which are declared administratively complete on or after September 1, 1999 are subject to the current version of this chapter. Registrations which are declared administratively complete before September 1, 1999 are subject to the preceding version of Chapter 106 (i.e., the December 24, 1998 version). This provision is required by HB 801, §7(b).

Amended §106.5(b) includes existing wording of §106.5 and adds new language which references the public notice requirements under Chapter 39. Correspondingly, §106.5(b)(1)-(2) have been deleted, because they are included in the commission's proposal to amend Chapter 39 relating to public notice. Public participation on those actions must follow the requirements in Chapter 55 relating to Requests for Reconsideration and Contested Case Hearing and Public Comment.

New §106.13, concerning permits by rule, states that exemptions from permitting in Chapter 106 are also permits by rule. This new section implements the statutory changes of SB 766, TCAA, §382.05196 effective September 1, 1999, and new requirements for authorization under TCAA, §382.057 and §382.058. These changes include authorization mechanisms for the construction of facilities using permits by rule and changes to existing facilities using exemptions from permitting under the adopted revised Chapter 106. Prior to these statutory changes, §382.057 authorized the commission to exempt changes within any facility and construction of certain types of facilities from certain permit requirements if the commission found that such changes or types of facilities will not make a significant contribution of air contaminants to the atmosphere. The commission has authorized these changes to facilities and types of facilities in rules codified in Chapter 106. SB 766 split this authorization by restricting authorization under §382.057 to only changes within facilities, and adding new §382.05196, Permits by Rule, for authorization of construction of certain types of facilities that will not make a significant contribution of air contaminants. The commission anticipates that applicants will continue to seek authorization for new facilities that do not make a significant contribution of air contaminants. Without this rule, authorizations under Chapter 106 would be limited to changes to facilities. The commission finds that the changes to facili-

ties and construction of certain types of facilities which will not make a significant contribution of air contaminants are those currently existing in Chapter 106, as previously determined by the commission, and therefore adopts this rule to clarify that the authorizations specified in that chapter are available for both categories of facilities.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted 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 the definition of a "major environmental rule." Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

"Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking is not a major environmental rule because it is not adopted with the specific intent of protecting the environment or reducing risks to human health or the environment. The specific primary intent of the rule is procedural in nature and establishes procedures associated with exemptions from permitting and permits by rule. The rule also provides that exemptions from permitting are also permits by rule. The adoption relates to procedures for providing public notice, in regard to exemptions from permitting. The rule does not concern an existing or new regulatory program that would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. It prescribes public notice procedures to be followed for exemptions and permits by rule and establishes that exemptions are also permits by rule. The rule does not prescribe control requirements or any other requirements that would normally be associated with a commission environmental rulemaking.

In addition, this adopted rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law because there are no federal public notice rules in regard to exemptions from permitting of permits by rule. This adoption does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; TCAA, §§382.057, 382.058, and 382.05196, as well as the other authorities cited in the STATUTORY AUTHORITY section of this preamble. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with Texas Water Code, §5.551, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program. This adoption does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., TCAA, §382.056). Finally, this rulemaking is not being adopted or adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these adopted rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific primary purpose of the adopted amendment and new section is to revise the TNRCC rules to establish procedures for public notice in regard to exemptions from permitting and permits by rule and to provide that exemptions from permitting are also permits by rule. The adopted rules will substantially advance these stated purposes by providing specific provisions on the aforementioned matters. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the adopted language consists of amendments and new sections relating to the commission's procedural rules.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The adopted actions concern only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (31 TAC Chapter 505; 30 TAC, §§281.40, et seq.).

HEARING AND COMMENTERS

A public hearing on this proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. No comments on this chapter were received during the public meeting. The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999. Written comments on this chapter were received from Baker & Botts, L.L.P. (Baker & Botts) on behalf of the Texas Industry Project.

Baker & Botts commented that because the only registrations subject to Chapter 39 public notice requirements are concrete batch plants as listed in §39.403(b)(10), this rule should be amended to limit the applicability of §106.5 to these actions.

As proposed, §106.5(b) stated that only permanently or temporarily located concrete batch plants are required to conduct public notice under Chapter 39. The commission believes no additional change is necessary to this rule to address this comment.

STATUTORY AUTHORITY

The amendment and new section are adopted under THSC, §382.056, which establishes the commission's authority concerning notice and hearing procedures for authorizations under TCAA.

Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules, and §5.105, which establishes the commission's authority to set policy by rule.

Additionally, relevant sections of the THSC include; §382.011, which establishes the commission's authority to carry out its re-

sponsibilities to control the quality of the state's air; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.05196, which establishes the commission's authority to adopt rules relating to permits by rule; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.061, which establishes delegation of authority to the executive director; and §382.062, which establishes the commission's authority to adopt rules for certain air authorizations.

An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

§106.5. Public Notice.

(a) Any registration subject to this chapter that is declared administratively complete on or after September 1, 1999 is subject to the current version of this chapter. Any registration that is declared administratively complete before September 1, 1999 is subject to the December 24, 1998 version of this chapter, and that version of this chapter is continued in effect for this purpose.

(b) Facilities constructed under this chapter that consist of permanently or temporarily located concrete plants that accomplish wet batching, dry batching, or central mixing, or specialty wet batch, concrete, mortar, grout mixing, or pre-cast concrete products, shall conduct public notice of the proposed construction unless exempted from public notice requirements by TCAA, §382.058(b). In all cases, public notice shall comply with the requirements under Chapter 39 of this title (relating to Public Notice) and public participation shall be subject to Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearing; Public Comment).

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 3, 1999.

TRD-9905722
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Chapter 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRICTION OR MODIFICATION

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§116.111, 116.114, 116.116, 116.183, 116.312, and 116.740; and the repeal of §116.124. Sections 116.111, 116.114, and 116.116 are adopted with changes to the proposed text as published in the July 16, 1999, issue of the *Texas Register* (24 TexReg 5427). Sections 116.124, 116.183, 116.312, and 116.740 are adopted without changes to the proposed text and will not be republished.

BACKGROUND

The primary purpose of the adopted amendments is to implement House Bill (HB) 801, and portions of Senate Bill (SB) 7 and SB 766 76th Legislature (1999). The adopted amendments and new sections are intended to establish and clarify the applicability of notice provision and provide avenues for public participation in the permitting process for water, waste, and air applications. These changes also update notice rules for air quality permit amendments. This proposal also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs. Certain rules will constitute a revision to the state implementation plan (SIP). Specifically, §§116.111, 116.114, 116.116, 116.183, 116.312, 116.740 as revised are being added to the SIP. In addition, existing §116.124 is being deleted from the SIP. Specific rules from Chapter 39 are also being adopted as SIP revisions.

OVERVIEW OF HB 801 AND IMPLEMENTATION

HB 801, enacted by the 76th Legislature, revises the commission's procedures for public participation in environmental permitting by adding new Texas Water Code (TWC), Chapter 5, Subchapter M; revising Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.088; revising Texas Clean Air Act (TCAA), THSC §382.056; and revising Texas Government Code, §2003.047. The new and amended statutory provisions apply to applications under TWC, Chapters 26 and 27, and THSC, Chapters 361 and 382. The changes in law made by HB 801 only apply to permit applications declared administratively complete on or after September 1, 1999 and former law is continued in effect for applications declared administratively complete before September 1, 1999. Generally, the amendments made by this law are procedural in nature and are not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for hearing are provided.

More specifically, HB 801 encourages early public participation in the environmental permitting process and is intended to streamline the contested case hearing process. For example, it requires an applicant to publish newspaper notice of intent to obtain a permit and notice of the executive director's preliminary decision on the application. It also requires the applicant to place a copy of the application and the executive director's preliminary decision at a public place in the county and authorizes the executive director to hold public meetings. The executive director is also required to prepare responses to relevant and material public comment. It requires the commission to prescribe alternative cost- effective procedures for newspaper publication for small business stationary sources seeking air emissions authorization that will not have a significant effect on air quality. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary to satisfy federal program authorization requirements. Contested case hearing procedures are also revised. The scope of proceedings and discovery is limited by the new law. These changes are adopted to be implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted to Chapters 106, 116, and 122. Most of these chapters also contain

changes necessary for the consolidation of the procedural rules of the agency and to improve consistency among the permitting programs as well as changes to clarify and update agency rules and changes necessary to facilitate permit processing. Changes for all of these chapters are published in this issue of the *Texas Register*. Changes to Chapter 321 were also proposed in the July 16, 1999 issue of the *Texas Register* but are not adopted at this time.

OVERVIEW OF SB 7 AND IMPLEMENTATION

Senate Bill (SB 7), enacted by the 76th Legislature, restructures electric utility service in Texas. Also, owners grandfathered utilities that generate electric energy for compensation are required to apply for electric generating facility permits from the commission by September 1, 2000. These permits are subject to notice under §382.056 of the THSC. SB 7 provides that initial issuance of these permits requires notice and comment proceedings. However, renewal of these permits requires notice, comment, and opportunity for contested case hearing.

The notice provisions for electric generating facility permits are implemented through changes to Chapter 39. Chapters 50 and 80 as amended also apply to these permits. Additional implementation of the requirements of SB 7 is expected to occur in future rulemaking by the commission.

OVERVIEW OF SB 766 AND IMPLEMENTATION

SB 766, enacted by the 76th Legislature, also amends TCAA, Chapter 382 by, among other things: (1) requiring the commission to establish procedures to authorize standard permits and permits by rule; (2) dividing the current category of exemptions from permitting into two categories: permits by rule for construction of new facilities with insignificant air emissions, and exemptions from permitting for changes to existing facilities with insignificant air emissions; and (3) creating a voluntary emission reduction permit for grandfathered facilities that must be applied for by September 1, 2001. Notice requirements for these changes are implemented in the changes to Chapter 39 because of the critical nature of the timing of the permit program. Public participation requirements applicable to permit applications under SB 766 are included in these chapters. Additional implementation of the requirements of SB 766 is expected to occur in future rulemaking proposals by the commission.

EXPLANATION OF ADOPTED RULES

The primary purpose of the adopted amendments and repeals is to implement HB 801, 76th Legislature (1999). Revised §116.111 contains a new requirement that applications for which notice is required must comply with the provisions of Chapters 39, relating to public notice and public participation in the permitting process, in accordance with TCAA, §382.056 as amended by HB 801. In addition, the notice waiver for previously permitted facilities is added to new §116.111(b), which mirrors the waiver in existing §116.130(b). No substantive changes have been made by the movement of this section. Section 116.111(b) has been revised to include a savings clause as to what notice requirements are applicable to certain applications. This is necessary for applicants to know what the substantive notice requirements are to implement HB 801. The language includes language in the existing §116.111(b) as proposed and the savings clause in new §39.601 of this title (relating to Applicability). The rule has also been revised to include new subsections (1) and (2) for easier understanding.

The amendment to §116.114(a)(2) incorporates the dual notification requirements of HB 801 in TCAA, §382.056(f). This section refers to the executive director's preliminary determination to approve or disapprove applications after completing the technical review. This requirement, under current rules, is exclusive only to applications subject to Federal Clean Air Act (FCAA), Title I, Part C or D (Nonattainment Permits) and 40 Code of Federal Regulations (CFR) Part 51.165(b) (relating to Prevention of Significant Deterioration permits) under §116.131(a). TCAA, §382.056(f) requires a preliminary determination for all applications subject to notification. The revised section outlines the circumstances under which applicants must to publish notice of the executive director's preliminary decision and seek additional public comment. This section is reformatted to account for the notification triggers but maintains the existing review deadlines for the executive director to complete the technical review and forward his preliminary determination to the company and the chief clerk. Section 116.11(b) has been revised to include a savings clause as to what notice requirements are applicable to certain applications. This is necessary for applicants to know what the substantive notice requirements are to implement HB 801. The language includes language in the existing §116.111(b) as proposed and the savings clause in new §39.601 of this title (relating to Applicability). The rule has also been revised to include new subsections (1) and (2) for easier understanding.

The amendment to §116.114(c)(1)-(3) incorporates the applicant notification requirements also in §116.137. These provisions streamline the format and match the previous requirements listed in Chapter 116, effective date March 21, 1999, under §§116.114(a)(2), 116.160(b)(3), and 116.314. These timelines establish when the executive director should notify applicants. No substantive changes have been made by the creation of this subsection.

Section 116.116(b)(4) is adopted to be added in accordance with adopted §39.403(8)(c) requirements for notice for certain permit amendments, including applications for construction of any new facility under TCAA, §382.0518 and the clarification of the existing practice of requiring public notification for modifications to existing facilities with significant emission increases authorized under Chapter 116. Under these new requirements, any new facility construction will be required to comply with notice requirements in Chapter 39. The previous reference to public notification requirements for actions under Chapter 116, Subchapter C, has been incorporated in new §39.403(9), under this adoption.

Adopted amendments to §116.116(d)(1) and (2) include authorization mechanisms for the construction of facilities using a permit by rule, and changes to existing facilities using exemptions from permitting, both under the adopted revised Chapter 106. This change references the implementation of the statutory changes from SB 766 and new requirements for authorization of insignificant facilities under TCAA, §§382.05196, 382.057 and 382.058.

The public notification text requirement for availability of compliance history information is adopted to be moved to §39.411(b)(10)(D) and §116.124 is being repealed. No substantive changes have been made to this rule.

Subchapter B, Division 3 (relating to Notification and Comment Procedures) §§116.130-116.137 are not repealed as proposed. These sections are retained for applications that are administratively complete before September 1, 1999. As a continua-

tion of the commission's effort to consolidate agency procedural rules, a new §116.111(b) requires applications that are administratively complete on or after September 1, 1999 to comply with the requirements of Chapter 39 (relating to Public Notice). Revised §116.111 contains new requirements that applications for which notice is required must comply with the provisions of Chapters 39 and 55. These chapters deal with public notice and public participation in the permitting process in accordance TCAA §382.056 as amended by HB 801. Similar changes have been adopted under §116.114(b)(1) (relating to Voiding of Deficient Applications); Subchapter C, §116.183 (relating to Public Notification for Hazardous Air Pollutants) §116.312 (relating to public notification requirements for Permit Renewals); and Subchapter G, §116.740(a) and (c) (relating to public notification requirements for Flexible Permits).

The requirements of §116.130(a) and (c) (relating to Applicability) are adopted to be moved to §39.403(b)(8) and (9). The requirements of §116.130(b) (relating to notification for change of location of previously permitted facilities) are adopted to be included in the amendment to §116.111(b). In addition, the notice waiver for previously permitted facilities is added to new §116.111(b) which mirrors the waiver in existing §116.130(b).

The preliminary determination and notification requirements of §116.131(a) are adopted to be incorporated in the revisions to §116.114(2). The application availability requirements under §116.131(b) are adopted to be incorporated into §39.411(b)(8) and revised to reflect the new requirements under TCAA, §382.056(d) which requires the applicant to make a copy of the application available for review by the public in the county where the facility is or will be located, and revised to reflect that this is also in §39.411(c)(5).

The public notice format requirements previously under §116.132(a) (relating to Publication in public notice section of newspaper) are adopted to be moved to §39.603 (relating to Newspaper Notice) and §39.411 (relating to Text of Public Notice), and include requirements as specified in HB 801 and TCAA, §382.056. Consistent with TCAA, §382.056(a) the previous requirement to publish notice in two consecutive issues of a newspaper is reduced to one issue of a newspaper for each set of required notices. The requirements of §116.132(b) (relating to Publication Elsewhere in the Newspaper) are adopted to be moved to §39.603(c)(2) and have no substantive changes. The requirements under §116.132(c) and (d) (relating to Additional Alternate Language Public Notice) are adopted to be moved to §39.603(d). Changes have been made to streamline and reformat the existing requirements as well as to clarify that alternate language notice is required even if the applicable schools do not have students in resident programs at the time of public notice applicability under new §39.603(d)(i)(D). In accordance with existing TNRCC practice, new §39.603(d)(7) requires applicants to complete a certification and submit this certification under §39.603(3) if they waive out of alternate language public notice.

The sign posting requirements previously under §116.133 and §116.312(b) are adopted to be moved to new §39.604. There are two substantive changes to these requirements under the new section. First, the lettering sizes have been modified for simplicity and standardized to two inches in height. Second, the posting of signs along property lines at the existing or adopted facility are limited to only those areas which parallel a public street, road, or highway. Previous references to "thoroughfare" are adopted to be deleted in accordance to Air Rule Interpretation Memo Number R6-133.001. The requirement under §116.312(b) which is adopted to be moved to §39.604 is the requirement for the sign heading to read "PROPOSED RENEWAL OF AIR QUALITY PERMIT."

Notification of Affected Agencies previously under §116.134 is adopted to be moved to §39.605. No substantive changes have been made to these rules. Section 39.605 refers to general notification requirements of §39.405(f) which requires applicants, regardless of commission program, to submit copies of notices and affidavits to the chief clerk of the agency.

Public comment procedures previously under §116.136 are adopted to be included in §39.409 (relating to Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice and Comment Hearing) in accordance with the new requirements under HB 801.

Notification of Final Action previously under §116.137 has been moved to §116.114(c)(1)-(3). No substantive changes are adopted to be made to these rules.

The commission has determined §§116.130-137 are necessary for the SIP with regard to applications that are declared administratively complete before September 1, 1999 and therefore is not repealing these sections as proposed.

Finally, certain rules in Chapters 39 and 116 will constitute a revision to the state implementation plan (SIP). Specifically, §§116.111, 116.114, 116.116, 116.183, 116.312, 116.740 as revised are adopted to be added to the SIP. In addition, §116.124 is being deleted from the SIP.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted 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 the definition of a "major environmental rule." Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a). "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking is not a major environmental rule because it is procedural in nature and establishes procedures associated with air permits for new construction or modification, public notice, and public comment on permit applications, and it is not adopted with the specific intent of protecting the environment or reducing risks to human health or the environment. The specific primary intent of the rule is to establish procedures for public participation in certain permitting proceedings. The adoption relates to procedures for providing public notice, providing opportunity for public comment, and providing opportunity for requesting public hearing. The rule would also consolidate already existing notice procedures for the air quality permitting program. In addition, the rule incorporates the reference to new permits by rule authorized by SB 766. The rule does not concern an existing or new regulatory program that would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Rather, it merely prescribes public participation procedures to be followed by the commission and applicants for certain commission au-

thorizations. The rule does not prescribe control requirements or any other requirements that would normally be associated with a commission environmental rulemaking.

In addition, this adopted rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This proposal does not impose any significant additional requirements not already required by federal law, because the main purpose of this proposal is to adopt state rules to provide for additional notice, opportunity for public comment, or opportunity for hearing which also satisfies federal program authorization requirements. This adoption does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice, and Texas Clean Air Act (TCAA), §382.05196 and §382.056; as well as the other authorities cited in the STATUTORY AUTHORITY section of this preamble. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rule is consistent with, and does not significantly exceed, federal requirements, and is in accordance with Texas Water Code, §5.551 and TCAA, §382.017, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program. This adoption does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., TCAA, §382.05196 and §382.056 and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted or adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these adopted rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific primary purpose of the adopted amendments and repeals is to revise the TNRCC rules to establish procedures for public participation in certain permitting proceedings as required by HB 801, and other legislation. The adoption relates to procedures for providing public notice, providing opportunity for public comment, and providing opportunity for requesting public hearing. The rule would also consolidate already existing notice procedures for the air quality permitting program; correct, clarify, and update the air quality permit amendment process; clarify requirements relating to bilingual education notices; and consolidate commission procedural rules. The adopted rules will substantially advance these stated purposes by providing specific provisions on the aforementioned matters. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the adopted language consists of amendments and new sections relating to the commission's procedural rules.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The adopted actions concern only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (31 TAC Chapter 505; 30 TAC §§281.40, et seq.).

COMMENTS REQUESTED

The commission solicited comments regarding the requirements in §39.603(a)(2) (Air Quality Permit applications) on the size of newspaper notice. The commission recognizes that the measurements in the rules do not necessarily reflect the measurements that newspapers use for advertisements. During the comment period, the Texas Press Association forwarded information to the TNRCC on how most advertising space is sold. The notice size was adjusted to match the size of Standard Advertising Units and still provide an effective notice to interested persons of the general public and meet statutory requirements (if applicable). This change will hopefully reduce the occurrence of errors and republication time and money.

HEARING AND COMMENTERS

A public hearing on the proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. No oral comments were given regarding this chapter. The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999. Written comments were submitted by Baker & Botts, L.L.P., on behalf of the Texas Industry Project; Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll), on behalf of the Texas Chemical Council, Texas Association of Business and Chambers of Commerce (TABCC), and Texas Oil and Gas Association; Henry, Lowerre, Johnson, Hess & Frederick, Attorneys at Law (Henry, Lowerre), on behalf of Blackburn and Carter, Clean Water Action, Consumers Union, Environmental Defense Fund, Henry, Lowerre, Johnson & Frederick, National Wildlife Federation, Public Citizen, Sierra Club, Lone Star Chapter, Texas Center for Policy Studies, and Texas Committee on Natural Resources; and the United States Environmental Protection Agency Region 6 Office (EPA).

§116.111

Henry, Lowerre commented that the limitation proposed in the sentence beginning with "upon written request" in 116.111(b) should be deleted on the basis that while this wording may be in existing law, HB 801 clearly requires better notice and public input than this section allows. The commenter states that the existing rules are a reflection of what he perceives to be past TNRCC biases against public participation. The commenter stated that TNRCC will not likely know of all impacts of such relocation until it has heard from the public and that the issues do not just involve the overall ambient condition of air pollution. The example given by the commenter is that at a large site, one side is in a very rural setting, the other side may in be an urban area with residences. He stated that there must be notice of the proposal to moving a boiler, an industrial waste landfill, or other facility from the rural side to the urban side, even if the overall pollution conditions are not changed because site specific conditions may change and property line violations may occur. He commented that those are issues on which the public has a right to comment or seek a hearing and it is not sufficient that the executive director has reviewed the applicant's modeling and agrees that there are no problems. He stated that the public may have data, including information on closer

receptors, that the applicant did not provide and that is why state and federal laws require public input to such decisions.

The commission has made no change in response to this comment. HB 801 specifically provides that it does not expand or restrict the types of commission actions for which notice, an opportunity for public comment, or opportunity for public hearing are provided. The expansion in public notice procedures was not included in the proposal for this rule and the commission does not believe that it would be appropriate to include such a provision at adoption without opportunity to comment. The jurisdiction given to the commission by the TCAA with regard to air permit applications is whether the application meets the intent of the TCAA, including evaluation of ambient air quality. The executive director includes as part of technical review of these applications, an evaluation to determine whether these facilities will meet all state and federal property line standards and will protect human health, welfare and property (impacts evaluation). All facility relocation reviews include an updated best available control technology (BACT) analysis as well as the impacts review of the proposed change. The information used in the impacts evaluation, such as receptor locations may be represented the applicant, but all off- property receptor locations are confirmed by timely site reviews performed by the regional office and local air pollution control programs. All air quality impact reviews are performed with consideration given to the type of receptor which may be impacted by potential emissions from the relocated facility. State and federal laws do not provide for public participation solely on the assumption that applicants may present incomplete information. Because the commission has retained the ability to send these actions to notice under the requirements listed in §39.403(b)(8)(C)(i)-(iv), public participation goals are met. In addition, just as with all applications reviewed by the executive director, these permit authorizations are subject to the motion to overturn process, which provides for an avenue of public participation.

EPA asked if §116.111(b) should also reference Chapter 55 as public comments processing are referenced in that chapter.

The commission agrees that the change is necessary, and the rule has been revised to reference Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment).

Brown McCarroll commented that §116.111(b) is not a complete sentence and it is not clear by the wording that the TNRCC intended that notice requirements be met before obtaining a permit.

The commission agrees and has revised this subsection to clarify that notice is required before a permit can be obtained.

Brown McCarroll comments that Chapter 39 notice requirements are not self-executing so that it is impossible to comply with §116.111(b). The commenter noted that Chapter 39 does not state that notice is required for air quality applications. The commenter also noted that the rules are circular when referring to one another with no definitive statement of what is required where and when.

The commission agrees with this comment and has revised §39.603 (a) and (b), which specifies when air applications must publish notice.

Brown McCarroll commented that §116.111(b) seems to require that an applicant for any permit or amendment must publish notice, noting that this would be incorrect in the case of permits by rule, exemptions, and standard permits. The commenter stated that none of these authorizations require an application, nor are the applications subject to public comment.

The commission has made no change in response to this comment. The commission does not believe it is necessary to list which actions are required to publish notice in this section. This structure is consistent with other programs where Chapter 39 is referred to for determination of whether a given action is or is not subject to public notice, comment and hearing. Actions authorized by Chapters 106 and 116, including permits by rule and exemptions, must refer to §39.403(b) and (c) which specifically address the different types of actions for which notice is required and is specifically exempt. For example, only concrete batch plants under Chapter 106 must publish notice, as explained in §39.403(c). Standard permits are also specifically excluded from notice requirements under §39.403(c). In addition, the term application as used in these rules is defined in 30 TAC §3.1 is broad and therefore includes registrations and other authorizations not commonly referred to as "permits." It is appropriate to use the term "application" because there are certain types of registrations and authorizations that may be subject to public notice.

Brown McCarroll commented that §116.111(b) should be deleted as unnecessary.

The commission disagrees with this comment. Notice and opportunity for comment is required under TCAA, §382.056 and a reference is needed in §116.111 is needed to inform applicants of this requirement to obtain a permit.

Brown McCarroll commented that the repeal of §116.130 will eliminate the executive director's discretion when requiring notice for air amendments, stating that this repeal unnecessarily removes this discretionary provision.

To comply with the commission's goal to consolidate all notice requirements in Chapter 39, the requirements in this section are now in that chapter. New requirements listed under §39.403(b)(8) - (12) include those necessary to reflect that notice requirements for air applications are now contained in Chapter 39, rather than Chapter 116, and to incorporate some of the changes resulting from SB 7 and SB 766. Those types of applications, which would be newly subject to the provisions in the additions to Chapter 39, include: (1) applications for air quality permits under §382.0518 and §382.055 of the Texas Health and Safety Code, unless otherwise specified in this section; (2) applications subject to the requirements of Chapter 116, Subchapter C of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), whether for construction or reconstruction; (3) concrete batch plants (CBP) registered under 30 TAC Chapter 106 (relating to Exemptions from Permitting) unless the facility is to be located in, or contiguous to, the right-of-way of a public works project; (4) applications for voluntary emission reduction permits under §382.0519 of the Texas Health and Safety Code; (5) applications for permits for electric generating facilities under §39.264 of the Utilities Code; (6) applications subject to the requirements of Chapter 116, Subchapter G of this title (relating to Flexible Permits); and (7) permit amendments under §116.116(b) of Chapter 116 initial issuance of flexible permits under Chapter 116, Subchapter G, or amendments to flexible permits under §116.710 of Chapter 116 when an action involves: (A) construction of any new facility, (B) modification of an existing facility which results in a signif-

icant increase in allowable emissions of any air contaminant, or (c) other changes when required by the executive director. These actions are required to undergo notice in accordance with Chapter 39 and have public participation under Chapter 55 as required by TCAA, §382.056.

Specifically, §39.403(b)(8)(A) and (B) clarifies that applications to amend existing permits for the purpose of authorizing new construction must comply with the notice requirements in 30 TAC Chapter 39, Subchapters H and K. This is required by the TCAA, §382.056(a), but was not codified in existing notice rules in 30 TAC Chapter 116, which will apply to applications that are administratively complete before September 1, 1999. This subsection is consistent with the requirement that all applications for new permits which would authorize new construction must comply with the notice requirements, and clarifies that there is no basis for different notice requirements for applications who are choosing to amend an existing permit versus obtaining a new permit. It also clarifies that applications for construction of new facilities with emissions of less than or equal to 25 tons per year must comply with notice requirements. Section 39.403(b)(8)(B) clarifies which applications for modification of existing facilities must comply with the notice requirements of Subchapters H and K of Chapter 39. Section 39.403(b)(8)(B) clarifies which applications for modification of existing facilities must comply with the same notice requirements by specifying that modifications for insignificant increases are not required to comply with these notice requirements. The references are existing determinations by the commission of what sources are exempt from permitting requirements, and permit amendments which do not meet the statutory definition of modification which have been exempt from compliance with notice requirements, as changed by SB 1125 and SB 1126, 74th Legislature, 1995, retain that exempt status.

§116.114

Henry, Lowerre commented that the proposed change to §116.114(a) to set deadlines on decisions must be deleted because it is not required or suggested by HB 801 or SB 766, and such a limit is not reasonable in many cases, especially when it is the applicant that has caused delays.

The commission has not revised this subsection in response to these comments. The requirements in §116.114(a) are not new requirements, but are existing ones which only have been reorganized and renumbered and are readopted under authority of TCAA, §382.051. In addition, deadlines are established to inform all interested persons (applicants and the general public) of the expected duration of any given action. These deadlines ensure timely resolution of any application and ensure that applicants do not unnecessarily delay the review of a project. If an applicant does not comply in a timely manner to requests for information or other review requirements, the review of the application is suspended as provided in §116.114.

EPA asks what safeguards are in place in §116.114(a)(2) to prevent a preliminary decision from being made before close of the comment period which could ultimately become the final decision, effectively depriving the public of meaningful opportunity to comment

Under §55.156, the commission is required to reply to comments after a preliminary decision is made and give opportunity to any interested person to request a hearing or request reconsideration of the executive director's decision. Specifically, nonattainment permits (FCAA, Title I, Part C or D) and Prevention of Significant Deterioration permits (40 CFR Part 51.165(b) and FCAA, §112(g) actions have more extensive newspaper notice requirements under §39.419 so that the federally required information can be presented to the public in the notice. The commission also revised §116.114(a)(2) to specifically reference §55.156.

Baker & Botts commented that §116.114(a)(2)(B) seems to contain typographical error. Since this section addresses application review schedule, the correct reference in (a)(2) should be "150 days *from* receipt of application"

The commission agrees and has revised §116.114 in accordance with this comment.

Henry, Lowerre commented that §116.114(c) needs to recognize that the deadlines for requests can be extended and the definition for "timely" requests to allow for this change.

The commission has made no change in response to this comment. The commission notes that HB 801 and rules implementing it in Chapters 39 and 50 of this title encourage early public participation in the environmental permitting process and are intended to streamline the contested case hearing process. For example, an applicant is required to publish newspaper notice of intent to obtain a permit and notice of the executive director's preliminary decision on the application. The applicant must also place a copy of the application and the executive director's preliminary decision at a public place in the county and the executive director is authorized to hold public meetings. The executive director is also required to prepare responses to relevant and material public comment received in response to the notices or at public meetings, and file the responses with the chief clerk. All these are examples of provisions which allow earlier public participation. The commission further notes that HB 801 is clear that public meetings may be held during the public comment period. Section 55.152(b) provides that the public comment period shall automatically be extended to the close of any public meeting. The commission declines to revise this rule to provide for extension. The existing public comment periods are sufficient for a person to submit comments, particularly since there is opportunity for a public meeting which could extend the process.

Henry, Lowerre commented that the alternative provision for notice in §116.114(c) if there is a large number of people who request notice needs to be deleted as there are no criteria for when notice would be "impracticable" and HB 801 does not permit the approach.

HB 801 does not prohibit this limitation which is allowed by TCAA, §382.0517. The commission has changed the term "parties" in the proposed rule to "persons" to have parallel construction of the language in the rule.

The commission has revised §116.114(c)(2) to clarify this subsection for voluntary emission reduction permit (VERP) and electric generating facility (EGF) requirements under SB 766 and 7.

Subchapter B. NEW SOURCE REVIEW PERMITS

Division 1. PERMIT APPLICATION

30 TAC §§116.111, 116.114, 116.116

STATUTORY AUTHORITY

The amendments are adopted under THSC, §382.056, which establishes the commission's authority concerning notice and hearing procedures for authorizations under TCAA

Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules and §5.105, which establishes the commission's authority to set policy by rule.

Additionally, relevant sections of the THSC include: §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §381.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.0517, which establishes the requirements for determinations of administrative completeness and notice of same; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; and §382.061, which establishes delegation of authority to the executive director.

An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

§116.111. General Application.

(a) In order to be granted a permit, amendment, or special permit amendment, the application must include:

(1) a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2) information which demonstrates that all of the following are met.

(A) Protection of public health and welfare.

(i) The emissions from the proposed facility will comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of the health and physical property of the people.

(ii) For issuance of a permit for construction or modification of any facility within 3,000 feet of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility may have on the individuals attending the school(s).

(B) Measurement of emissions. The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Natural Resource Conservation Commission (TNRCC) Sampling Procedures Manual."

(C) Best available control technology (BACT). The proposed facility will utilize BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility.

(D) New Source Performance Standards (NSPS). The emissions from the proposed facility will meet the requirements of any applicable NSPS as listed under Title 40 Code of Federal Regulations (CFR) Part 60, promulgated by the EPA under FCAA, §111, as amended.

(E) National Emission Standards for Hazardous Air Pollutants (NESHAP). The emissions from the proposed facility will meet the requirements of any applicable NESHAP, as listed under 40 CFR Part 61, promulgated by EPA under FCAA, §112, as amended.

(F) NESHAP for source categories. The emissions from the proposed facility will meet the requirements of any applicable maximum achievable control technology standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA §112, 40 CFR 63)).

(G) Performance demonstration. The proposed facility will achieve the performance specified in the permit application. The applicant may be required to submit additional engineering data after a permit has been issued in order to demonstrate further that the proposed facility will achieve the performance specified in the permit application. In addition, dispersion modeling, monitoring, or stack testing may be required.

(H) Nonattainment review. If the proposed facility is located in a nonattainment area, it shall comply with all applicable requirements in this chapter concerning nonattainment review.

(I) Prevention of Significant Deterioration (PSD) review. If the proposed facility is located in an attainment area, it shall comply with all applicable requirements in this chapter concerning PSD review.

(J) Air dispersion modeling. Computerized air dispersion modeling may be required by the executive director to determine air quality impacts from a proposed new facility or source modification.

(K) Hazardous air pollutants. Affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) for hazardous air pollutants shall comply with all applicable requirements under Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(b) In order to be granted a permit, amendment, or special permit amendment, the owner or operator must comply with the following notice requirements.

(1) Applications declared administratively complete before September 1, 1999, are subject to the requirements of Chapter

116, Subchapter B, Division 3 (relating to Public Notification and Comment Procedures) (effective March 21, 1999).

(2) Applications declared administratively complete on or after September 1, 1999, are subject to the requirements of Chapter 39 of this title (relating to Public Notice) and Chapter 55 of this title (relating to Request for Reconsideration and Contested Case Hearings; Public Comment). Upon request by the owner or operator of a facility which previously has received a permit or special permit from the commission, the executive director or designated representative may exempt the relocation of such facility from the provisions in Chapter 39 of this title if there is no indication that the operation of the facility at the proposed new location will significantly affect ambient air quality and no indication that operation of the facility at the proposed new location will cause a condition of air pollution.

§116.114. Application Review Schedule.

(a) Review schedule. The executive director shall review permit applications in accordance with the following.

(1) Notice of completion or deficiency. The executive director shall mail written notification informing the applicant that the application is complete or that it is deficient within 90 days of receipt of the application for a new permit, or amendment to a permit or special permit.

(A) If the application is deficient, the notification must state:

(i) the additional information required; and

(ii) the intent of the executive director to void the application if information for a complete application is not submitted.

(B) Additional information may be requested within 60 days of receipt of the information provided in response to the deficiency notification.

(2) Preliminary decision to approve or disapprove the application. The executive director shall conduct a technical review and send written notice to the applicant of the preliminary decision to approve or not approve the application within 180 days from receipt of a completed permit application or 150 days from receipt of a completed permit amendment. If the applicant has provided Notice of Receipt of Application and Intent to Obtain Permit public notification as required by the executive director under Chapter 39 of this title (relating to Public Notice), one of the following shall apply:

(A) if comments are received on the proposed facility and replied to by the executive director in accordance with §39.420 of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision) and §55.156 of this title (relating to Public Comment Processing); and

(B) if no requests for public hearing or public meeting on the proposed facility have been received or the application is otherwise exempt under §39.419(e) of this title (relating to Notice of Application and Preliminary Decision), the executive director shall send a copy of the Preliminary Decision to the applicant; or

(C) if Notice of Application and Preliminary Decision is required under §39.419(d) of this title (relating to Notice of Application and Preliminary Decision), the executive director shall authorize this notice and send copies to the applicant and all other persons are required under §39.602 of this title (relating to Mailed Notice).

(3) Refund of permit fee.

(A) If the time limits provided in this section to process an application are exceeded, the applicant may appeal in writing to the executive director for a refund of the permit fee.

(B) The permit fee shall be reimbursed if it is determined by the executive director that the specified period was exceeded without good cause, as provided in Texas Civil Statutes, Article 6252-13b.1, §3.

(b) Voiding of deficient application.

(1) An applicant shall make a good faith effort to submit, in a timely manner, adequate information which demonstrates that the requirements for obtaining a permit or permit amendment are met in response to any deficiency notification issued by the executive director under the provisions of this section, or Chapter 39 of this title (relating to Public Notice).

(2) If an applicant fails to make such good faith effort, the executive director shall void the application and notify the applicant. If the application is resubmitted within six months of the voidance, it shall be exempt from the requirements of §116.140 of this title (relating to Applicability).

(c) Notification of executive director's decision.

(1) Notification to Applicant. The executive director or the chief clerk shall send to the applicant the decision to approve or not approve the application if:

(A) no timely requests for reconsideration, contested case hearing, or public meeting the proposed facility have been received; or

(B) if hearing requests have been received and withdrawn before the executive director's Preliminary Decision; or

(C) the application is for any amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted; and

(D) the applicant has satisfied all public notification requirements of Chapter 39 of this title.

(2) Notification to commenters. Except for initial issuance of voluntary emission reduction permits and electric generating facility permits, persons submitting written comments under Chapter 39 of this title shall be sent the executive director's final action and given an explanation of the opportunity to file a motion under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) at the same time that the applicant is notified. If the number of interested persons who have requested notification makes it impracticable for the commission to notify those persons by mail, the commission shall notify those persons by publication using the method prescribed by §382.031(a) of the Texas Health and Safety Code.

(3) Time Limits. The executive director shall send notification of final action within:

(A) one year after receipt of a complete PSD or nonattainment permit application, or a complete permit application for an action under Subchapter C of this chapter;

(B) 180 days of receipt of a completed permit or permit renewal application; or

(C) 150 days of receipt of a permit amendment or special permit amendment application.

§116.116. Changes to Facilities.

(a) Representations and conditions. The following are the conditions upon which a permit, special permit, or special exemption are issued:

(1) representations with regard to construction plans and operation procedures in an application for a permit, special permit, or special exemption; and

(2) any general and special conditions attached to the permit, special permit, or special exemption itself.

(b) Permit amendments.

(1) Except as provided in subsection (e) of this section, the permit holder shall not vary from any representation or permit condition without obtaining a permit amendment if the change will cause:

(A) a change in the method of control of emissions;

(B) a change in the character of the emissions; or

(C) an increase in the emission rate of any air contaminant.

(2) Any person who requests permit amendments must receive prior approval by the executive director or the commission. Applications must be submitted with a completed Form PI-1 and are subject to the requirements of §116.111 of this title (relating to General Application).

(3) Any person who applies for an amendment to a permit to construct or reconstruct an affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) under Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)) shall comply with the provisions in Chapter 39 of this title (relating to Public Notice).

(4) Any person who applies for an amendment to a permit to construct a new facility or modify an existing facility shall comply with the provisions in Chapter 39 of this title.

(c) Permit alteration.

(1) A permit alteration is:

(A) a decrease in allowable emissions; or

(B) any change from a representation in an application, general condition, or special condition in a permit that does not cause:

(i) a change in the method of control of emissions;

(ii) a change in the character of emissions; or

(iii) an increase in the emission rate of any air contaminant.

(2) Requests for permit alterations that must receive prior approval by the executive director are those that:

(A) result in an increase in off-property concentrations of air contaminants;

(B) involve a change in permit conditions; or

(C) affect facility or control equipment performance.

(3) The executive director shall be notified in writing of all other permit alterations not specified in paragraph (2) of this subsection.

(4) A request for permit alteration shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with the requirements of §116.111(3) of this title.

(5) Permit alterations are not subject to the requirements §116.111(3) of this title.

(d) Permits by rule and exemptions from permitting under Chapter 106 of this title (relating to Exemptions from Permitting) in lieu of permit amendment or alteration.

(1) A permit amendment or alteration is not required if the changes to the permitted facility qualify for an exemption from permitting or permit by rule under Chapter 106 of this title unless prohibited by permit condition as provided in §116.115 of this title (relating to General and Special Conditions).

(2) All exempted changes to, and permits by rule associated with, a permitted facility shall be incorporated into that facility's permit when the permit is amended or renewed.

(e) Changes to qualified facilities.

(1) Notwithstanding any other subsection of this section, a physical or operational change may be made to a qualified facility if it can be determined that the change does not result in:

(A) a net increase in allowable emissions of any air contaminant; and

(B) the emission of any air contaminant not previously emitted.

(2) In making the determination in paragraph (1) of this subsection, the effect on emissions of the following shall be considered:

(A) any air pollution control method applied to the qualified facility;

(B) any decreases in allowable emissions from other qualified facilities at the same commission air quality account number that have received a preconstruction permit or permit amendment no earlier than 120 months before the change will occur; and

(C) any decrease in actual emissions from other qualified facilities at the same commission air quality account number that are not included in subparagraph (B) of this paragraph.

(3) The determination in paragraph (1) of this subsection shall be based on the allowable emissions for air contaminant categories and any allowable emissions for individual compounds. If a physical or operational change would result in emissions of a air contaminant category or compound above the allowable emissions for that air contaminant category or compound, the amount above the allowable emissions must be offset by an equivalent decrease in emissions at the same facility or a different facility. In making this offset, the following applies.

(A) The offset shall be based on the same time periods (e.g., hourly and annual rates) as the allowable emissions for the facility at which the change will occur.

(B) Emissions of different compounds within the same air contaminant category may be interchanged.

(C) For allowable emissions for individual compounds, any interchange shall adjust the emission rates for the different compounds in accordance with the ratio of the effects screening levels of the compounds.

(D) For allowable emissions for air contaminant categories, interchanges shall use the unadjusted emission rates for the different compounds.

(E) The effects screening level shall be determined by the executive director.

(F) An air contaminant category is a group of related compounds, such as volatile organic compounds, particulate matter, nitrogen oxides, and sulfur compounds.

(4) Persons making changes to qualified facilities under this subsection shall comply with the applicable requirements of §116.117 of this title (relating to Documentation and Notification of Changes to Qualified Facilities) and §116.118 of this title (relating to Pre-change Qualification).

(5) As used in this subsection, the term "physical and operational change" does not include:

(A) construction of a new facility; or

(B) changes to procedures regarding monitoring, determination of emissions and recordkeeping that are required by a permit.

(6) Additional air pollution control methods may be implemented for the purpose of making a facility a qualified facility. The implementation of any additional control methods to qualify a facility shall be subject to the requirements of this chapter. The owner or operator shall:

(A) utilize additional control methods that are as effective as best available control technology (BACT) required at the time the additional control methods are implemented; or

(B) demonstrate that the additional control methods, although not as effective as BACT, were implemented to comply with a law, rule, order, permit, or implemented to resolve a documented citizen complaint.

(7) For purposes of this subsection and §116.117 of this title, the following subparagraphs apply.

(A) Intraplant trading means the consideration of decreases in allowable and actual emissions from other qualified facilities in accordance with paragraph (2) of this subsection.

(B) The allowable emissions from facilities that were never constructed shall not be used in intraplant trading.

(C) The decreases in allowable and actual emissions shall be based on emission rates for the same time periods (e.g., hourly and annual rates) as the allowable emissions for the facility at which the change will occur and for which an intraplant trade is desired.

(D) Actual emissions shall be based on data that is representative of the emissions actually achieved from a facility during the relevant time period (e.g., hourly or annual rate).

(8) The existing level of control may not be lessened for a qualified facility.

(f) Use of credits. Notwithstanding any other subsection of this section, discrete emission reduction credits may be used to exceed permit allowables as described in §101.29(d)(4)(v) of this title (relating to Emission Credit Banking and Trading) if all applicable conditions of §101.29 of this title are met. This subsection does not authorize any physical changes to a facility.

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 3, 1999.

TRD-9905731
Margaret Hoffman
Director Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Division 2. COMPLIANCE HISTORY

30 TAC §116.124

STATUTORY AUTHORITY

The repeal is adopted under THSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules, and §5.105, which establishes the commission's authority to set policy by rule.

Additionally, relevant sections of the THSC include: §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §381.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; and §382.061, which establishes delegation of authority to the executive director.

An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

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 3, 1999.

TRD-9905732
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter C. HAZARDOUS AIR POLLUTANTS: REGULATIONS GOVERNING CONSTRUCTED OR RECONSTRUCTED MAJOR SOURCES (FCAA, §112(G), 40 CFR PART 63)

Division 3. PUBLIC NOTIFICATION AND COMMENT PROCEDURES

30 TAC §116.183

STATUTORY AUTHORITY

The amendment is adopted under THSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules and §5.105, which establishes the commission's authority to set policy by rule.

Additionally, relevant sections of the THSC include: §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §381.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; and §382.061, which establishes delegation of authority to the executive director.

An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

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 3, 1999.

TRD-9905734
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter D. PERMIT RENEWALS

30 TAC §116.312

STATUTORY AUTHORITY

The amendment is adopted under THSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules and §5.105, which establishes the commission's authority to set policy by rule.

Additionally, relevant sections of the THSC include: §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §381.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; and §382.061, which establishes delegation of authority to the executive director.

An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

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 3, 1999.

TRD-9905735
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Subchapter G. FLEXIBLE PERMITS

30 TAC §116.740

STATUTORY AUTHORITY

The amendment is adopted under THSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules and §5.105, which establishes the commission's authority to set policy by rule.

Additionally, relevant sections of the THSC include: §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §381.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; and §382.061, which establishes delegation of authority to the executive director.

An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

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 3, 1999.

TRD-9905736
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Chapter 122. FEDERAL OPERATING PERMITS

Subchapter D. PUBLIC ANNOUNCEMENT, PUBLIC NOTICE, AFFECTED STATE REVIEW, NOTICE AND COMMENT HEARING, NOTICE OF PROPOSED FINAL ACTION, EPA REVIEW AND PUBLIC PETITION

Division 2. PUBLIC NOTICE

30 TAC §122.320

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §122.320, concerning Public Notice. Section 122.320 is adopted without changes to the proposed text as published in the July 16, 1999, issue of the *Texas Register* (24 TexReg 5449).

BACKGROUND

The primary purpose of the adopted amendments is to implement House Bill (HB) 801. The adopted amendments are intended to update public notice rules for federal operating permits. This adoption also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

OVERVIEW OF HB 801 AND IMPLEMENTATION

HB 801, enacted by the 76th Legislature, revises the commission's procedures for public participation in environmental permitting by adding new Texas Water Code (TWC), Chapter 5, Subchapter M; revising Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.088; revising THSC, Texas Clean Air Act (TCAA), §382.056; and revising Texas Government Code (TGC), §2003.047. Except for the changes required under TGC, §2003.047, the new and amended statutory provisions expressly apply to applications under TWC, Chapters 26 and 27, and THSC, Chapters 361 and 382. The changes in law made by HB 801 only apply to permit applications declared administratively complete on or after September 1, 1999 and former law is continued in effect for applications declared administratively complete before September 1, 1999. Generally, the amendments made by this law are procedural in nature and are not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment and an opportunity for hearing are provided.

More specifically, HB 801 encourages early public participation in the environmental permitting process and is intended to streamline the contested case hearing process. For example,

it requires an applicant to publish newspaper notice of the executive director's preliminary decision on the application. For a federal operating permit (FOP) application, the notice of the executive director's preliminary decision is equivalent to the 40 Code of Federal Regulations (CFR) Part 70 requirement to provide notice of a draft permit. HB 801 also requires the applicant to place a copy of the application and the executive director's preliminary decision at a public place in the county and authorizes the executive director to hold public meetings. The executive director is also required to prepare responses to relevant and material public comment. In addition, for an FOP application, the commission is required to prepare responses to all timely public comment, as required under 40 CFR Part 70. It requires the commission to prescribe alternative cost-effective procedures for newspaper publication for small business stationary sources seeking air emissions authorization that will not have a significant effect on air quality. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary to satisfy federal program authorization requirements. Contested case hearing procedures are also revised. The scope of proceedings and discovery is limited by the new law. These changes are being implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122, and 305. Most of these chapters also contain changes necessary for the consolidation of the procedural rules of the agency and to improve consistency among the permitting programs as well as changes to clarify and update agency rules and changes necessary to facilitate permit processing. Changes for all of these chapters are published in this edition of the *Texas Register.* Changes to Chapters 55 and 321 also proposed on July 16, 1999 are not adopted at this time, but will be subject to future consideration by the commission.

EXPLANATION OF ADOPTED RULE

The primary purpose of the adopted amendments is to implement HB 801, 76th Legislature (1999). HB 801 establishes new procedures for public participation in environmental permitting proceedings. It establishes procedures for providing public notice and opportunity for public comment. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary to satisfy air quality federal program authorization requirements. More specifically, HB 801 revises the public participation in environmental permitting procedures of the commission by adding new statutory provisions to TWC, Chapter 5, Subchapter M; revisions to THSC, §382.056; and revisions to TGC, §2003.047. Certain changes made by HB 801, other than the changes made to TGC, §2003.047, apply to federal operating permits. These changes are implemented in Chapter 122. In addition, revisions to Chapters 39, 50, 80, 106, 116, and 305 as required by HB 801 are also published in this edition of the *Texas Register.* Concurrently with this rulemaking the commission is adopting the review of and readoption of 30 TAC Chapters 39, 50, and 80 in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997.

More specifically, HB 801 revises public participation in federal operating permit procedures of the commission by adding new statutory provisions to the TCAA under THSC, §382.056. As discussed below in detail, the changes adopted in 30 TAC §122.320, relating to public notice requirements for the federal operating permit program, incorporate the revised statutory requirements contained in §5 of HB 801.

The adopted amendment to §122.320(b) incorporates the requirement that the applicant shall make a copy of the application and draft permit available for review and copying at a public place in the county in which the site is located or proposed to be located.

The adopted amendment to §122.320(b)(2) specifies that the newspaper notice shall include an applicant telephone number and a description of the manner in which a person may contact the applicant or permit holder for further information.

The adopted amendments to §122.320(b)(7) and (8) are proposed to be revised to specify incorporate the requirements that certain statements in the newspaper notice shall be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice.

As adopted, the requirements in the original §122.320(b)(9) are moved to §122.320(b)(11). The newly adopted 122.320(b)(9) adds a new requirement that the newspaper notice include a statement describing the procedure by which a person may be placed on a mailing list in order to receive additional information about the application or draft permit.

New §122.320(b)(10) is adopted to add a requirement that a newspaper notice shall include a statement for the time and location of any public meeting to be held, if applicable.

New §122.320(m) is adopted to specify that the applicant, in cooperation with the executive director, may hold a public meeting in the county in which the site is located or proposed to be located. This new subsection also proposes that any such meeting shall be provided in the notice required by subsection (b) of this section.

Section 5 of HB 801 specifies that the executive director shall conduct a technical review of and issue a preliminary decision on the application. All applications under Chapter 122 of this title (relating to Federal Operating Permits) undergo a technical review and executive director preliminary decision. Title 40 CFR Part 70 requires the development of a draft permit for public review and comment. This draft permit is equivalent to the HB 801 requirement for the executive director to issue a preliminary decision. The language in §122.320 continues to reflect the 40 CFR Part 70 reference to draft permit but adds the HB 801 language relating to preliminary decision. Also, when the executive director issues a draft permit and requires the applicant to publish notice, he is fulfilling the HB 801 requirement to issue an executive director preliminary decision and its notice.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of TGC, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a). "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of

the rulemaking is procedural in nature and establishes procedures associated with public comment on permit applications and requests for contested case hearing, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the rule is a major environmental rule, a draft regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law. This adoption does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and Texas Water Code, Chapter 5, Subchapter M, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with TWC, §5.551, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program. This adoption does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., TWC, Chapter 5, Subchapter M and TGC, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these adopted rules pursuant to TGC, §2007.043. The following is a summary of that assessment. The specific primary purpose of the adopted amendments is to revise federal operating permit public notice procedures and opportunity for public comment. The adopted rules will substantially advance these stated purposes by providing specific provisions on the aforementioned matters. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the rule language consists of amendments relating to the commission's procedural rules.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The adopted actions concern only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (31 TAC, Chapter 505; 30 TAC, §§281.40, et seq.).

HEARING AND COMMENTERS

A public hearing on the proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. No oral comments were received at this hearing related to the proposed revisions to Chapter 122. The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999. No written comments were submitted related to the proposed revisions to Chapter 122.

The commission did not receive any general or specific comments regarding Chapter 122; therefore, the changes have been adopted as proposed. The following sections are adopted to incorporate specific requirements of HB 801.

STATUTORY AUTHORITY

The amendment is adopted under THSC, §382.056 which establishes the commission's authority concerning notice and hearing procedures for authorizations under TCAA.

In addition, relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules, and §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases.

Additionally, relevant sections of the THSC include: §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; and §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits.

An additional relevant section is TGC, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

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 3, 1999.

TRD-9905737
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

Chapter 305. CONSOLIDATED PERMITS

Subchapter D. AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS, REVOCATION, AND SUSPENSION OF PERMITS

30 TAC §305.63, §305.65

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §305.63, and

new §305.65, concerning public notice of permit renewals. The proposed amendment and new section are adopted without changes to the proposed text as published in the July 16, 1999 edition of the *Texas Register* (24 TexReg 5303).

BACKGROUND

The primary purpose of the adopted amendments and new sections is to implement House Bill (HB). HB 801 establishes new procedures for public participation in environmental permitting proceedings. It establishes procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing for certain actions. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment or opportunity for hearing as necessary to satisfy air quality federal program authorization requirements. These changes are implemented in Chapters 39, 50, and 80. Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122, and 305; changes for all of these chapters are published in this edition of the *Texas Register.* This adoption also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

EXPLANATION OF ADOPTED RULES

The primary purpose of the adopted amendments and new section is to implement HB 801, 76th Legislature (1999).

Adopted amendments to §305.63 contain new language relating to applicability, stating that this section is applicable to any permit renewal application that is declared administratively complete before September 1, 1999. The adopted amendments also reformat the section to account for the addition of the applicability statement. This amendment leaves existing procedures in place for hazardous waste management facilities not affected by HB 801 changes.

Generally, adopted new §305.65, with some renumbering, mirrors existing §305.63 with certain significant exceptions. First, new §305.65(a) includes a provision reflecting applicability of this section to applications filed on or after September 1, 1999. Second, new §305.65(a)(8) would authorize the commission to renew permits without providing an opportunity for a contested case hearing if certain conditions are met, which are as follows: after complying with all applicable rules in Chapters 39, 50, and 55 of this title, the commission, without providing an opportunity for a contested case hearing, may act on an application to renew a permit for storage of hazardous waste in containers, tanks, or other closed vessels if the waste was generated on-site and does not include waste generated from other waste transported to the site. Similarly, the commission may act on an application, without providing an opportunity for a contested case hearing, to renew a permit for the processing of hazardous waste if the waste was generated on-site; the waste does not include waste generated from other waste transported to the site; and the processing does not include thermal processing. Third, under new §305.65(a)(9), if the commission determines that an applicant's compliance history for the preceding five years raises an issue regarding the applicant's ability to comply with a material term of its permit, the commission shall provide an opportunity to request a contested case hearing. These changes are consistent with and implement requirements in HB 801 relating to permit processing requirements for certain hazardous waste management facilities.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the 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 the definition of a "major environmental rule" as defined in the act. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

"Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and establishes procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing as well as consolidate existing notice procedures for some air permitting programs, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the adopted rule is a major environmental rule, a regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopts a rule solely under the general powers of the agency. This adoption is expressly authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and Texas Water Code, Chapter 5, Subchapter M, as well as the other statutory authorities cited in the Statutory Authority section of this preamble. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with Texas Water Code, §5.551, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program. This action does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., Texas Water Code, Chapter 5, Subchapter M and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these adopted rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific primary purpose of the amendments and new sections is to revise the TNRCC rules to establish procedures for public participation in certain permitting proceedings as required by HB 801, and other legislation. The adoption relates to procedures for providing public notice, providing opportunity for public comment, and providing opportunity for requesting contested case hearings as well as specific procedures for hearings. The adopted rules will substantially advance these stated purposes by providing specific provisions on the aforementioned matters. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the language consists of

amendments and new sections relating to the commission's procedural rules rather than substantive requirements.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The actions concern only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (31 TAC Chapter 505, 30 TAC §§281.40, et seq.).

HEARING AND COMMENTERS

A public hearing on the proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. Oral comments were provided by an individual and Locke, Liddell and Sapp, L.L.P.. The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999. Written comments were submitted by Baker & Botts, L.L.P., on behalf of the Texas Industry Project; Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll), on behalf of the Texas Chemical Council, Texas Association of Business and Chambers of Commerce (TABCC), and Texas Oil and Gas Association; Brown, Potts & Reilly, L.L.P., on behalf of Merco Joint Venture, L.L.C.; City Public Service (CPS) of San Antonio, Texas; Dow Chemical Company (Dow); Eastman Chemical Company, Texas Eastman Division (Eastman); Exxon Chemical Company's Baytown Chemical Plant, Baytown Olefins Plant and Mont Belvieu Plastics Plant (Exxon Chemical); Exxon Company, U.S.A., Baytown Refinery (Exxon); Henry, Lowerre, Johnson, Hess & Frederick, Attorneys at Law (Lowerre), on behalf of Blackburn and Carter, Clean Water Action, Consumers Union, Environmental Defense Fund, Henry, Lowerre, Johnson & Frederick, National Wildlife Federation, Public Citizen, Sierra Club, Lone Star Chapter, Texas Center for Policy Studies, and Texas Committee on Natural Resources; Jackson Walker L.L.P.; Jenkens & Gilchrist, P.C.; Public Interest Counsel, Texas Natural Resource Conservation Commission (PIC); Roller and Allensworth, L.L.P., on behalf of the Greenbelt Municipal and Industrial Water Authority; Small Business Compliance Advisory Panel (CAP); Texas Association of Business & Chambers of Commerce (TABCC); Texas Cattle Feeders Association (TCFA); Texas Cotton Ginners' Association; Texas Instruments Incorporated (TI); Thompson & Knight, L.L.P.; and the United States Environmental Protection Agency Region 6 Office (EPA).

ANALYSIS OF COMMENTS AND ADOPTED RULES

Subchapter D, §305.63. Renewal

This section, pertaining to the renewal of permits, was amended to be applicable only to applications declared administratively complete before September 1, 1999, pursuant to HB 801. Renewal applications declared administratively complete on or after September 1, 1999 are covered under new §305.65. No public comments were received on §305.63, and it was adopted without change from the proposal.

Subchapter D, §305.65. Renewal

Adopted new §305.65, pertaining to the renewal of permits, was proposed as a parallel section to §305.63, and lays out the permit renewal procedures for applications declared administratively complete on or after September 1, 1999. The purpose of this section is to help distinguish, and assist in the processing of, applications for permit renewals that fall under HB 801. In addition, §305.65(8) implements Section 4 of HB 801, which allows the commission to act, without providing an opportunity for a contested case hearing, on renewal applications for certain permits to store or process hazardous waste, if the wastes were generated on-site and do not include any off-site wastes. The language in §305.65(8) mirrors the statutory language of HB 801 and is added to the commission's rules as a matter of clarification and practicality. No public comments were received on proposed new §305.65, and it was adopted without change from the proposal.

Subchapter D, §305.69. Solid Waste Permit Modification at the Request of the Permittee

Although this section was not opened in the proposal published in the July 16, 1999 Texas Register, two comments were received requesting clarification of notice requirements for Class 3 modifications, particularly concerning the number of public notices, the calculation of publication dates, and the harmonization of HB 801 with the existing notice provisions in §305.69(d)(2). Although comments were received on §305.69, no changes were made to it since the section was not open and available for public comment during the proposal period.

Jenkens & Gilchrist commented that, under the proposed rules, a person requesting a Class 3 modification of a solid waste permit would be forced to publish two separate notices for the same purpose, within 45 days after filing a request for a Class 3 modification. Section 305.69(d)(2) of the current rules requires notice to be published within seven days before or after the date of submission of the modification request to the commission. By comparison, HB 801 requires that a *Notice of Receipt and Intent to Obtain Permit* must be published no later than 30 days after the date the application is determined to be administratively complete. The commenter was concerned that this would effectively require: (1) two separate but similar notices, and (2) two comment periods, since it is unlikely, given the time frames involved, that an application would ever be deemed to be administratively complete within the period allowed for publication of the notice of modification. The commenter recommended that the commission amend §305.69 to make it consistent with the requirements proposed by §39.418.

The commission has made no changes to Chapter 305 in response to this comment. The commission agrees that it is possible to construe HB 801 notice provisions in such a way as to mandate two new notices in addition to the one currently required for Class 3 modifications. This would then require the publication of three notices for Class 3 Modifications, whereas only two would be required for new solid waste permits. However, after considering HB 801 and federal notice requirements, the commission has determined that the initial HB 801 notice, *Notice of Receipt and Intent to Obtain Permit,* satisfies the notice of modification in §305.69(d)(2). Therefore, the new *Notice of Receipt and Intent to Obtain Permit,* under §39.418, will now supersede the notice in §305.69(d)(2). Under new §39.418, the chief clerk will now mail the notice, rather than the applicant, as was the prior practice under §305.69(d)(2).

Applicants for Class 3 modifications, whose applications are declared administratively complete on or after September 1, 1999, should publish the new *Notice of Receipt of Application and Intent to Obtain Permit* in lieu of the notice of modification currently

required by §305.69(d)(2). In order to make this substitution clear, and to avoid the possibility of having duplicative notices, the commission has revised §39.509 to clarify that the *Notice of Receipt of Application and Intent to Obtain Permit* should be given instead of the notice of modification in §305.69(d)(2).

The commission notes that the second new notice, *Notice of Application and Preliminary Decision* (30 TAC §39.419), adds an extra layer of public participation to that which is currently required. Under this notice, interested persons are informed of the executive director's preliminary decision (draft permit) on the application. As with the earlier notice of receipt, directions on how to obtain additional information, including a copy of the draft permit, are included. Under HB 801, commenters are provided responses to public comments, and are offered an opportunity to request a contested case hearing.

Although the commission understands the reasoning behind the commenter's request to modify the language of §305.69(d)(2), to make it consistent with new §39.418, the commission is unable to do so at this time because Texas Register procedures prohibit the modification of rule sections that were not open during the original rule proposal period. The commission will propose any needed changes to § 305.69(d)(2) in subsequent rulemakings as necessary.

Subchapter D, §305.69(d). Class 3 modifications of solid waste permits

Jenkens & Gilchrist commented that §305.69(d)(2) refers to §305.103(b) as containing a list of persons who must receive notice by mail of a Class 1, Class 2, or Class 3 modification request. Currently, there is no §305.103 in the TNRCC's rules. Existing §39.13, and proposed §39.413, do contain lists of persons who must receive notice by mail. The commenter proposed changes to the language of this section in order to correct the mailing list citations and to clarify that the notice of modification should be mailed and published no later than 30 days after administrative completeness so as to conform to the *Notice of Receipt and Intent to Obtain Permit* time frame in HB 801.

The commission agrees with the commenter and, coincidentally, has already corrected this citation in a recent rulemaking package. Section 305.69(d)(2) now cites to §39.13 instead of §305.103(b). For applications declared administratively complete before September 1, 1999, the correct mailing list citation is §39.13. For applications declared administratively complete on or after September 1, 1999, the correct mailing list citation is 39.413.

The commission notes that for Class 3 modifications declared administratively complete after September 1, 1999, the provisions of §305.69(d)(2), pertaining to the publication of a notice of modification for Class 3 modifications, are now superseded by the provisions of §39.418. For those applications, only the *Notice of Receipt of Application and Intent to Obtain Permit* (§39.418), and *Notice of Application and Preliminary Decision* (§39.419) will now be required.

STATUTORY AUTHORITY

The amendment and new section are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056 and §382.088.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; and §26.011, which establishes the commission's authority over water quality in the state.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; and §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits.

An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

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 3, 1999.

TRD-9905738
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: September 23, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 239-1932

♦ ♦ ♦

TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

Chapter 53. FINANCE

Subchapter A. LICENSE FEES AND BOAT AND MOTOR FEES

31 TAC §53.1, §53.3

Texas Parks and Wildlife Commission adopts amendments to §53.1 and §53.3, concerning fishing license fees and exemptions, without changes to the proposed text as published in the July 16, 1999, issue of the *Texas Register* (24 TexReg 5458).

The rules are necessary to establish the same requirements for non-residents fishing in Texas that are required of Texas residents.

The rules will function by allowing non-resident anglers to fish in Texas under reciprocal agreements between Texas and their state of residence.

The department received no comments concerning adoption of the proposed rules.

The amendments are adopted under the authority of Parks and Wildlife Code, Chapter 41, and Chapter 46, Subchapter A, which provides the Commission with authority to waive or lower fishing license fees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 10, 1999.

TRD-9905867
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Effective date: September 30, 1999
Proposal publication date: July 16, 1999
For further information, please call: (512) 389-4775

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part 1. TEXAS DEPARTMENT OF HUMAN SERVICES

Chapter 3. INCOME ASSISTANCE SERVICES

The Texas Department of Human Services (DHS) adopts amendments to §§3.1002 and 3.3701, the repeal of §3.3702, and new §§3.3702 and 3.3703, in its Income Assistance Services chapter. The amendments, repeal, and new sections are adopted without changes to the proposed text published in the July 23, 1999, issue of the *Texas Register* (24 TexReg 5689).

The department is adopting these amendments and new sections to increase the Temporary Assistance for Needy Families (TANF) and Refugee Cash Assistance (RCA) grant amounts to equal 17% of the federal poverty income limit, because the state legislature authorized the changes in House Bill 1, 76th Legislature, Regular Session.

The amendments and new sections will function by ensuring that recipients will have more money to better meet the needs of their dependent children.

The department received no comments regarding adoption of the sections.

Subchapter J. BUDGETING

40 TAC §3.1002

The amendment is adopted under the Human Resources Code, Title 2, Chapter 31, which provides the department with the authority to administer financial assistance programs.

The amendment implements the Human Resources Code, §§31.001- 31.0325.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 8, 1999.

TRD-9905772
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 1, 1999
Proposal publication date: July 23, 1999
For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter KK. SUPPORT DOCUMENTS

40 TAC §§3.3701-3.3703

The amendment and new sections are adopted under the Human Resources Code, Title 2, Chapter 31, which provides the department with the authority to administer financial assistance programs.

The amendment and new sections implement the Human Resources Code, §§31.001-31.0325.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 8, 1999.

TRD-9905774
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 1, 1999
Proposal publication date: July 23, 1999
For further information, please call: (512) 438-3765

♦ ♦ ♦

40 TAC §3.3702

The repeal is adopted under the Human Resources Code, Title 2, Chapter 31, which provides the department with the authority to administer financial assistance programs.

The repeal implements the Human Resources Code, §§31.001-31.0325.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 8, 1999.

TRD-9905773
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 1, 1999
Proposal publication date: July 23, 1999
For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter T. SOCIAL SECURITY NUMBERS

40 TAC §3.2001

The Texas Department of Human Services (DHS) adopts an amendment to §3.2001, in its Income Assistance Services chapter. The amendment is adopted without changes to the proposed text as published in the July 23, 1999, issue of the *Texas Register* (24 TexReg 5690).

In order to make TANF policy more consistent with Food Stamp policy, the department is adopting this amendment to allow a child who is six months of age or younger to receive Temporary Assistance for Needy Families (TANF) benefits without providing a Social Security number (SSN) or proof that he has applied for one until the next complete review, or for six months following the month the child was born, whichever is later.

The amendment will function by ensuring that households will have more money to better meet the needs of their dependent children because a child age six months or younger who does not have a Social Security number will be eligible to be included in the grant.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, Title 2, Chapter 31, which provides the department with the authority to administer financial assistance programs.

The amendment implements the Human Resources Code, §§31.001- 31.0325.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 8, 1999.

TRD-9905775
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 1, 1999
Proposal publication date: July 23, 1999
For further information, please call: (512) 438-3765

♦ ♦ ♦

Chapter 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Texas Department of Human Services (DHS) adopts amendments to §19.201, §19.214, and §19.2106, with changes to the proposed text published in the May 28, 1999 issue of the *Texas Register* (24 TexReg 3989).

The justification for the amendments is to provide DHS with information about financial difficulties nursing facilities may be experiencing, if such conditions threaten to adversely affect services at the facilities, so that DHS can appropriately intervene and protect the residents.

The amendments will function by enabling DHS to become aware of facilities experiencing serious financial difficulties, so that DHS can intervene to protect the residents of the facilities. Facilities which fail to notify DHS could have their licenses denied or revoked.

The department received one comment from the Texas Health Care Association (THCA) regarding adoption of the amendments.

Comment: On behalf of THCA, we understand the department's desire to avoid a state financial crisis where a facility may not have the financial resources to provide staff, food and other vital daily needs. In fact, the legislature discussed this issue extensively during the past session and passed SB 1292, 76th Regular Session in response. One of the provisions in SB 1292 requires the department to include in its rule "conditions that constitute a significant change in an institution's financial condition that are required to be reported" (Section 242.074(d)). We have reviewed the proposed rule and found some inconsistencies with legislative expectation and directives.

The statutory language requires TDHS to identify significant changes in a facility's financial condition that must be reported to TDHS. This language should be incorporated into the proposed rule by inserting "significant" before "conditions" in §19.201 (i) and by deleting the "s" at the end of the word "conditions" in that section. The department should also clarify what entity has the duty to make a report. "Facility Owner" is an ambiguous term and should be replaced with "Facility licensee" or "NFO" to track language elsewhere in the department's rules.

The department understandably wants to be able to detect when a financial crisis is imminent at a facility. However, the language in the proposed rule requires the reporting of any change that "could" adversely impact essential facility operations. This language is overly broad, as it would literally require reporting of every situation in which there is any possibility of an adverse impact, regardless of how unlikely it is that the impact will occur. The department should narrow the scope of the reporting requirement to significant changes that have a reasonable probability of adversely impacting essential facility operations.

At the Aged and Disabled Advisory Committee meeting the department indicated that it was not the intent of the department to be punitive with this rule. The department indicated that similar rules would also be developed for the Community Care Programs. The rules for both programs should be consistent, including the enforcement of the rule.

Although the Legislation permits revocation, this action may be counterproductive. Without a license, a facility is unable to participate in either the Medicare or Medicaid programs. In the event the state is required to step in to operate a financially strained facility without a license, the department must have not only state funds but also pure state dollars that may be needed to replace lost federal Medicare and Federal matching Medicaid funds. To finance operating a facility without a license would obviously jeopardize the federal funding.

Finally, based on action of the legislature on this issue of facility financial condition, we recommend that the department revise §19.201 (j) of the proposed rule to read as follows:

"As a condition of continued licensure a facility licensee must notify Facility Enrollment of significant changes in its financial condition that have a reasonable probability of adversely impacting the delivery of essential services, such as nursing or dietary services or utilities."

Response: While the department recognizes that THCA's comments address Senate Bill 1292, this rule change was initiated prior to this legislation. The department is considering further possible rules to more fully implement Senate Bill 1292. In re-

sponse to comment, in §19.201 the department will substitute "licensee" for "owner" and insert "significant" before change, but will not make the suggested change regarding "reasonable probability." The department's rule language, "could adversely affect," tracks that of Senate Bill 1292. To further track Senate Bill 1292, the department will also substitute "financial position, cash flow, or results of operation" for "financial condition." The department will retain the rule provision that allows, but does not require, the department to deny, suspend or revoke a license when such situations are not reported. The department must reserve all options when addressing situations which might not be reported under this rule.

In addition, the word "condition" was made plural in §19.214(a)(8) and §19.2106(a)(3).

Subchapter C. NURSING FACILITY LICENSURE APPLICATION PROCESS

40 TAC §19.201, §19.214

The amendments are adopted under the Health and Safety Code, Chapter 242, which authorizes the department to license and regulate nursing facilities.

The amendments implement the Health and Safety Code, §242.037.

§19.201. Criteria for Licensing.

(a) A person or governmental unit, acting jointly or severally, must be licensed by the Texas Department of Human Services (DHS) to establish, conduct, or maintain a facility.

(b) An applicant for a license must submit a complete application form and license fee to DHS.

(c) No person may apply for a license, change of ownership, increase in capacity, or renewal of a nursing facility license without making a disclosure of information as required in this section.

(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.

(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.

(j) As a condition of continued licensure, a facility licensee must notify Facility Enrollment of significant changes in financial position, cash flow, or results of operation that could adversely affect the delivery of essential services, such as nursing or dietary services or utilities. The notification must:

(1) occur as soon as the facility becomes aware of the change in financial condition;

(2) include a description of the specific financial situation; and

(3) be faxed to 512-438-2730 or 512-438-3728.

§19.214. Criteria for Denying a License or Renewal of a License.

(a) The Texas Department of Human Services (DHS) may deny an initial license or refuse to renew a license if an applicant, or any person required to submit background and qualification information:

(1) does not have a satisfactory history of compliance with state and federal nursing home regulations. In determining whether there is a history of satisfactory compliance with federal or state regulations, DHS at a minimum may consider:

(A) whether any violation resulted in significant harm or a serious and immediate threat to the health, safety, or welfare of any resident;

(B) whether the person promptly investigated the circumstances surrounding any violation and took steps to correct and prevent a recurrence of a violation;

(C) the history of surveys and complaint investigation findings and any resulting enforcement actions;

(D) repeated failure to comply with regulation;

(E) inability to attain compliance with cited deficiencies within an acceptable period of time as specified in the plan of correction or credible allegation of compliance, whichever is appropriate;

(F) the number of violations relative to the number of facilities the applicant or any other person named in §19.201(e) of this title (relating to Criteria for Licensing) has been affiliated with during the last five years; and

(G) any exculpatory information deemed relevant by DHS;

(2) has committed any act described in §19.2112(a)(2)-(6) of this title (relating to Administrative Penalties);

(3) violated Chapter 242 of the Texas Health and Safety Code in either a repeated or substantial manner;

(4) aids, abets, or permits a substantial violation described in paragraph (3) of this subsection about which the person had or should have had knowledge;

(5) fails to provide the required information and facts and/or references;

(6) fails to pay the following fees, taxes, and assessments when due:

(A) licensing fees as described in §19.216 of this title (relating to License Fees);

(B) reimbursement of emergency assistance funds within one year from the date on which the funds were received by the trustee in accordance with the provisions of §19.2116(e) and (f) of this title (relating to Involuntary Appointment of a Trustee); or

(C) franchise taxes;

(7) discloses any of the following actions within the five-year period preceding the application:

(A) operation of a facility that has been decertified and/or had its contract canceled under the Medicare or Medicaid program in any state;

(B) federal or state nursing facility sanctions or penalties, including, but not limited to, monetary penalties, downgrading the status of a facility license, proposals to decertify, directed plans of correction or the denial of payment for new Medicaid admissions;

(C) state or federal criminal convictions for any offense that provides a penalty of incarceration;

(D) unsatisfied final judgments;

(E) eviction involving any property or space used as a facility in any state; or

(F) suspension of a license to operate a health care facility, long-term care facility, personal care facility, or a similar facility in any state; or

(8) fails to notify DHS of a significant change in financial conditions, as required under §19.201(j) of this title (relating to Criteria for Licensing).

(b) DHS will not issue a license to an applicant to operate a new facility if the applicant discloses any of the following actions during the five-year period preceding the application:

(1) revocation of a license to operate a health care facility, long-term care facility, personal care facility, or similar facility in any state;

(2) debarment or exclusion from the Medicare or Medicaid programs by the federal government or a state; or

(3) a court injunction prohibiting the applicant or manager from operating a facility.

(c) Only final actions are considered for purposes of subsections (a)(7) and (b) of this section. An action is final when routine administrative and judicial remedies are exhausted. All actions, whether pending or final, must be disclosed.

(d) If an applicant for a new license owns multiple facilities, the overall record of compliance in all of the facilities will be examined. Denial of an application for a new license will not preclude the renewal of licenses of other of the applicant's facilities with satisfactory records.

(e) If DHS denies a license or refuses to issue a renewal of a license, the applicant or licensee may request an administrative hearing. Administrative hearings are held under the provisions of the Administrative Procedures Act (APA), Title 10 of the Texas Government Code, §§2001.051 et seq, and DHS's formal hearing rules in §§79.1601-79.1614 of this title (relating to Formal Hearings).

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 9, 1999.

TRD-9905805
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 1, 1999
Proposal publication date: May 28, 1999
For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter V. ENFORCEMENT

Division 2. LICENSING REMEDIES

40 TAC §19.2106

The amendments are adopted under the Health and Safety Code, Chapter 242, which authorizes the department to license and regulate nursing facilities.

The amendments implement the Health and Safety Code, §242.037.

§19.2106. Revocation of a License.

(a) The Texas Department of Human Services (DHS) may revoke a facility's license when the license holder, or any other person described in §19.201(e) of this title (relating to Criteria for Licensing), has:

(1) violated the requirements of the Health and Safety Code, Chapter 242, or the rules adopted under that chapter, in either a repeated or substantial manner;

(2) committed any act described in §19.2112(a)(2)-(6) of this title (relating to Administrative Penalties); or

(3) failed to notify DHS of a significant change in financial conditions, as required under §19.201(j) of this title (relating to Criteria for Licensing).

(b) Revocation of a license may occur simultaneously with any other enforcement provision available to DHS.

(c) The facility will be notified by certified mail of DHS's intent to revoke the license, including the facts or conduct alleged to warrant the revocation. The facility has an opportunity to show compliance with all requirements of law for the retention of the license as provided in §19.215 of this title (relating to Informal Reconsideration). If the facility requests an informal reconsideration, DHS will give the license holder a written affirmation or reversal of the proposed action.

(d) The facility will be notified by certified mail of DHS's revocation of the facility's license. The facility has 15 days from receipt of the certified mail notice to request a hearing in accordance with Chapter 79, Subchapter Q of this title (relating to Formal Appeals). The revocation will take effect when the deadline for appeal of the revocation passes, unless the facility appeals the revocation. If the facility appeals the revocation, the status of the license holder is preserved until final disposition of the contested matter. Upon revocation, the license must be returned to 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 9, 1999.

TRD-9905806
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: October 1, 1999
Proposal publication date: May 28, 1999
For further information, please call: (512) 438-3765

♦ ♦ ♦

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 Education Agency

Title 19, Part 2

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 62, Commissioner's Rules Concerning the Equalized Wealth Level, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reason for adopting 19 TAC Chapter 62 continues to exist. The comment period will last for 30 days beginning with the publication of this notice.

Comments or questions regarding this rule review may be submitted to Criss Cloudt, Policy Planning and Research, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas, 78701-1494, (512) 463-9701, or electronically to rules@tmail.tea.state.tx.us.

TRD-9905870
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: September 13, 1999

♦ ♦ ♦

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 89, Adaptations for Special Populations, Subchapter A, Gifted/Talented Education, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reason for adopting 19 TAC Chapter 89, Subchapter A, continues to exist. The comment period will last for 30 days beginning with the publication of this notice.

Comments or questions regarding this rule review may be submitted to Criss Cloudt, Policy Planning and Research, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas, 78701-1494, (512) 463-9701, or electronically to rules@tmail.tea.state.tx.us.

TRD-9905871
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: September 13, 1999

♦ ♦ ♦

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 89, Adaptations for Special Populations, Subchapter D, Special Education Services and Settings, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reason for adopting 19 TAC Chapter 89, Subchapter D, continues to exist. The comment period will last for 30 days beginning with the publication of this notice.

Comments or questions regarding this rule review may be submitted to Criss Cloudt, Policy Planning and Research, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas, 78701-1494, (512) 463-9701, or electronically to rules@tmail.tea.state.tx.us.

TRD-9905872
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: September 13, 1999

♦ ♦ ♦

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 97, Planning and Accreditation, Subchapter A, Accreditation, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reason for adopting 19 TAC Chapter 97, Subchapter A, continues to exist. The comment period will last for 30 days beginning with the publication of this notice.

Comments or questions regarding this rule review may be submitted to Criss Cloudt, Policy Planning and Research, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas, 78701-1494, (512) 463-9701, or electronically to rules@tmail.tea.state.tx.us.

TRD-9905873
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: September 13, 1999

♦ ♦ ♦

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 157, Hearings and Appeals, Subchapter D, Independent Hearing Examiners, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reason for adopting 19 TAC Chapter 157, Subchapter D, continues to exist. The comment period will last for 30 days beginning with the publication of this notice.

Comments or questions regarding this rule review may be submitted to Criss Cloudt, Policy Planning and Research, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas, 78701-1494, (512) 463-9701, or electronically to rules@tmail.tea.state.tx.us.

TRD-9905874
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: September 13, 1999

♦ ♦ ♦

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 157, Hearings and Appeals, Subchapter AA, General Provisions for Hearings Before the Commissioner of Education, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reason for adopting 19 TAC Chapter 157, Subchapter AA, continues to exist. The comment period will last for 30 days beginning with the publication of this notice.

Comments or questions regarding this rule review may be submitted to Criss Cloudt, Policy Planning and Research, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas, 78701-1494, (512) 463-9701, or electronically to rules@tmail.tea.state.tx.us.

TRD-9905875
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: September 13, 1999

♦ ♦ ♦

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 157, Hearings and Appeals, Subchapter BB, Specific Appeals to the Commissioner, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reason for adopting 19 TAC Chapter 157, Subchapter BB, continues to exist. The comment period will last for 30 days beginning with the publication of this notice.

Comments or questions regarding this rule review may be submitted to Criss Cloudt, Policy Planning and Research, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas, 78701-1494, (512) 463-9701, or electronically to rules@tmail.tea.state.tx.us.

TRD-9905876
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: September 13, 1999

♦ ♦ ♦

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 157, Hearings and Appeals, Subchapter CC, Hearings of Appeals Arising Under Federal Law and Regulations, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reason for adopting 19 TAC Chapter 157, Subchapter CC, continues to exist. The comment period will last for 30 days beginning with the publication of this notice.

Comments or questions regarding this rule review may be submitted to Criss Cloudt, Policy Planning and Research, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas, 78701-1494, (512) 463-9701, or electronically to rules@tmail.tea.state.tx.us.

TRD-9905877
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: September 13, 1999

♦ ♦ ♦

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 157, Hearings and Appeals, Subchapter DD, Hearings Conducted by Independent Hearing Examiners, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reason for adopting 19 TAC Chapter 157, Subchapter DD, continues to exist. The comment period will last for 30 days beginning with the publication of this notice.

Comments or questions regarding this rule review may be submitted to Criss Cloudt, Policy Planning and Research, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas, 78701-1494, (512) 463-9701, or electronically to rules@tmail.tea.state.tx.us.

TRD-9905878
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: September 13, 1999

♦ ♦ ♦

Employees Retirement System of Texas

Title 34, Part 4

The Employees Retirement System of Texas (ERS) has reviewed the following sections, concerning Membership and Refunds, in accordance with the Appropriations Act, Article IX, §167, passed by the 75th Texas Legislature, and now found in Article IX, §9-10.13, passed by the 76th Texas Legislature. The ERS proposes that these sections be readopted, as the agency's reason for adopting these sections continues to exist. Please refer to the Texas Administrative Code to review these rules.

§69.1 Employees Covered by Teacher Retirement System

§69.5 Interest Payable at Time of Refund

§69.7 Reinstatement of Refunded Accounts within 15 Days

§69.9 Trustee to Trustee Transfers

Comments on the proposed readoption of these sections may be submitted to Paula A. Jones, General Counsel, Employees Retirement System of Texas, P. O. Box 13207, Austin, Texas 78711-3207 or e-mail Ms. Jones at pjones@ers.state.tx.us.

TRD-9905964
Sheila W. Beckett
Executive Director
Employees Retirement System of Texas
Filed: September 14, 1999

♦ ♦ ♦

The Employees Retirement System of Texas (ERS) has reviewed Chapter 75, concerning Benefits, in accordance with the Appropriations Act, Article IX, §167, passed by the 75th Texas Legislature, and now found in Article IX, §9-10.13, passed by the 76th Texas Legislature. The ERS proposes that this Chapter be readopted, as the agency's reason for adopting this Chapter continues to exist. Please refer to the Texas Administrative Code to review this Chapter.

Comments on the proposed readoption of Chapter 75 may be submitted to Paula A. Jones, General Counsel, Employees Retirement System of Texas, P. O. Box 13207, Austin, Texas 78711-3207 or e-mail Ms. Jones at pjones@ers.state.tx.us.

TRD-9905965
Sheila W. Beckett
Executive Director
Employees Retirement System of Texas
Filed: September 14, 1999

♦ ♦ ♦

Department of Information Resources

Title 1, Part 10

The Department of Information Resources (DIR) files this notice of intention to review and consider for readoption, revision, or repeal, Title 1, Texas Administrative Code, Chapter 201, Section 201.7, "Interagency Contracts for Information Resources Technologies." This review and consideration is being conducted in accordance with the General Appropriations Act, House Bill 1, 75th Legislature, Article IX, §167. The review will include, at a minimum, an assessment by DIR as to whether the reasons for adopting or readopting these rules continue to exist.

Any questions or written comments pertaining to this rule review may be submitted to C. J. Brandt, Jr., General Counsel, P.O. Box 13564, Austin, Texas 78711, via facsimile at (512) 475-4759, or via e-mail at . The deadline for comments is thirty (30) days after publication in the Texas Register. Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rule section of the Texas Register. The proposed rule changes will be open for public comment prior to final adoption or repeal by the department in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001. 1 TAC §201.7, Interagency Contracts for Information Resources Technologies.

TRD-9905986
C.J. Brandt, Jr.
General Counsel
Department of Information Resources
Filed: September 15, 1999

♦ ♦ ♦

Public Utility Commission of Texas

Title 16, Part 2

The Public Utility Commission of Texas files this notice of intention to review §23.55 relating to Operator Services pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167). Project Number 17709 has been assigned to the review of this section.

As part of this review process, the commission is proposing the repeal of §23.55 and is proposing new §§26.311 relating to Information Relating to Operator Services; 26.313 relating to General Requirements Relating to Operator Services; 26.315 relating to Requirements for Dominant Certificated Telecommunications Utilities (DCTUs); 26.317 relating to Information to be Provided at the Telephone Set, 26.319 relating to Access to the Operator of a Local Exchange Company (LEC); and 26.321 relating to 9-1-1 Calls, "0-" Calls, and End User Choice to replace §23.55. The proposed repeal and new sections 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 rule 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 North Congress Avenue, Austin, Texas 78711-3326 or at voice telephone (512) 936-7308.

16 TAC §23.55. Operator Services.

TRD-9905783
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 8, 1999

♦ ♦ ♦

The Public Utility Commission of Texas files this notice of intention to review §23.97 relating to Interconnection pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167). Project Number 17709 has been assigned to the review of this rule section.

As part of this review process, the commission is proposing the repeal of §23.97 and is proposing new §26.272 of this title (relating to Interconnection) to replace §23.97. The proposed repeal and new rule 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 rule continues to exist in the comments filed on the proposed new section.

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 North Congress Avenue, Austin, Texas 78711-3326 or at voice telephone (512) 936-7308.

16 TAC §23.97. Interconnection.

TRD-9905883
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 13, 1999

♦ ♦ ♦

Texas Water Development Board

Title 31, Part 10

The Texas Water Development Board files this notice of intent to review 31 TAC, Part X, Chapter 363, Financial Assistance

Programs, excluding Subchapter E, Economically Distressed Areas Program, in accordance with the Government Code, §2001.039. The board finds that the reason for adopting the chapter continues to exist. The board concurrently proposes: amendments to §§363.2, 363.13, 363.16, 363.17, 363.32, 363.33, 363.42, 363.43, 363.51, 363.53, 363.54, 363.86, 363.87, 363.202, 363.402, 363.602, 363.704, 363.712, 363.721, and 363.809; repeal of §§363.3, 363.81-363.84 and 363.511; and new §§363.81-3763.85.

As required by statute, the board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in Chapter 363 continues to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this rule review may be submitted to Jonathan Steinberg, Assistant General Counsel, Border Project Management Division, Legal Services, 512/475-2051, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to jsteinbe@twdb.state.tx.us or by fax @ 512/463-5580.

TRD-9906027
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: September 15, 1999

♦ ♦ ♦

Adopted Rule Reviews

Texas Department of Economic Development

Title 10, Part 5

The Texas Department of Economic Development (department) has completed the review of Title 10 Texas Administrative Code, Chapter 180 related to Industrial Projects as published in the May 7, 1999, issue of the *Texas Register* (24 TexReg 3545). The department readopts Chapter 180 and finds that the reason for the rules continues to exist.

The department received no comments on the review of this chapter. As part of this review process, the department proposed amendments to §180.1 and §180.2. The amendments were published in the May 7, 1999, issue of the *Texas Register* (24 TexReg 3436). The department received no comments on the proposed amendments. The adoption of the amendments may be found in the Adopted Rules Section of this *Texas Register*.

TRD-9905790
Gary Rosenquest
Chief Administrative Officer
Texas Department of Economic Development
Filed: September 9, 1999

♦ ♦ ♦

The Texas Department of Economic Development (department) has completed the review of Title 10 Texas Administrative Code, Chapter 197, related to Private Donations, as published in the May 7, 1999, issue of the *Texas Register* (24 TexReg 3545). The department readopts Chapter 197 and finds that the reason for the rules continues to exist.

The department received no comments on the review of this chapter. As part of this review process the department proposed amendments to §§197.1, 197.2, 197.4, and 197.6. The amendments were published in the May 7, 1999, issue of the *Texas Register* (24 TexReg 3437). The department received one comment on the proposed amendments. The adoption of the amendments may be found in the Adopted Rules Section of this *Texas Register*.

TRD-9905792
Gary Rosenquest
Chief Administrative Officer
Texas Department of Economic Development
Filed: September 9, 1999

♦ ♦ ♦

Texas Natural Resource Conservation Commission

Title 30, Part 1

The Texas Natural Resource Conservation Commission (commission) adopts the review of 30 TAC Chapters 39, 50, and 80, concerning Public Notice, Action on Applications, Request for Reconsideration and Contested Case Hearings; Public Comment, and Contested Case Hearings; and readopts Chapters 39, 50, and 80, as amended, in accordance with Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, Section 9-10.13, 76th Legislature, 1999. The proposed notice of intention to review was published in the July 16, 1999 issue of the *Texas Register* (24 TexReg 5532).

The Texas Government Code and the General Appropriations Act require state agencies to review and consider for readoption each of their rules every four years. A review must include, at a minimum, an assessment of whether the reasons for the rules continue to exist.

The rules review was conducted concurrently with rulemaking to amend Chapters 39, 50, and 80 to implement the requirements of House Bill (HB) 801, 76th Legislature, 1999.

During the public comment period, which closed August 16, 1999, the commission received one comment, from Brown McCarroll, who stated that the quadrennial review should not be a bar to future consideration of necessary changes to the new rules following adoption. Brown McCarroll recommended that the commission clearly indicate that the rules will be revisited after their implementation to address any problems resulting from the "fast track" timeline for this rulemaking.

The commission agrees with the commenter that the new procedural rules being adopted should be subject to review to correct any deficiencies which may become apparent following adoption. The fact that the rules have undergone the statutorily required quadrennial review, and the commission has determined that the reasons for the rules continue to exist, will not prevent the commission from revisiting the procedural rules following implementation of HB 801.

The reasons for the rules are to provide procedures for obtaining public comment on permit applications and to provide procedures for conducting contested case hearings involving permit applications.

These reasons continue to exist because state and federal law continues to require persons to obtain permits from the commission to engage in a number of activities.

The commission has reviewed the rules in Chapters 39, 50, and 80, as amended, and determined that the reasons for the rules continue to exist. Therefore, the commission readopts Chapters 39, 50, and 80, as amended.

TRD-9905739
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission

Filed: September 3, 1999

♦ ♦ ♦

Texas Workers' Compensation Commission

Title 28, Part 2

In accordance with the General Appropriation Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by Senate Bill 178, 76th Legislature, and pursuant to the notice of intention to review published in the May 21, 1999 issue of the *Texas Register* (24 TexReg 3870) the Texas Workers' Compensation Commission (the Commission) has reviewed and considered for readoption the following rules in Title 28, Part 2 of the Texas Administrative Code:

Chapter 156–Representative of Parties

§156.1. Carrier's Austin Representative.

Chapter 164–Extra-Hazardous Employer Program

§164.1. Criteria for Identifying Extra-Hazardous Employers.

§164.2. Notice to Extra-Hazardous Employer.

§164.3. Safety Consultation for Public Employers.

§164.4. Formulation of Accident Prevention Plan for Public Employers.

§164.5. Follow-up Inspection of Public Employers by the Division.

§164.6. Report of Follow-up Inspection, Public Employers.

§164.7. Removal of Public Employers from Extra-Hazardous Employer Status.

§164.8. Continuation of Extra-Hazardous Employer Status, Public Employers.

§164.9. Approval of Professional Sources for Safety Consultations.

§164.10. Removal from the List of Approved Professional Sources.

§164.11. Request for Safety Consultation from the Division.

§164.12. Reimbursement to Division for Services provided to Extra-Hazardous Employers.

§164.14. Values Assigned for Computation of Extra-Hazardous Employer Identification.

§164.15. Administrative Reviews and Hearings Regarding Identification as an Extra-Hazardous Employer.

§164.16. Removal of Private Employers from Extra-Hazardous Employer Status.

§164.17. Availability of OSHCON Services.

§164.18. Severability.

The Commission has assessed whether the reason for adopting or readopting these rules continues to exist. No comments were received regarding the review of these rules. As a result of the review, the Commission has determined that the agency's reasons for adopting §156.1 continue to exist. Recent legislation passed by the 76th Legislature has prompted revisions to this rule. Section 156.1 is proposed to be amended elsewhere in this issue of the *Texas Register* through the regular APA process. Therefore §156.1 is readopted.

As a result of the review, the Commission has determined that the reasons for adoption of the rules in Chapter 164 continue to exist. Therefore, the Commission readopts these rules. If the Commission determines that any of these rules should be revised, the revision will be accomplished in accordance with the Administrative Procedure Act.

NOTE: As a result of legislative action by the 76th Legislature, the name of the *Extra-Hazardous Employer Program* has been changed to the *Hazardous Employer Program* and references to this program in Chapter 164 has been changed accordingly, effective September 1, 1999.

TRD-9905807
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: September 9, 1999

♦ ♦ ♦

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.

Graphic Material will not be reproduced in the Acrobat version of this issue of the *Texas Register* due to the large volume. To obtain a copy of the material please contact the Texas Register office at (512) 463-5561 or (800) 226-7199.

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.

Aransas County

Request for Comments and Proposals from Interested Parties Interested in Providing Additional Medicaid Certified Nursing Facility Beds

House Bill 606, 75th Legislature, the State of Texas, permits a County Commissioner's Court of a rural county (defined as a county with a population of 100,000 or less) to request that the Texas Department of Human Services (TDHS) contract for additional Medicaid nursing facility beds in that county. This may be done without regard to the occupancy rate in available beds in the county.

Aransas County Commissioners Court is considering desirability of requesting that TDHS contract for more Medicaid nursing facility beds in Aransas County. The Commissioners Court is soliciting comments from all interested parties on the appropriateness of such a request. Additionally, the Commissioners Court seeks to determine if qualified entities are interested in submitting proposals to provide these additional Medicaid certified nursing facility beds. Comments and/or proposals should be submitted to the Honorable William Adams of Aransas County Commissioners Court, Aransas County Courthouse, Rockport, Texas 78382, telephone (361) 790-0100, by 5:00 p.m. on October 8, 1999. Action will be taken by the Commissioners Court at its regular meeting on October 27, 1999.

TRD-9905799
William Adams
County Judge
Aransas County
Filed: September 9, 1999

♦ ♦ ♦

Office of the Attorney General

Texas Clean Air Act Enforcement Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Clean Air Act. Before the State may settle a judicial enforcement action under the Texas Clean Air Act, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act.

Case Title and Court: State of Texas v. Bob Bounds d/b/a Bob Bounds Paving Company and Bob Bounds, Individually, Case No. 98-07032, in the District Court of Travis County, Texas

Nature of Defendant's Operations: Defendant owned and operated a sandpit operation located on the east side of FM 1634, two miles south of the intersection of County Road 367 and FM 1634, Wichita Falls, Wichita County, Texas. This facility is the subject of this litigation and proposed settlement.

Proposed Agreed Judgment: The Agreed Final Judgment contains provisions for $6,000.00 in civil penalties. The judgment contains a requirement that the defendant pay $1000.00 in attorney's fees for the State of Texas and $171.00 for court costs..

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement should be directed to Eugene A. Clayborn, Assistant Attorney General, Office of the Texas Attorney General, P. O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

TRD-9905862
Elizabeth Robinson
Assistant Attorney General
Office of the Attorney General
Filed: September 10, 1999

♦ ♦ ♦

Central Texas Council of Governments

Request for Proposals

The Central Texas Council of Governments is requesting proposals from qualified firms of certified public accountants to audit financial statements of the Central Texas Workforce Board, Inc. for the fiscal year ending June 30,1999, with the option of auditing its financial statements for each of the four subsequent fiscal years. The audit shall be conducted in accordance with generally accepted auditing

standards and the standards for financial audits contained Government Auditing Standards (1994 Revision), issued by the Comptroller General of the United States, and OMB Revised Circular A-133, Audits of States, Local Governments and Non-Profit Organizations and the State of Texas Uniform Grants Management Standards.

To obtain copies of this RFP, please contact Beverly Zatlo, Central Texas Council of Governments, P.O. Box 729, Belton, TX 76513, telephone 254/933-6026 or bzatlo@centex.ct.cog.tx.us.

TRD-9905979
R. Michael Irvine
Director of Administration
Central Texas Council of Governments
Filed: September 15, 1999

♦ ♦ ♦

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were received for the following projects(s) during the period of September 3, 1999, through September 13, 1999:

FEDERAL AGENCY ACTIONS:

Applicant: Gordon Phillips ; Location: The project is located in wetlands at Lot No. 67, Section 2 of Gulf Shores adjacent to 1256 East Canal Street, Crystal Beach, Galveston County, Texas; CCC Project No.: 99-0321-F1; Description of Proposed Action: The applicant proposes to fill a vacant lot containing approximately 2,700 square feet (0.06 acres) of adjacent wetlands. The vacant lot is adjacent to the applicant's existing house, and the filled area would be used as a yard or as a parking area for visitors' cars. Approximately 56 cubic yards of fill dirt would be used to raise the level of the vacant lot to that of the adjacent house site and of East Canal Street; Type of Application: U.S.A.C.E. permit application #21625 under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Fisher Channel Dock; Location: The project is located in Lavaca Bay at the Fisher Channel Dock facilities on Commerce Street, Port Lavaca, Calhoun County, Texas; CCC Project No.: 99-0322-F1; Description of Proposed Action: The applicant proposes to modify his existing Department of the Army Permit Number 13436(04) to construct a breakwater approximately 1,800 feet long to encompass his existing facilities known as Fisher Channel Dock. The applicant also plans to deposit approximately 92,000 cubic yards of clay/silt material within this breakwater over a 10 year period; Type of Application: U.S.A.C.E. permit application #13436(05) 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: U.S. Army Corps of Engineers, Galveston District; Location: 15638(03): The territorial sea in the Gulf of Mexico at locations in State Tracts offshore from Cameron and Willacy counties, central to a point approximately 20 miles north of Port Isabel, Texas. 16026(03): The territorial sea in the Gulf of Mexico at locations in State Tracts offshore from Kenedy County, central to a point approximately 30 miles northeast of Port Mansfield, Texas. 16458(04): The territorial sea in the Gulf of Mexico at locations in State Tracts offshore from Kleberg and Nueces counties, central to a point approximately 24 miles southeast of Corpus Christi, Texas. 16510(04): The territorial sea in the Gulf of Mexico at locations in State Tracts offshore from Aransas, Calhoun and Matagorda counties, central to a point approximately 20 miles southeast of Seadrift, Texas. 16525(04): The territorial sea in the Gulf of Mexico, at locations in State Tracts offshore from Matagorda and Brazoria counties, central to a point approximately 11 miles southeast of Sargent, Texas. 16637(04): The territorial sea in the Gulf of Mexico at locations in State Tracts offshore from Brazoria and Galveston counties, central to a point approximately 10 miles southwest of Galveston, Texas. 16761(04): The territorial sea in the Gulf of Mexico at locations in State Tracts offshore from Chambers and Jefferson counties and Cameron Parish, central to a point approximately 17 miles southwest of Sabine, Texas; CCC Project No.: 99-0323-F1; Description of Proposed Action: These General Permits (GPs) authorize the applicant to erect and maintain structures and appurtenances to be used in connection with the drilling of wells for the production of oil, gas, or other minerals, and for producing and transporting oil, gas, or other minerals. The amendments are for including authorization of Section 404 activities for the installation of pipelines associated with the drilling structures, including trenching, disking, and jetting methods; Type of Application: U.S.A.C.E. General Permit application #15638(03), 16026(03), 16458(04), 16510(04), 16525(04), 16637(04), 16671(04) 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: Exxon Pipeline Company; Location: The project is located on Garcitas Creek, approximately 1.1 miles upstream from Lavaca Bay, near La Salle, Victoria and Jackson counties, Texas; CCC Project No.: 99-0324-F1; Description of Proposed Action: The applicant proposes to amend two permits. Permit 6925 authorizes the installation of a 16-inch pipeline, while Permit 7374 authorizes an 8-inch pipeline. The pipelines are approximately 50 feet apart. Both amendments concern armoring exposed lengths of these pipelines. The armoring would consist of placing concrete bags over the exposed and minimally covered sections of pipelines. The bags would cover approximately 300 square feet of the creek bottom and would extend 3 feet above the natural bottom of the creek. Reburying the pipelines to the required depth of 5 feet would entail excavating wetlands for 1,000 feet on either side of Garcitas Creek; Type of Application: U.S.A.C.E. permit application #6925(01) & 7343(01) 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: Robert Custer; Location: The project is located on a drainage canal adjacent to Mr. Custer's property at 949 Kenlyn Drive, Crystal Beach, Galveston County, Texas; CCC Project No.: 99-0325-F1; Description of Proposed Action: The applicant requests authorization to install a bulkhead in a drainage canal. The project would be 110 feet in length and would have a 6 by 7-foot extension in the center of the bulkhead. Forty cubic yards of backfill would be placed behind the bulkhead. Aquatic vegetation exists within the entire proposed bulkhead site and will be impacted by this project; Type of Application: U.S.A.C.E. permit application #21746 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: Texas Parks and Wildlife Department; Location: The project is located in OCS Block High Island-A462 in the Gulf of Mexico; CCC Project No.: 99-0326-F1; Description of Proposed Action: The applicant proposes to create an artificial reef. The project would consist of placing oil and gas production structures, surplus vessels, obsolete army tanks and similar materials on the ocean floor

with a minimum clearance of 85 feet at mean low water. All structures will be placed with the confines of a 1320 by 1320-foot area; Type of Application: U.S.A.C.E. permit application #21772 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403).

Applicant: Louis Dreyfus Natural Gas; Location: The project is located in the Gulf of Mexico Galveston Anchorage Area, Galveston Area Block 148, approximately 4.5 miles southeast of Galveston, Galveston County, Texas; CCC Project No.: 99-0327-F1; Description of Proposed Action: The applicant proposes to drill a well and install, operate, and maintain a drilling/production complex and appurtenant structures in the anchorage area. The project site will be located in approximately 55 feet of water and will be placed a minimum of 2 nautical miles from any other structure in the anchorage area; Type of Application: U.S.A.C.E. permit application #21768 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403).

FEDERAL AGENCY ACTIVITIES:

Applicant: Gulf of Mexico Fishery Management Council; CCC Project No.: 99-0328-F2; Description of Proposed Activity: Pursuant to the Magnuson Stevens Fishery Conservation and Management Act, the applicant proposes to add to Amendment 17 to the Reef Fish Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico the following one (1) action: Extend the commercial reef fish permit moratorium for another 5 years.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is, or is not consistent with the Texas Coastal Management Program goals and policies, and whether the action should be referred to the Coastal Coordination Council for review. Further information for the applications listed above may be obtained from Ms. Janet Fatheree, Council Secretary, Coastal Coordination Council, 1700 North Congress Avenue, Room 617, Austin, Texas 78701-1495, or janet.fatheree@glo.state.tx.us. Persons are encouraged to submit written comments as soon as possible within 30 days of publication of this notice. Comments should be sent to Ms. Fatheree at the above address or by fax at 512/475-0680.

TRD-9905988
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: September 15, 1999

♦ ♦ ♦

Comptroller of Public Accounts

Notice of Withdrawal of Request for Proposals

In accordance with the provisions of Texas Government Code, §2305.028 the Comptroller of Public Accounts, Sate Energy Conservation Office, hereby withdraws the Request for Proposals (RFP) to provide energy engineering assistance to the Local Government Energy Management Program.

The proposal request was published in the August 20, 1999, issue of the *Texas Register* (24 TexReg 6562).

TRD-9905962
David R. Brown
Legal Counsel
Comptroller of Public Accounts
Filed: September 14, 1999

♦ ♦ ♦

Office of Consumer Credit Commissioner

Notices of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/13/99 - 09/19/99 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by §303.003 and §303.09 for the period of 09/13/99 - 09/19/99 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.

TRD-9905786
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: September 9, 1999

♦ ♦ ♦

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 09/20/99 - 09/26/99 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by §303.003 and §303.09 for the period of 09/20/99 - 09/26/99 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.

TRD-9905950
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: September 14, 1999

♦ ♦ ♦

The Consumer Credit Commissioner of Texas has ascertained the market competitive rate ceiling by use of the formulas and methods described in §§345.151-345.154 TEXAS FINANCE CODE. The market competitive rate ceiling for the period October 1, 1999, through September 30, 2000, is 21%.

TRD-9905951
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: September 14, 1999

♦ ♦ ♦

Texas Credit Union Department

Application(s) to Amend Articles of Incorporation

Notice is given that the following application has been filed with the Texas Credit Union Department and is under consideration:

An application for a name change was received for TEC & State Employees Credit Union, Fort Worth, Texas. The proposed new name is Workforce Credit Union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-9906004
Harold E. Feeney
Commissioner
Texas Credit Union Department
Filed: September 15, 1999

♦ ♦ ♦

Application(s) to Expand Field of Membership

Notice is given that the following applications have been filed with the Texas Credit Union Department and are under consideration:

An application was received from District 2 TEC/TWC Credit Union, San Antonio, Texas to expand its field of membership. The proposal would permit all former and current employees of the TWC in Regions 19, 20, 21, 22, 23, 24, 27 (formerly Texas Employment Commission District 2), as well as contractors and their employees who work under contract for the TWC in regions 19, 20, 21, 22, 23, 24, and 27 excluding those persons eligible for primary membership in any occupational based credit union at the time membership is sought, to be eligible for membership in the credit union.

An application was received from Community Credit Union, Plano, Texas to expand its field of membership. The proposal would permit persons who work or reside within the cities of Flower Mount, Highland Village, Trophy Club, Southlake or Westlake, excluding persons primarily eligible for membership in any occupation or association based credit union with less than 20,000 members as of the date of this amendment (4-13-99) having an office within this area, to be eligible for membership in the credit union.

An application was received from Austin Metropolitan Financial Credit Union, Austin, Texas to expand its field of membership. The proposal would permit the employees of Advance Security, Inc., and Advance Security, Inc. as a separate entity, to be eligible for membership in the credit union.

An application was received from Austin Metropolitan Financial Credit Union, Austin, Texas to expand its field of membership. The proposal would permit the employees of Trend Technologies, Inc. who live or work in Austin, Texas, and Trend Technologies, Inc. as a separate entity, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-9905997
Harold E. Feeney
Commissioner
Texas Credit Union Department
Filed: September 15, 1999

♦ ♦ ♦

Notice of Final Action Taken

In accordance with the provisions of 7 TAC Section 91.103, the Texas Credit Union Department provides notice of the final action taken on the following application(s):

Application(s) to Expand Field of Membership

Employees Credit Union, Dallas, Texas - See *Texas Register* issue dated 06-25-99

Texas Dow Employees Credit Union, Lake Jackson, Texas - See *Texas Register* issue dated 06-25-99

Gulf Employees Credit Union, Groves, Texas - See *Texas Register* issue dated 06-25-99

Cameron

TRD-9906005
Harold E. Feeney
Commissioner
Texas Credit Union Department
Filed: September 15, 1999

♦ ♦ ♦

Texas Department of Criminal Justice

Notice of Award

The Texas Department of Criminal Justice hereby gives notice of award for the Giddings State School Alterations, Requisition Number 696-FD-0-0-C0154, published in the September 10, 1999, issue of the *Texas Register* (24 TexReg 7300) . The Notice was awarded to CSS., Inc., for a dollar amount of $1,188,825.

TRD-9905980
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: September 15, 1999

♦ ♦ ♦

Notice To Bidders

The Texas Department of Criminal Justice invites bids for complete Roof Renovation of several buildings at the Skyview Unit in Rusk, Texas. The project consists of complete removal of existing roof systems including insulation, base flashing, metal flashing and present roof membrane. The installation of the new roof insulation, both tapered and flats as specified. Coal Tar Pitch roof system membrane with specified surfacing on the Castner Building and Radio Picket Building. Asphalt roof system membrane on portions of the 200 Bed Psychiatric Facility. Base Flashing, metal flashing and counter flashing shall be as specified. This Project consist of roof replacements on several buildings and roof areas with a total size of approximately 131,096 square feet. Contract Documents prepared by: Amtech Roofing Consultants, Inc..

The successful bidder will be required to meet the following requirements and submit evidence within five days after receiving notice of intent to award from the Owner:

Contractor must have a minimum of five consecutive years of experience as a General Contractor and provide references for at least three projects that have been completed of a dollar value and complexity equal to or greater than the proposed project.

Contractor must be certified by the roofing materials manufacturer, as an approved No Dollar Limit (NDL) applicator for a minimum of three years prior to Bid Date, and qualified to provide specified warranty on selected systems and flashings.

Contractor must be certified by the Fume recovery system manufacturer as trained or approved to properly operate and maintain the selected equipment.

Contractor must be bondable and insurable at the levels required.

All Bid Proposals must be accompanied by a Bid Bond in the amount of 5.0% of greatest amount bid. Performance and Payment Bonds in the amount of 100% of the contract amount will be required upon award of a contract. The Owner reserves the right to reject any or all bids, and to waive any informality or irregularity.

Bid Documents can be purchased from the Architect/Engineer at a cost of $50, (non-refundable) per set, inclusive of mailing/delivery costs, or they may be viewed at various plan rooms. Payment checks for documents should be made payable to the Architect/ Engineer : AMTECH ROOFING CONSULTANTS, INC., ATTN: BOB ALFORD, 3300 SO. GESSNER, SUITE 245, HOUSTON, TEXAS 77063; Phone: (713)-266-4829; Fax: (713)-266-4977.

A Pre-Bid conference will be held at 11AM on 05 October 1999 at the Skyview Unit in Rusk,Texas, followed by a site-visit. ATTENDANCE IS MANDATORY. A second NON-MANDATORY site-visit will be 12 October 1999 at 9AM.

Bids will be publicly opened and read at 2pm on 19 October 1999, in the Blue Conference Room at the Facilities Division located in the warehouse building of the TDCJ Administrative Complex (formally Brown Oil Tool) on Spur 59 off of Highway 75 North, Huntsville, Texas.

The Texas Department of Criminal Justice requires the Contractor to make a good faith effort to include Historically Underutilized Businesses (Hubs) in at least 57.2% of the total value of this construction contract award. Attention is called to the fact that not less than the minimum wage rates prescribed in the Special Conditions must be paid on these projects.

TRD-9905992
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: September 15, 1999

♦ ♦ ♦

Texas Education Agency

Request for Early Reading Diagnostic Instruments

Description. The Texas Education Agency (TEA) is notifying publishers that early reading diagnostic instruments for Kindergarten, Grade 1 and Grade 2 may be submitted for review. Texas Education Code (TEC), §28.006, authorizes the commissioner of education to develop recommendations for school districts for administering early reading instruments to diagnose student reading skill and comprehension development.

Under TEC, §28.006(b), the commissioner of education shall adopt a list of early reading instruments that school districts may use to diagnose reading skill and comprehension development. Additionally, the reading instruments used must evaluate individual student reading progress and be used to determine students at-risk for dyslexia or other reading difficulties. Any reading instrument used must be based on scientific research concerning both reading skills development and comprehension development. The list of reading instruments adopted under TEC, §28.006(b), must also provide for diagnosing the reading skills development and comprehension of students participating in a bilingual program under TEC, Chapter 29, Subchapter B (relating to bilingual education and special language programs).

Program Requirements. School districts were required to administer early reading instruments beginning with the 1998-1999 school year. Results from the early reading instruments will be used to inform instruction and provide grade appropriate intervention activities to identified students as determined and established by the school district. Results from the early reading instruments will also be reported to the commissioner of education, the local school board of trustees and parents and/or guardians. The list of early reading instruments will be made available to local school districts and charter schools no later than May 1, 2000. The list of instruments adopted by the commissioner will remain in effect through the 2002-2003 school year. State funds will only pay for the cost of early reading instruments on the list adopted by the commissioner.

Selection Criteria. Proposed reading instruments will be evaluated for validity and reliability. Proposed reading instruments will be evaluated for use in determining students at-risk for dyslexia and other reading difficulties. Proposed reading instruments will also be evaluated for cost-effectiveness, as well as ease of administration and application by the classroom teacher. Additional information regarding the criteria used to select instruments is available through the Office of Statewide Initiatives. For additional information, contact the Office of Statewide Initiatives at (512) 463-9027.

Proposals must be submitted to the Office of Statewide Initiatives, Suite 4-104, 1701 North Congress Avenue, Austin, TX 78701 by November 23, 1999, to be considered. If you would like your reading instrument returned after review, please indicate so on a cover letter submitted with the proposal.

TRD-9905982
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: September 15, 1999

♦ ♦ ♦

Request for Proposals Concerning Contracted Services for Student Assessment

Eligible Proposers. The Texas Education Agency (TEA) is requesting proposals under Request for Proposals (RFP) #701-99-029 from education service centers, colleges and universities, nonprofit organizations, and for-profit organizations for contracted services for the statewide assessment of student academic skills as required by the Texas Education Code (TEC), §§39.022 through 39.033, for school years 2000-2001 through 2004-2005. Historically Underutilized Businesses (HUBs) are encouraged to determine their possible role in this endeavor.

Description. The TEC, §§39.022 through 39.033, requires the assessment of student achievement with criterion-referenced tests. The TEA is requesting contracted services to conduct the student assessment program, which evaluates the progress of Texas students longitudinally and at critical checkpoints.

The Texas Assessment of Academic Skills (TAAS) program currently measures the state-mandated curriculum, the Texas Essential Knowledge and Skills (TEKS), in reading and mathematics at Grades 3 through 8 and at the exit level; in writing at Grades 4 and 8 and at the exit level; and in science and social studies at Grade 8. Spanish-version TAAS tests measure the TEKS in reading and mathematics at Grades 3 through 6 and in writing at Grade 4. Satisfactory performance on the exit level tests is prerequisite to a high school diploma from a Texas public school. Demonstrating satisfactory performance on a specific combination of end-of-course tests is an alternative means for students to be eligible to graduate. The Algebra I, Biology, English II, and U.S. History end-of-course tests measure the TEKS in these corresponding high school courses.

The statewide assessment program has also recently added two assessments: alternative assessment and the reading proficiency test in English (RPTE). As specified by the TEC, §39.023, the alternative assessment will measure the academic performance of special education students in reading and mathematics in Grades 3 through 8, and writing in Grades 4 and 8 who are being instructed in the TEKS but who are exempted from the TAAS test by their admission, review and dismissal (ARD) committee because this test is not an appropriate measure of their academic performance, even with allowable accommodations. The alternative assessment, which will be administered beginning in spring 2001, will assess students at their appropriate instructional levels, as determined by their ARD committees, rather than at their assigned grade level.

The RPTE will be administered to limited English proficient (LEP) students beginning in spring 2000. The RPTE, combined with TAAS in English and Spanish, will provide a comprehensive system for assessing LEP students. The RPTE, designed specifically for second language learners, will provide useful data on these students' current reading levels and will be a measure of growth in their English reading proficiency. As specified by Senate Bill 103, 76th Texas Legislature, 1999, every LEP student will either take the RPTE or both the Spanish-version TAAS and the RPTE.

In addition to the existing assessment program, this RFP covers services over a contract period in which TEA will implement a new program, as mandated by the 76th Texas Legislature. New legislation requires that the exit level assessment move from Grade 10 to Grade 11 and include additional subjects, and tests at Grades 9 and 10 be added. Also, the Grade 3 reading test will be administered three times each year beginning in the 2002-2003 school year, and the Grade 5 reading and mathematics tests will be administered three times each year beginning with the 2004-2005 school year.

Dates of Project. Contracted services for student assessment will be conducted during the 2000-2001 school year through the 2004-2005 school year. Proposers should plan for a starting date of no earlier than March 14, 2000, and an ending date of no later than August 31, 2005.

Project Funding. Funding for this project is subject to the availability of funds appropriated by legislative act for the purposes stated. Dollar amounts in proposals are subject to downward negotiation. Project funding subsequent to the 2000-2001 school year will be based on satisfactory progress of the previous year's objectives and activities and general budget approval.

Selection Criteria. Proposals will be selected based on the ability of each proposer to carry out the requirements contained in this RFP. The TEA will base its selection on, among other things, demonstrated competence and qualifications of the proposer. The selection criteria and the review process are specified in the RFP. The TEA reserves the right to select from the highest ranking proposals those that address all requirements in the RFP.

The TEA is not obligated to execute a resulting contract, provide funds, or endorse any proposal submitted in response to this RFP. This RFP does not commit TEA to pay any costs incurred before a contract is executed. The issuance of this RFP does not obligate TEA to award a contract or pay any costs incurred in preparing a response.

Requesting the Proposal. A complete copy of RFP #701-99-029 may be obtained by writing the: Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701, or by calling (512) 463-9304. Please refer to the RFP number in your request.

Further Information. For clarifying information about this RFP, contact Keith Cruse, Student Assessment Division, Texas Education Agency, (512) 463-9536.

Proposers' Conference. There will be an opportunity for interested parties to attend the Proposers' Conference scheduled for Thursday, October 21, 1999, from 10:00 a.m. until 12:00 p.m. in Room 1-104, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas. This conference will be the single opportunity afforded to ask questions of TEA personnel to assist potential proposers in clarifying their understanding of the scope and nature of the work required. The conference will be open to all potential proposers, and all questions asked and answered will be in the presence of all attending.

Deadline for Receipt of Proposals. Proposals must be received in the Document Control Center of the TEA by 5:00 p.m. (central time), January 11, 2000, to be considered.

TRD-9905990
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: September 15, 1999

♦ ♦ ♦

Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Kristin Newkirk, Director, Disclosure Filings, at (512) 463-5800 or (800) 325-8506.

Deadline: Monthly PAC Report, due June 5, 1999

Michelle Meyers, Houston Gay & Lesbian Political Committee, 3601 Allen Pkwy #302, Houston, TX 77019-1644

Don L. King, Sensitive Care PAC, 500 N, Akard St. #3960, Dallas, TX 75201-6604

Robert E. Molyneaux, Texas Penney PAC, P.O. Box 10001, Dallas, TX 75301-1311

Deadline: Monthly Lobby Activity Report, due May 10, 1999

Carter, Darryl, 1021 Main St. #1360, Houston, TX 77002-6502

Keene, Russell T., P.O. Box 569440, Dallas, TX 75356

Overstreet, Morris, P.O. Box 12817, Austin, TX 78711

Deadline: Annual Personal Financial Statement, due April 30, 1999

Black Jr., Albert, 1133 S Madison Ave, Dallas, TX 75208

Boales, Brian, P.O. Box 105279, Atlanta, GA 30348-0279

Cabell Jr., Enos, P.O. Box 87865, Houston, TX 77297-7865

Cantu Sr., Pete, 10731 Bar X Tr, Helotes, TX 78023

Clements, Jerry, 16330 Amberwood, Dallas, TX 75248

Cummings, Bobby L., P.O. Box 736, Gatesville, TX 76528

Curry, Ron, P.O. Box 2241, Austin, TX 78768

Dailey Jr., Maceo, Blacker St., El Paso, TX 79902

Davidson, Roseanna C., P.O. Box 41071, Lubbock, TX 79409-1071

Dutton, Harold V., 601 Jefferson St. #125, Houston, TX 77002

Espronceda, Ruben, P.O. Box 14373, San Antonio, TX 78214

Gonzalez-Falla, Celso, 2101 Glenoak, Corpus Christi, TX 78412

Hackebeil, Anton, P.O. Box 220, Hondo, TX 78861-0220

Hadnot, Cloyd., P.O. Box 565, Hillister, TX 77624

Hawkins, Robert, 1108 Lewis St., Bellmead, TX 76705-2969

Hendricks, John C., 2401 S 31st St., Temple, TX 76508

Humphreys, Joe B., 300 Crescent Ct., #700, Dallas, TX 75201

Jones, N. Scott, 3425 Sprindletter Dr., Grapevine, TX 76051

Jones, Ralph,2400 One Main Pl, 1201 Main St, Dallas, TX 75202

Kirven, Joe, 2828 Martin Luther King Blvd., Dallas, TX 75215

Leggat, Bonnie, 211 Merrill, Marshall, TX 75670

Madeley, Hank, 1701 N. Congress Ave, Austin, TX 78701

Mendez, David, 707 Travis St., 6th Fl., Houston, TX 77252-8047

Meyers, James M., 1512 Gaston Ave., Austin, TX 78703

Oakley, Keith, 504 First St., Terrell, TX 75160

Parrish, Robert E., 1315 Red Maple Dr., Carrollton, TX 75007

Pearson, Jacquelyn,4975 Preston Park Blvd #500E,Plano,TX 75093

Rabuck, Robert, P.O. Box 2910, Austin, TX 78768-2910

Rodriguez, Nelda, 433 S. Tancahua, Corpus Christi, TX 78411

Schonberger, Olivia, 424 Sharondale, El Paso, TX 79912

Taylor, Clare, 915 Red Oak, Corsicana, TX 75110

Turner, John M., 6009 Hillcrest, Dallas, TX 75205

Van Manen, Mary, 2114 Whirlaway Dr., Stafford, TX 77477-6488

Vittitoe, Craig H., P.O. Drawer 1429, Harlingen, TX 78550

Wilson, Ron, P.O. Box 2910, Austin, TX 78768

Worrall, W. David, 4609 Foster Rd., Vernon, TX 76384

Zepeda Jr., Gilberto, 714 W. Sam Houston, San Juan, TX 78589

Deadline: Monthly Lobby Activity Report, due April 10, 1999

Keene, Russell T., P.O. Box 569440, Dallas, Texas 75356

Deadline: Monthly Lobby Activity Report, due March 10, 1999

Keene, Russell T., P.O. Box 569440, Dallas, Texas 75356

TRD-9905840
Tom Harrison
Executive Director
Texas Ethics Commission
Filed: September 10, 1999

♦ ♦ ♦

General Land Office

Invitation for Offers of Consulting Services

Effective September 1, 1999, Senate Bill 7, 76th Legislature, authorizes the Commissioner of the Texas General Land Office (GLO), under Chapter 35 of the Texas Utilities Code, to negotiate and execute contracts for the conversion of royalties taken in kind to other forms of energy including electricity for sale to public retail customers which include public school districts, state institutions of higher education, agencies of the state, and political subdivisions of the state (the Program).

Pursuant to Senate Bill 7 and Texas Government Code, §2254.021, et seq., the commissioner is requesting offers of consulting services to assist the GLO in implementing the Program. Consultant will assist the GLO with the following:

(1) Development of a strategy identifying all activities that need to be completed before sales to public retail customers are initiated;

(2) Selection of providers to assist with conversion of royalties taken in kind to other forms of energy including electricity and associated power marketing activities;

(3) Assistance in conjunction with the adoption of rules and procedures at the Public Utility Commission of Texas;

(4) Development of marketing strategies to identify and recruit public retail customers.

(5) Development of pricing strategies for retail sales to public retail customers;.

(6) Establishment of a standard contract through which electricity may be sold to public retail customers;.

(7) Development of load profile information for each public retail customer; and

(8) Development of an implementation for metering and billing plan.

The consultant selected must demonstrate extensive knowledge in electric utility operations, and have knowledge and experience working with public retail customers, as defined herein.

The closing date for the receipt of offers of these consulting services in 5:00 p.m., Monday, October 25, 1999. Further information may be obtained by contacting Mr. Stephen Raines at the General Land Office, 1700 North Congress, Room 836B, Austin, Texas 78701-1495, (512) 936-1941.

TRD-9905844
Larry R. Soward
Chief Clerk
General Land Office
Filed: September 10, 1999

♦ ♦ ♦

Texas Department of Health

Licensing Actions for Radioactive Materials

The Texas Department of Health has taken actions regarding licenses for the possession and use of radioactive materials as listed in the table below. The subheading labeled "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

Licensing Actions for Radioactive Materials

NEW LICENSES ISSUED:

Location	Name	License#	City	Amendment #	Date of Action
Through out Texas	Westech	L05231	Houston	0	08/12/99
Through out Texas	Terracon Inc	L05268	Dallas	0	08/17/99

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License#	City	Amendment #	Date of Action
Amarillo	Amarillo Road Company	L05063	Amarillo	1	08/19/99
Arlington	Arlington Memorial Hospital Foundation INC	L02217	Arlington	56	08/18/99
Arlington	Health Images Texas	L05033	Arlington	11	08/99/99
Arlington	Radiology Associates of Tarrant County PA	L05109	Arlington	11	08/26/99
Austin	Texas Natural Resource	L01715	Austin	32	08/19/99
Austin	High End System INC	L04908	Austin	1	08/31/99
Baytown	Exxon Chemical Americas	L01135	Baytown	57	08/30/99
Baytown	Bayer Corporation	L01577	Baytown	50	08/12/99
Brownsville	Brownsville Medical Center	L01526	Brownsville	28	08/25/99
Brownwood	Brownwood Regional Hospital Inc	L01322	Brownwood	42	08/17/99
Colorado	Michell County Hospital	L01643	Colorado	17	08/30/99
Corpus Christi	Spohn Health System Corporation	L00265	Corpus Christi	69	08/20/99
Corpus Christi	Spohn Hospital	L02495	Corpus Christi	58	08/26/99
Corpus Christi	Syncor International Corporation	L04043	Corpus Christi	23	08/16/99
D/FW Airport	GE Lighting	L03819	D/FW Airport	11	08/18/99
Dallas	Texas Instruments Incorporated	L05048	Dallas	3	08/19/99
Deer Park	Radiation Consultants Inc	L02179	Deer Park	33	08/19/99
Denison	Texoma Medical Center	L01624	Denison	51	08/31/99
Diboll	Temple-Inland Forest Products	L04250	Diboll	3	08/12/99
EL Paso	Columbia Medical Center West Nuclear Medicine	L02715	El Paso	40	08/20/99
EL Paso	EP Premier Medical Group PA	L05198	EL Paso	1	08/23/99
El Paso	R E Thomason General Hospital	L00502	EL Paso	46	08/20/99
El Paso	Isomedix Operations INC	L04268	EL Paso	11	08/11/99
Fort Worth	Syncor International Corporation	L02905	Fort Worth	51	08/25/99

Fort Worth 08/24/99	Radiology Associates	L03953	Fort Worth	21
Houston 08/17/99	Atomic Energy Industrial	L01067	Houston	22
Houston 08/17/99	Tenet Healthcare LTD	L02432	Houston	27
Houston 08/20/99	Mallinckrodt Medical Inc	L03008	Houston	49
Houston 08/19/99	Kellogg Brown & Root Inc	L03660	Houston	8
Houston 08/30/99	Kellogg Brown & Root Inc	L03660	Houston	9
Houston 08/23/99	Macgregor Medical Association	L04646	Houston	8

CONTINUED ADMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License#	City	Amendment #
Date of Action				
Houston 08/20/99	Houston Cardiovascular Associate	L05070	Houston	2
Houston 08/20/99	Proportional Technologies Inc	L04747	Houston	10
Katy 08/13/99	Katy Medical Center Inc	L03052	Katy	28
Katy 08/16/99	Katy Medical Center Inc	L03052	Katy	28
La Porte 08/19/99	TRU-TEX Service Inc	L03913	LA Porte	57
Lake Jackson 08/19/99	Non Destrictive Inspection Corporation	L02712	Lake Jackson	67
Laredo 08/12/99	Mercy Regional Medical Center	L01306	Laredo	45
Lubbock 08/30/99	Covenant Medical Center	L00483	Lubbock	106
Lubbock 08/13/99	University Medical Center	L04719	Lubbock	27
Lubbock 08/19/99	M Fawwaz Shoukfeh MD PA	L05276	Lubbock	1
Midland 08/25/99	GEOCO Inc	L05146	Midland	2
Odessa 08/12/99	Rexene Corp	L00547	Odessa	37
Odessa 08/13/99	Black Warrior Wireline Corp.	L04473	Odessa	11
Paris 08/25/99	Texas Health System	L02457	Paris	17
Paris 08/25/99	Saleen Mallick MD PA	L05132	Paris	2
Pasadena 08/19/99	Pasadena Paper Co	L00906	Pasadena	33
Plano 08/20/99	Columbia Medical Center of Plano Subsidiary LP	L02032	Plano	45
Richmond 08/12/99	Richmond Foundry ABC-NACO	L00312	Richmond	35
San Antonio 08/16/99	Methodist Healthcare System of San Antonio	L00594	San Antonio	140
San Antonio 08/23/99	Methodist Healthcare System of San Antonio LTD	L02232	San Antonio	39
San Antonio 08/16/99	Santa Rosa Health Care	L02237	San Antonio	57
San Antonio 08/17/99	Northeast Methodist Hospital	L03810	San Antonio	20
Sugarland 08/25/99	Schlumberger Technology Corporation	L01833	Sugarland	112
Sugarland 08/25/99	US Imaging Inc	L04459	Sugarland	24

Tatum 08/13/99	TXU Electric, Martin Lake Plant	L04593	Tatum	4
Through out Texas 08/09/99	E I DU Pont De Nemours & Company	L00314	La Porte	71
Through out Texas 08/12/99	Western Atlas International Inc	L00446	Houston	120
Through out Texas 08/19/99	ICO Worldwide Inc	L01884	Houston	29
Through out Texas 08/18/99	CB&I Constructors Inc	L01902	Houston	40
Through out Texas 08/19/99	Desert Industrial X-Ray LP	L04590	Odessa	24
Through out Texas 08/19/99	Geoscience Engineering & Testing Inc	L05180	Houston	3
Through out Texas 08/25/99	Raven Inspection & Testing	L05219	Huffman	1
Tyler 08/17/99	The University of Texas Health Center at Tyler	L01796	Tyler	49
Webster 08/13/99	Clear Lake Regional Medical	L01680	Webster	43
Weslaco 08/20/99	KNAPP Medical Center	L03290	Weslaco	26
Through out Texas 08/13/99	Longview Inspection Inc	L01774	Houston	150
Through out Texas 08/13/99	VIA NDT Engineering and Testing	L04322	Channelview	43
Through out Texas 08/19/99	Gulf Coast International Inspection Inc	L04934	Ingleside	11
Through out Texas 08/24/99	Professsional Service Industries Inc	L04947	Austin	8
Through out Texas 08/16/99	Zack Burkett Company	L04102	Graham	5

RENEWALS OF EXISTING LICENSES ISSUED:

Location	Name	License#	City	Amend-ment #	Date of Action
Austin	Ambion Inc	L04307	Austin	8	08/31/99
Dallas	Mallinckrodt Inc	L03580	Dallas	36	08/25/99
Houston	Berthold Systems Inc	L04597	Houston	5	08/20/99

CONTINUED RENEWALS OF EXISTING LICENSES ISSUED:

Location	Name	License#	City	Amend-ment #	Date of Action
Houston	Institute of Biosciences and Technology	L04681	Houston	9	08/20/99
Houston	HMA Environmental Services Inc	L04779	Houston	8	08/30/99
Jacksonville	East Texas Medical Center Jacksonville	L00169	Jacksonville	32	08/24/99
San Antonio	MEDI-Physics Inc	L04764	San Antonio	11	08/25/99
San Antonio	Heart and Vascular Institute of Texas	L04799	San Antonio	4	08/12/99
Tyler	Cardiovascular Associates of East Texas PA	L04800	Tyler	6	08/23/99

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License#	City	Amendment #	Date of Action
Arlington	City of Arlington Water Utilities Laboratory Services	L01956	Arlington	8	08/13/99
Carrollton	Forney Corporation	L05110	Carrollton	2	08/17/99
Kerrville	Guadalupe Physcians group	L05173	Kerrville	1	08/12/99

In issuing new licenses and amending and renewing existing licenses, the Texas Department of Health, Bureau of Radiation Control, has determined that the applicants are qualified by reason of training and experience to use the material in question for the purposes requested in accordance with 25 TAC, Chapter 289 in such a manner as to minimize danger to public health and safety or property and the environment; the applicants' proposed equipment, facilities, and procedures are adequate to minimize danger to public health and safety or property and the environment; the issuance of the license(s) will not be inimical to the health and safety of the public or the environment; and the applicants satisfy any applicable special requirements in 25 TAC, Chapter 289.

This notice affords the opportunity for a hearing on written request of a licensee, applicant, or "person affected" within 30 days of the date of publication of this notice. A "person affected" is defined as a person who is resident of a county, or a county adjacent to the county, in which the radioactive materials are or will be located, including any person who is doing business or who has a legal interest in land in the county or adjacent county, and any local government in the county; and who can demonstrate that he has suffered or will suffer actual injury or economic damage due to emissions of radiation. A licensee, applicant, or "person affected" may request a hearing by writing Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), 1100 West 49th Street, Austin, Texas 78756-3189.

Any request for a hearing must contain the name and address of the person who considers himself affected by Agency action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is represented by an agent, the name and address of the agent must be stated.

Copies of these documents and supporting materials are available for inspection and copying at the office of the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, from 8:00 a.m. to 5:00 p.m. Monday-Friday (except holidays).

TRD-9905785
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: September 9, 1999

♦ ♦ ♦

Notice of Public Hearing for School Health and Related Services Rates Recalculation

A public hearing concerning the proposed recalculation of the School Health and Related Services rates will be held on Friday, October 8, 1999, at the Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756, in the Main Building, Room G-107, from 2:00 p.m. until 5:00 p.m. School Health and Related Services Rates must be recalculated every five years. A copy of the proposed methodology for this rate calculation and the proposed new rates may be obtained by contacting Janet Kres, Bureau of Reimbursement Analysis, Y-995, 1100 West 49th Street, Austin, Texas 78756, Telephone (512) 794-5166, Fax (512) 338-6544.

Comments on the proposed rates will be accepted until 5:00 p.m., Central Daylight Saving Time, on October 15, 1999.

TRD-9905967
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: September 14, 1999

♦ ♦ ♦

Notice of Request for Proposals for Services in Counselor Training for Prevention Counseling and Partner Elicitation

Introduction and Purpose

Vendors are requested to submit proposals for services to train Human Immunodeficiency Virus/Sexually Transmitted Diseases (HIV/STD) counselors on a statewide basis in prevention counseling and partner elicitation (PCPE). The award will be made on a competitive basis.

Eligible Applicants

Eligible applicants include governmental, public or private non-profit entities, and for profit entities. Applicants must have demonstrated ability to conduct training. Entities that have had state or federal contracts terminated within the last 24 months for deficiencies in fiscal or programmatic performance are not eligible to apply.

Availability of Funds

Approximately $40,000 is expected to be available to fund one entity with a twelve month budget. Award of funds is contingent upon annual federal grant awards to the Texas Department of Health from the Centers for Disease Control and Prevention (CDC). The Request for Proposals (RFP) is made prior to the award of the federal funds to allow applicants sufficient time to respond to the application due date. Vendor responses will be evaluated by a six member panel. The three top scoring vendors will be required to give a training demonstration/ presentation. The award will be made to the vendor with the highest overall score (written response plus training demonstration).

To Obtain RFP

The RFP document may be obtained from Beth Kelley, Training and Public Education Branch, Bureau of HIV/STD Prevention, Texas Department of Health, 1100 West 49th Street, Austin, Texas, Telephone (512) 490-2535. No copies of the RFP will be released prior to October 15, 1999.

Deadline

Proposals should be submitted to Beth Kelley, Training and Public Education Branch, Bureau of HIV/STD Prevention, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, no later than 5:00 p.m., Central Standard Time, on November 29, 1999.

TRD-9905968
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: September 14, 1999

♦ ♦ ♦

Notice of Uranium By-Product Material License Amendment

The Texas Department of Health (department) gives notice that it has amended uranium by-product material license L03626 issued to Everest Exploration Incorporated, for its Mt. Lucas Project located at the Twin Oak Ranch in Live Oak County, approximately three miles south of Dinero, Texas. Amendment number five will authorize a soil homogenization pilot project on a former by-product irrigation site.

The department's Bureau of Radiation Control, Division of Licensing, Registration and Standards has determined, pursuant to 25 Texas Administrative Code (TAC) Chapter 289, that the licensee has met the standards appropriate to this amendment.

This notice affords the opportunity for a public hearing upon written request by a person affected by the amendment to the license. A written hearing request must be received, from a person affected, within 30 days from the date of publication of this notice in the *Texas Register*. A person affected is defined as a person who is a resident of the county, or a county adjacent to the county, in which the radioactive materials are or will be located, including any person who is doing business or who has a legal interest in the county or adjacent county, and any local government in the county; and who can demonstrate that he has suffered or will suffer actual injury or economic damage.

A person affected may request a hearing by writing Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189. Any request for a hearing must contain the name and address of the person who considers himself affected by agency action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is to be represented by an attorney, the name and address of the attorney also must be stated. Should no request for a public hearing be timely filed, the license will remain in effect.

Copies of all relevant material are available for public inspection and copying at the Bureau of Radiation Control, Texas Department of Health, 8407 Wall Street, Austin, Texas. Information relative to the amendment of this specific radioactive material license may be obtained by contacting Chrissie Toungate, Custodian of Records, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, by calling (512) 834-6688, or by visiting 8407 Wall Street, Austin, Texas.

TRD-9905969
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: September 14, 1999

♦ ♦ ♦

Texas Department of Human Services

Request for Offer–Coupon Conversion Direct Mail Issuing Agent Contract

The Texas Department of Human Services (TDHS) is currently seeking to obtain offers to handle the coupon conversion direct mail issuance (CCDMI) of food coupons for: (1) all out-going Coupon Conversion DMIs certified, restricted delivery; (2) all returned undelivered CCDMIs which includes those returned by USPS, and any returned to the DMI return mail PO Box 149045; and (3) any CCDMIs that the TDHS may deem necessary for emergency situations.

DESCRIPTION OF SERVICES: In addition to the above described tasks, the Contractor is also responsible for accounting, reporting, secure coupon storage, and secure coupon transportation. The Contractor will provide the Department with one million dollar ($1,000,000) insurance coverage, which is the amount of the face value of all food coupons in the Contractor's possession.

CLOSING DATE AND TIME: Offers must be received by the Department by 3:00 PM on Monday, October 18, 1999.

QUESTIONS/INQUIRIES: Potential Contractors must submit questions pertaining to the RFO to the attention of Chris Wilson. All questions must be received by TDHS by 5:00 PM on Friday, October 1, 1999.

RFO CONFERENCE: October 6, 1999, 2:00 PM; Conference Room 103 West; Texas Department of Human Services; John H. Winters Building; 701 West 51st Street; Austin, TX 78751

CONTACT PERSON FOR RFO: To obtain a Request for Offer packet, please visit the Electronic State Business Daily at **http://www.marketplace.state.tx.us** or contact Chris Wilson, Texas Department of Human Services, Lone Star Technology Dept (MC Y-980), P.O. Box 149030, Austin, TX 78714-9030. You may call (512) 231-5763 or fax a request to (512) 231-5836. Email address: **chris.wilson@dhs.state.tx.us**.

TRD-9905983
Paul Leche
Agency Liaison
Texas Department of Human Services
Filed: September 15, 1999

♦ ♦ ♦

Texas Department of Insurance

Insurer Services

The following applications have been filed with the Texas Department of Insurance and are under consideration:

Application for admission to the State of Texas by COMMERCIAL COMPENSATION CASUALTY COMPANY, a foreign fire and casualty company. The home office is in Calabasas, California.

Application to change the name of JEFFERSON INSURANCE COMPANY OF NEW YORK to JEFFERSON INSURANCE COMPANY, a foreign fire and casualty company. The home office is in New York, New York.

Application to change the name of NORTHBROOK NATIONAL INSURANCE COMPANY to DISCOVER PROPERTY & CASUALTY INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Chicago, Illinois.

Any objections must be 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-9905984
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: September 15, 1999

♦ ♦ ♦

Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of Meridian Health Care Management, Inc., a foreign third party administrator. The home office is Wilmington, Delaware.

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-9905943
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: September 13, 1999

♦ ♦ ♦

Texas Department of Licensing and Regulation

Vacancy on Service Contract Providers Advisory Board

The Texas Commission of Licensing and Regulation reposts this announcement of vacancies on the Service Contract Providers Advisory Board established by Acts of the 76th Legislature, SB 1775 which created Texas Civil Statutes, Article 9034, Service Contract Regulatory Act. This announcement is for all positions on the advisory board. Applicants must be residents of the State of Texas.

The service contract providers advisory board is an advisory body to the department. The advisory board advises the commissioner in adopting rules and enforcing and administering this article and advises the commission in setting fees. The advisory board is composed of six members appointed by the commissioner as follows: two members must be officers, directors, or employees of a provider of service contracts; two members must be officers, directors, or employees of a retail outlet or other entity located in this state that provides to consumers service contracts; one member must be an officer, director, or employee of an entity approved by the Texas Department of Insurance to sell reimbursement insurance policies; and one member must be a resident of this state who has, as a consumer, a service contract in force in this state at the time of the appointment. Providers must be registered by January 1, 2000.

A member of the advisory board serves a term of six years with terms expiring on February 1 of odd-numbered years. The commissioner shall designate one member of the advisory board to serve as presiding officer. The commissioner or the commissioner's designee shall serve as an ex officio nonvoting member of the advisory board. The commissioner shall fill any vacancy on the advisory board for the remainder of the unexpired term with an individual who represents the same interests with which the predecessor was identified. The advisory board shall meet at least every six months and may meet at other times at the call of the presiding officer. The advisory board shall meet at a location in this state designated by the advisory board. A decision of the advisory board is not effective unless it receives the affirmative vote of at least four members. The advisory board members serve without compensation. A member is entitled to reimbursement for actual and necessary expenses incurred in performing functions as a member of the advisory board, subject to any applicable limitation on reimbursement provided by the General Appropriations Act.

Interested persons should request an application from the Texas Department of Licensing and Regulation by telephone (512) 463-7348 or (512) 463-7357, FAX (512) 475-2872 or E-mail caroline@license.state.tx.us. Applications must be returned to the Department of Licensing and Regulation no later than October 18th, 1999.

Applicants may be asked to appear for an interview, however any required travel for an interview would be at the applicant's expense.

TRD-9905954
Rachelle A. Martin
Executive Director
Texas Department of Licensing and Regulation
Filed: September 14, 1999

♦ ♦ ♦

Texas Natural Resource Conservation Commission

Applications for Industrial Hazardous Waste Permits/Compliance Plans and Underground Injection Control Permits

Attached are Notices of Applications issued during the period of August 24, 1999 thru September 13, 1999.

The Executive Director will issue these permits unless one or more persons file written protests and/or a request for a hearing within 45 days (unless otherwise noted) after newspaper publication of the notice.

To request a hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the applicant and the permit number; (3) the statement "I/we request a public hearing;" (4) a brief description of how you would be adversely affected by the granting of the application in a way not common to the general public; (5) the location of your property relative to the applicant's operations; and (6) your proposed adjustments to the application/permit which would satisfy your concerns and cause you to withdraw your request for hearing.

Information concerning any aspect of these applications may be obtained by contacting the Texas Natural Resource Conservation Commission, Chief Clerks Office-MC105, P.O. Box 13087, Austin, Texas 78711. 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.

Safety-Kleen Systems, Inc. located at 1580 Industrial Drive in Missouri City, Fort Bend County, Texas, operates a commercial solid waste management facility, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a major amendment to their compliance plan (Compliance Plan Number CP-50236). The compliance plan requires the permittee to monitor the concentrations of hazardous constituents in groundwater and remediate groundwater to specific standards. The major amendment specifies performance-based operation standards for groundwater monitoring and corrective action; and defines the Corrective Action Program consisting of monitored natural attenuation. The Executive Director of the TNRCC has prepared a draft compliance which, if approved, would establish the conditions under which the facility must operate.

Lyondell Chemical Worldwide, Inc formerly ARCO Chemical Company, PO Box 30, Channelview, Texas 77530-0030 has filed two applications with the Texas Natural Resource Conservation Commission (TNRCC) for major amendments to Underground Injection Control (UIC) Well, Permit Number WDW-148 and WDW-162. The Lyondell facility is located 205 miles north of the town of Channelview in Harris County, Texas. The Executive Director has prepared draft permits. The applicant currently manufactures synthetic organic chemicals. The disposal wells are used to dispose of treated hazardous and nonhazardous waste generated by the permittee's Channelview and Bayport facilities and from Equistar Chemicals L.P. Channelview Complex. WDW-148 and WDW-162 were put in service in 1978 and 1980. The permitted injection zone is at the well log depths of 5155 to 7200 feet. The authorized injection interval is at the well log depths of 6500 to 7200 feet. The lowermost underground source of drinking water in the vicinity of the wells occurs at depths of approximately 2370 feet subsurface in this area. The operating surface injection pressure shall not exceed 1,000 pounds per square inch gauge (psig) per well. The maximum injection rate shall not exceed 700 gallons per minute (gpm) for both wells. The volume of waste water injected is limited to 367,920,000 gallons per year.

TRD-9905973
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: September 14, 1999

♦ ♦ ♦

Notice of Administratively Complete Application for a Municipal Solid Waste Management Facility Permit

The City of Tulia, 201 Maxwell Street, Tulia, Texas 79088, has applied to the Texas Natural Resource Conservation Commission (TNRCC) to amend existing Permit Number 1009 (Proposed Permit Number MSW 1009A) for a Type IAE municipal solid waste landfill facility to expand horizontally for an additional disposal area of approximately 58 acres. The site is located approximately 1.84 miles east of the intersection of Farm to Market Road 1318 and Farm to Market Road on 79.07 acres of land.

Construction Recycling & Waste Corporation, 5950 Berkshire Lane, Suite 700, Dallas, Texas 75225, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a permit (Proposed Permit Number MSW-2278) to authorize a new Type IV municipal solid waste landfill facility. The proposed 146.79 acre tract is located 4.0 miles east of the Intersection of U.S. 75 and U.S. 380 on U.S. 380 in Collin County, Texas. The street address of the facility is 2650 E. University Drive, McKinney, Collin County, Texas, and is estimated to receive 4,500 cubic yards of municipal solid waste per day.

Trinity Waste Services, 580 Huffines Boulevard, Lewisville, Texas, 75056, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a permit (Proposed Permit Number MSW-2275) to authorize a new Type V municipal solid waste transfer station facility. The proposed 8.0 acre site is located on Elliott Reeder Road, approximately 0.55 miles southeast of the intersection of Carson Street and State Highway 121 in Fort Worth, Texas.

Written comments concerning these minor amendments may be submitted to the TNRCC, Chief Clerk's Office, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087 telephone (512) 239-3300. Comments must be received no later than 10 days from the date this notice is mailed. Written comments must include the following: (1) your name (or for a group or association, the name of an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the applicant and the permit number; and (3) the location of your property relative to the applicant's operations. Individual members of the public who wish to inquire about the information contained in this notice may contact the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040.

TRD-9905972
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: September 14, 1999

♦ ♦ ♦

Notice of Approval of Registration of a Municipal Solid Waste Management Facility Permit for September 8,1999

The City of Copperas Cove has an application for Registration of a Municipal Solid Waste Composte. The application for registration of a municipal solid waste compost has been approved by the Executive Director of the TNRCC. The registration number is MSW-42017. The applicant is City of Copperas Cove, PO Drawer 1449, Copperas Cove TX 76522. The facility name is Copperas Cove compost facility and is located 6025 miles south to intersection of FM-2657 with Boy's Ranch Road on US 190 in Coryell County, Texas. The facility will receive 320 cubic yards of municipal sludge and 900 cubic yards

of grinded wood materials like brush, yard waste, and clean wood material.

Written comments concerning these minor amendments may be submitted to the TNRCC, Chief Clerk's Office, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087 telephone (512) 239-3300. Comments must be received no later than 10 days from the date this notice is mailed. Written comments must include the following: (1) your name (or for a group or association, the name of an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the applicant and the permit number; and (3) the location of your property relative to the applicant's operations. Individual members of the public who wish to inquire about the information contained in this notice may contact the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040.

TRD-9905971
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: September 14, 1999

♦ ♦ ♦

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 a Default Order 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 (the Code), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 24, 1999**. 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 Orders 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 the Default Order should be sent to the attorney designated for the Default Order at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 24, 1999**. 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 numbers; however, comments on the Default Orders should be submitted to the TNRCC in **writing**.

(1)COMPANY: Arthur Costello dba Costello's Septic Tank Service; DOCKET NUMBER: 1998-0587-SLG-E; TNRCC IDENTIFICATION (ID) NUMBER: 22380; LOCATION: Dripping Springs, Hays County, Texas; TYPE OF FACILITY: septic tank service; RULES VIOLATED: 30 TAC §312.143 and the Code, §26.121(a)(1) by failing to get authorization to discharge waste into or adjacent to water in the state; PENALTY: $5,000; STAFF ATTORNEY: M. Camille Morris, Litigation Division, MC 175, (512) 239-3915; REGIONAL OFFICE: 1921 Cedar Bend, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(2)COMPANY: Clifton Sherwood; DOCKET NUMBER: 1998-0157-AGR-E; TNRCC ID NUMBER: 12107; LOCATION: Grand Prairie, Tarrant County, Texas; TYPE OF FACILITY: concentrated animal feeding; RULES VIOLATED: 30 TAC §321.33(e) by failing to install and maintain proper waste management facilities for a concentrated animal feeding operation; PENALTY: $500; STAFF ATTORNEY: M. Camille Morris, Litigation Division, MC 175, (512) 239-3915; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington Texas 76010-6499, (817) 469-6750.

(3)COMPANY: Ali Al-khafaji dba Al's Auto Sales; DOCKET NUMBER: 1999-0062-AIR-E; TNRCC ID NUMBER: 13310; LOCATION: Denton, Denton County, Texas; TYPE OF FACILITY: used car lot; RULES VIOLATED: 30 TAC §114.20(c)(1) and THSC, §382.085(b) by offering for sale vehicles with missing or inoperable vehicle emission control devices; and 30 TAC §334.21 and the Code, §26.358(d) by failing to pay annual fees for underground storage tanks; PENALTY: $1,000; STAFF ATTORNEY: Robin Houston, Litigation Division, MC 175, (512) 239-0682; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington Texas 76010-6499, (817) 469-6750.

TRD-9905941
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: September 13, 1999

♦ ♦ ♦

Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to the Texas Water Code (the Code), §7.075. Section 7.075 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 **October 24, l999**. 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 AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the 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 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 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 the 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 October 24, l999**. 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 numbers; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing**.

(1)COMPANY: Walter Schreiner dba Y O Ranch Adventure Camp; DOCKET NUMBER: 1998- 0490-PWS-E; TNRCC IDENTIFICATION (ID) NUMBER: 1330116; LOCATION: Mountain Home, Kerr County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.106(a) and Texas Health and Safety Code (THSC), §341.033(d) by failing to submit bacteriological samples; 30 TAC §290.103(5) by failing to notify the public of the failure to comply with the bacteriological monitoring requirements; and 30 TAC §290.51 and THSC, §341.041 by failing to pay the public health service fee; PENALTY: $3,750; STAFF ATTORNEY: David Speaker, Litigation Division, MC 175, (512) 239-2548; REGIONAL OFFICE: 140 Heimer Road, Suite 360, San Antonio, Texas 78232-5042, (210) 490-3096.

(2)COMPANY: Quality Rubber Products, Incorporated, dba Tire Recycling of San Antonio; DOCKET NUMBERS: 1998-1051-MSW-E and 1998-0724-MIS; TNRCC ID NUMBER: 79510; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: waste tire processing; RULES VIOLATED: 30 TAC §§330.828, 330.877(b)(3), 330.845(b), (c)(1)(D) and (E), and (c)(2)(C) and (D) by failing to maintain manifests of the number and type of scrap tires delivered to its facility, maintain at its facility daily logs, and maintain copies of all required records for a period of three years; and 30 TAC §330.282 and §330.848(g) by failing to ensure that the manifests were complete, accurate, and contained the signature of an authorized representative acknowledging that the information on the manifest was true and correct and by failing to maintain proper records, such as manifests, filled out completely by the waste tire facility prior to final disposition of the whole used or scrap tire pieces; PENALTY: $386,789 (of which $356,389 is for reinbursement to the Tire Recycling Fund Program); STAFF ATTORNEY: Mary R. Risner, Litigation Division, MC 175, (512) 239-6224; REGIONAL OFFICE: 140 Heimer Road, Suite 360, San Antonio, Texas 78232-5042, (210) 490-3096.

TRD-9905940

Paul C. Sarahan

Director, Litigation Division

Texas Natural Resource Conservation Commission

Filed: September 13, 1999

♦ ♦ ♦

Notice of Opportunity to Comment on ShutDown 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 Shutdown Orders. Texas Water Code (the Code), §26.3475 authorizes the TNRCC to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The TNRCC staff proposes a shutdown order after the owner or operator of a underground storage tank facility fails by to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. Pursuant to the Code, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 24, l999**. The TNRCC will consider any written comments received and the TNRCC may withdraw or withhold approval of a Shutdown Order if a comment discloses facts or consideration that indicate that the consent to the proposed Shutdown 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 Shutdown Order is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed Shutdown 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 the Shutdown Order should be sent to the attorney designated for the Shutdown Order at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 24, l999**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the Shutdown Orders and/or the comment procedure at the listed phone numbers; however, comments on the Shutdown Orders should be submitted to the TNRCC in **writing**.

(1)FACILITY: Douglas H. Raney dba Aztec Rental Center of San Antonio; OWNER: Douglas H. Raney; DOCKET NUMBER: 1999-0673-PST-E; TNRCC IDENTIFICATION (ID) NUMBER: 34504; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: retail gasoline service station with USTs; RULES VIOLATED: 30 TAC §334.50(a)(1)(A) by failing to provide proper release detection for the USTs; and 30 TAC §334.49(a) by failing to provide corrosion protection for the UST systems; PENALTY: Shutdown Order; STAFF ATTORNEY: John Wright, Litigation Division, MC 175 (512) 239-2269; REGIONAL OFFICE: 140 Heimer Road, Suite 360, San Antonio, Texas 78232-5042, (210) 490-3096.

(2)FACILITY: Salim Merchant dba Neighbor Mini Mart; OWNER: Salim Merchant; DOCKET NUMBER: 1999-0677-PST-E; TNRCC ID NUMBER: 5938; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: retail gasoline service station with USTs; RULES VIOLATED: 30 TAC §334.50(a)(1)(A) by failing to provide proper release detection for the USTs; 30 TAC §334.51(b) by failing to provide proper spill and overfill prevention equipment for the UST systems; and 30 TAC §334.49(a) by failing to provide corrosion protection for the UST systems; PENALTY: Shutdown Order; STAFF ATTORNEY: John Wright, TNRCC Litigation Division, MC 175 (512) 239-2269; REGIONAL OFFICE: 140 Heimer Road, Suite 360, San Antonio, Texas 78232- 5042, (210) 490-3096.

TRD-9905942

Paul C. Sarahan

Director, Litigation Division

Texas Natural Resource Conservation Commission

Filed: September 13, 1999

♦ ♦ ♦

Notices of Public Hearing

The Texas Natural Resource Conservation Commission (commission) will conduct six public hearings to receive testimony concerning revisions to 30 TAC Chapter 116 and to the State Implementation Plan (SIP) under the requirements of Texas Health and Safety Code,

§382.017; Texas Government Code, Subchapter B, Chapter 2001; and 40 Code of Federal Regulations, §51.102 of the United States Environmental Protection Agency regulations concerning SIPs. The revisions to Chapter 116 constitute revisions to the SIP. The changes revise the commission's procedural rules for notice, comment, and hearings.

The proposed amendments and new sections constitute the first phase of the implementation of Senate Bill (SB) 766. Included in this action are procedures for obtaining a voluntary emission reduction permit (VERP) and the new procedures to create standard permits. A VERP will allow grandfathered facilities to apply for permits using a variety of options, including the acquisition of credits, to reduce or offset emissions. VERP requirements would be in a new Subchapter H in Chapter 116, concerning Control of Air Pollution by Permits for New Construction or Modification. A second phase of rulemaking related to SB 766 will address exemptions from permitting, permits by rule, multiple plant permits, and de minimis criteria, and is scheduled for proposal in November 1999.

The commission will hold the first public hearing on this proposal in El Paso on October 1, 1999, at 12:00 p.m. in the City of El Paso Council Chambers, located at 2 Civic Center Plaza, 2nd Floor. Additional hearings will be held in Lubbock on October 1 at 9:00 p.m. in the City of Lubbock Council Chambers, located at 1625 13th Street; in Austin on October 4 at 12:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle; in Irving on October 5 at 4:00 p.m. in the City of Irving Central Library Auditorium, located at 801 West Irving Boulevard; in Houston on October 7 at 12:00 p.m. in the City of Houston Pollution Control Building Auditorium, located at 7411 Park Place Boulevard; and in Beaumont on October 7 at 9:00 p.m. in the John Gray Institute, located at 855 Florida Avenue. The hearings are 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 be permitted during the hearings; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearings and will answer questions before and after the hearings.

Written comments may be submitted by mail to Casey Vise, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should reference Rule Log Number 99029A-116-AI. Comments must be received by 5:00 p.m., October 11, 1999. For further information, please contact Beecher Cameron, of the Policy and Regulations Division, at (512) 239-1495.

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-9905841
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: September 10, 1999

♦ ♦ ♦

The Texas Natural Resource Conservation Commission (commission) will conduct six public hearings to receive testimony concerning revisions to 30 TAC Chapters 101 and 116 and the State Implementation Plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Subchapter B, Chapter 2001; and 40 Code of Federal Regulations, §51.102 of the United States Environmental Protection Agency regulations concerning SIPs. The revisions to Chapters 101 and 116 constitute revisions to the SIP.

The proposed amendments to Chapters 101 and 116 will implement the requirements of Senate Bill (SB) 7, concerning the permitting of grandfathered electric generating facilities (EGF). SB 7 amends Texas Utilities Code, §39.264, and requires that grandfathered EGFs apply for a permit by September 1, 2000, and that EGFs reduce emissions of nitrogen oxide (NOx) by 50% and, for coal- fired EGFs, reduce sulfur dioxide by 25%. The amendments allow these reductions to be met by installing control technology or trading allowances from other EGFs. Grandfathered facilities must be permitted by May 1, 2003, or cease operation unless they show good cause for an extension.

The commission will hold a public hearing on this proposal in El Paso on October 1, 1999, at 9:00 a.m. in the City of El Paso Council Chambers, located at 2 Civic Center Plaza, 2nd Floor. Additional hearings will be held in Lubbock on October 1 at 6:00 p.m. in the City of Lubbock Council Chambers, located at 1625 13th Street; in Austin on October 4 at 9:00 a.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle; in Irving on October 5 at 1:00 p.m. in the City of Irving Central Library Auditorium, located at 801 West Irving Boulevard; in Houston on October 7 at 9:00 a.m. in the City of Houston Pollution Control Building Auditorium, located at 7411 Park Place Boulevard; and in Beaumont on October 7 at 6:00 p.m. in the John Gray Institute, located at 855 Florida Avenue. The hearings are 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 be permitted during the hearings; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearings and will answer questions before and after the hearings.

Written comments may be submitted by mail to Casey Vise, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should reference Rule Log Number 99033-116-AI. Comments must be received by 5:00 p.m., October 11, 1999. For further information, please contact Beecher Cameron, of the Policy and Regulations Division, at (512) 239-1495.

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-9905842
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: September 10, 1999

♦ ♦ ♦

Notice of Water Quality Applications

The following notices were issued during the period of September 8, 1999 through September 14, 1999.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P O Box 13087, Austin Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

APPLIED INDUSTRIAL MATERIALS CORPORATION has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit Number 02670, which authorizes the discharge of stormwater runoff, dust suppression water, and truck wash water on an intermittent and flow variable basis via Outfall 001. The applicant operates a facility which stores and ships petroleum coke, coal, barite, and limestone. The plant site is located on Loop 197 South, approximately 500 feet west of the Dock 40-41 Complex in the City of Texas City, Galveston County, Texas.

CITY OF BARDWELL has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit Number 13675-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 59,000 gallons per day. The plant site is located approximately 1,500 feet northeast of the intersection of Farm-to-Market Road 984 and State Highway 34, and approximately 1,000 feet noethwest of State Highway 34 and Farm-to-Market Road 985 in Ellis County, Texas.

CITY OF BIG SANDY has applied for a permit, proposed TPDES Permit Number 14071-001, which will authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 235,000 gallons per day. The plant site is located approximately 1 mile south of the intersection of U.S. Highway 80 and State Highway 155, approximately 1.25 miles east of State Highway 155 in Upshur County, Texas.

BLACKSHER DEVELOPMENT CORPORATION has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit Number 13691-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The plant site is located approximately 3,900 feet northwest of the intersection of State Highway 87 with State Highway 62 and approximately 260 feet west of State Highway 62 in Orange County, Texas.

CEDAR BAYOU PARK UTILITY DISTRICT has applied for a renewal of TNRCC Permit Number 11713-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day. The plant site is located at the Southern Pacific Railroad crossing of McGee Gully, approximately 5,000 feet south of Interstate Highway 10 and approximately 5,000 feet southeast of the intersection of Interstate Highway 10 and Sjolander Road in Harris County, Texas.

CHEMICAL WASTE MANAGEMENT, INC. has applied for a renewal of TNRCC Permit Number 02417, which authorizes the discharge of domestic wastewater, utility wastewater, and storm water runoff on a continuous but flow variable basis via Outfall 001. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit Number TX0083828 issued on May 13, 1981 and TNRCC Permit Number 02417, issued on June 25, 1993. The applicant operates a hazardous waste treatment, storage, and disposal facility. The plant site is located south of State Highway 73 and approximately 3.5 miles southwest of the location where the State Highway 73 bridge crosses Taylor Bayou, Jefferson County, Texas

CITY OF COLUMBUS has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit Number 10025-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day. The plant site is located approximately 1,000 feet south and 2,000 feet west of the intersection of State Highway 71 and the Colorado River in Colorado County, Texas.

COMANCHE POTTERY, INC. AND D&MA LEASING, INC. has applied for a Texas Pollutant Discharge Elimination System (TPDES) wastewater permit. The applicant has an existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 03931 which authorizes the discharge of process water and stormwater at a daily average flow not to exceed 350 gallons per day via Outfall 001. The applicant operates a plant that manufactures decorative clay pots. The plant site is located on U.S. Highway 36, one mile east of the intersection of U.S. Highway 36 and U.S. Highway 377 in the city of Comanche in Comanche County, Texas.

ROY CURLEE has applied for a Texas Pollutant Discharge Elimination System (TPDES) wastewater permit. The applicant has an existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 11260-001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 2,000 gallons per day. The plant site is located on a county road approximately 3/4 mile north of Farm-to-Market Road 726, approximately 2 1/4 miles east of the intersection of Farm-to-Market Roads 726 and 1968 and on the south shoreline of Lake O' the Pines in Marion County, Texas.

CW - MHP LTD. has applied for a renewal of TNRCC Permit Number 13054-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day. The plant site is located at 20810 Cypress Wood Drive in Harris County, Texas.

CITY OF DANBURY has applied for a renewal of TNRCC Permit Number 10158-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 504,000 gallons per day. The plant site is located on Avenue L between Seventh and Eighth Streets on the west side of Danbury in Brazoria County, Texas

CITY OF DAWSON has applied for a Texas Pollutant Discharge Elimination System (TPDES) wastewater permit. The applicant has an existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 10026-001. The draft permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 130,000 gallons per day. The plant site is located approximately 0.5 mile south-southeast of Farm-to-Market Road 709 and approximately 0.5 mile east-northeast of Farm-to-Market Road 1838 in the southeast section of the City of Dawson in Navarro County, Texas.

CITY OF EDEN has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit Number 10081-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 225,000 gallons per day. The plant site is located approximately 2/3 of a mile east of U.S. Highway 83, 2/3 of a mile south of U.S. Highway 87 and immediately north of Harden Branch in the City of Eden in Concho County, Texas.

CITY OF ELKHART has applied for a major amendment to TNRCC Permit Number 10735-001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 123,000 gallons per day to a daily average flow not to exceed 210,000 gallons per day. The applicant has also requested a temporary variance to the existing water quality standards to allow time for the TNRCC to adopt a site specific standard for Box Creek for incorporation into 30 TAC §307.10, Appendix D. The draft permit authorizes a variance to the Texas Surface Water Quality Standards under 30 TAC 307.2(d)(4). The variance would authorize a three-year period in which the Commission will consider a recommended site-specific standard for Box Creek and determine whether to adopt

the standard or require the existing water quality standard to remain in effect.

FIRST TIMBERWOOD NURSING HOME PROPERTY LIMITED has applied for renewal of an existing wastewater permit. The applicant has an existing National Pollutant Discharge Elimination System (NPDES) Permit Number TX0104213 and an existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 13388-001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 12,000 gallons per day The plant site is located on the west side of U.S. Highway 59 approximately 3.5 miles northeast of the City of Livingston and just south of the town of Marston in Polk County, Texas.

THE CITY OF GRANBURY has applied for a renewal of an existing wastewater permit. The applicant has an existing National Pollutant Discharge Elimination System (NPDES) Permit Number TX0093114 and an existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 02625. The draft permit authorizes the discharge of process wastewater (reject water from an electrodialysis reversal water treatment system) at a daily average flow not to exceed 125,000 gallons per day via Outfall 001. The applicant operates a water treatment plant. The plant site is located on the south side of Lake Granbury and the east side of State Highway Loop 426 just north of the intersection of Loop 426 and State Highway 377, in the City of Granbury in Hood County, Texas.

GRANT PRIDECO has applied for a renewal of TNRCC Permit Number 03022, which authorizes the discharge of cooling system blowdown at a daily average flow not to exceed 7,500 gallons per day via Outfall 001. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit Number TX0103926 issued on December 1, 1989 and TNRCC Permit Number 03022, issued on February 11, 1994. The applicant operates a metal heat treating facility which manufactures oil field drilling tools. The plant site is located on a 10 acre site on the west side of the 6000 block of Thomas Road approximately 0.3 miles north of Tanner Road in the City of Houston, Harris County, Texas.

CITY OF HILLCREST VILLAGE has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit Number 10420-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day. The plant site is located on the west bank of Mustang Bayou, approximately 0.5 mile west of the intersection of County Road 326 and County Road 155 in Brazoria County, Texas.

HOPE CENTER YOUTH & FAMILY SERVICES has applied for a renewal of TNRCC Permit Number 11943- 001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 5,100 gallons per day. The plant site is located approximately 2,000 feet southeast of Kickapoo Creek, approximately 5,800 feet downstream of the confluence of Kickapoo Creek and Steam Mill Creek and 9 miles southeast of the City of Groveton in Trinity County, Texas.

HUNTER'S GLEN MUNICIPAL UTILITY DISTRICT has applied for a renewal of TNRCC Permit Number 11618-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 750,000 gallons per day. The plant site is located at 19926 Foxchester Lane approximately 3/4 mile northwest of the intersection of Lee Road and Farm-to-Market Road 1960 in Harris County, Texas.

HUNTSMAN POLYMERS CORPORATION has applied for a renewal of an existing wastewater permit. The applicant has an existing National Pollutant Discharge Elimination System (NPDES) Permit Number TX0111708 and an existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 01304. The draft permit authorizes the discharge of storm water runoff. The applicant operates a petrochemical complex. The plant site is located immediately south of Interstate Highway 20 between South Grandview and South Dixie Streets in the City of Odessa in Ector County, Texas.

KOLLWOOD GOLF OPERATING has applied for a renewal of TNRCC Permit Number 12402-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day. The plant site is located on the Tennwood Recreational property, which is approximately 2.5 miles north of the intersection of Hegar Road and Farm-to-Market Road 2920 in Waller County, Texas.

CITY OF LYFORD has applied for a renewal of TNRCC Permit Number 11210-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 270,000 gallons per day. The plant site is located east of Lyford, approximately 0.8 mile east and 0.6 mile south of the intersection of State Highway 448 and Farm-to-Market Road 1921 in Willacy County, Texas.

THOMAS JERRY MCFARLAND AND JOSHUA EVAN MCFARLAND has applied for renewal of an existing wastewater permit. The applicant has an existing National Pollutant Discharge Elimination System (NPDES) Permit Number TX0097497 and an existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 13085-001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 23,000 gallons per day. The plant site is located approximately 1.8 miles south of the intersection of Interstate Highway 20 and State Highway 43 and approximately 5,800 feet east of State Highway 43 in Harrison County, Texas.

MARKHAM MUNICIPAL UTILITY DISTRICT has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit Number 10580-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The plant site is located approximately 500 feet southwest of the intersection of Farm-to-Market Roads 1468 and 2431 in Matagorda County, Texas

MARTIN REALTY & LAND, INC. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 14081-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 450,000 gallons per day. The plant site is located 1.2 miles east-northeast of the intersection of Portland Road and Farm-to-Market Road 1314 and 2.5 miles northwest of the intersection of Farm- to-Market Road 1314 and U.S. Highway 59 in Montgomery County, Texas.

CITY OF MATHIS has applied for a Texas Pollutant Discharge Elimination System (TPDES) wastewater permit. The applicant has an existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 10015-001. The draft permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 947,000 gallons per day. The plant site is located approximately 1.25 miles northwest of the intersection of State Highway Spur 198 and Farm-to-Market Road 1068, along the access road northwest extension of San Patricio Avenue in the City of Mathis in San Patricio County, Texas.

OHMSTEDE, INC. has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit Number 01318, which authorizes the discharge of process water, hydrostatic test water, domestic wastewater, cooling water, and storm water at a daily maximum flow not to exceed 45,000 gallons per day

via Outfall 001. The applicant operates a manufacturing and repair facility of heat exchangers. The plant site is located at 12415 La Porte Road in the City of La Porte, Harris County, Texas.

CITY OF PEARLAND has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit Number 10134-009, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 370,000 gallons per day. The plant site is located 0.3 mile northeast of the intersection of Farm-to-Market Road 518 and Farm-to-Market Road 865, approximately 2.5 miles east of State Highway 288 and 3.6 miles west of the City of Pearland in Brazoria County, Texas.

PHILLIPS COAL COMPANY & KIEWIT TEXAS MINING COMPANY has applied for a renewal of an existing wastewater permit. The applicant has an existing National Pollutant Discharge Elimination System (NPDES) Permit Number TX0101567 and an existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 02881. The draft permit authorizes the discharge of wastewater from the active mining areas, treated domestic wastewater, and wash water via Outfall 001 on an intermittent and flow variable basis; wastewater from the active mining areas via Outfalls 002, 003, 004, 005, 008, 010, and 013 on an intermittent and flow variable basis; wastewater from the post-mining areas, treated domestic wastewater, and oily waters via Outfall 101 on an intermittent and flow variable basis; wastewater from the post-mining areas via Outfalls 102, 103, 104, 105, 108, 110, and 113 on an intermittent and flow variable basis; groundwater via Outfall 006 at a daily maximum rate of 1,080,000 gallons per day; groundwater via Outfall 007 at a daily maximum rate of 1,150,000 gallons per day; discharge from a treatment pond via Outfall 009 on an intermittent and flow variable basis; groundwater via Outfall 011 at a daily maximum rate of 14,400,000 gallons per day; and groundwater via Outfall 012 at a daily maximum rate of 4,320,000 gallons per day. The applicant operates the Calvert Lignite Mine. The plant site is located between State Highways 6 and 46, on Tidwell Prairie Road, approximately 4.5 miles southeast of the City of Bremond, Robertson County, Texas.

PORT O' CONNOR MUNICIPAL UTILITY DISTRICT has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit Number 13693-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day. The plant site is located north of and adjacent to State Highway 185 and approximately 1,000 feet northwest of the Port O'Connor Airport in Calhoun County, Texas.

CITY OF PREMONT has applied for a major amendment to Permit Number 10253-001, to authorize an increase in the acreage irrigated from 30 acres to150 acres. The proposed amendment also requests to modify an aeration lagoon, to add one stabilization pond to the wastewater treatment system and to construct an effluent holding pond. The current permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 450,000 gallons per day via irrigation of 30 acres of land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facilities and disposal site are located southeast of the center of the City of Premont, approximately 1 mile south and 1.5 miles east of the intersection of Farm-to-Market Road 716 and U.S. Highway 281 in Jim Wells County, Texas.

RELIANT ENERGY INCORPORATED has applied for a renewal of TNRCC Permit Number 02608, which authorizes the discharge of sanitary waste commingled with vehicle wash water, floor drainage and air conditioning condensate, and stormwater at a daily average flow not to exceed 20,000 gallons per day via Outfall 001. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit Number TX0092258 issued on July 29, 1988 and TNRCC Permit Number 02608, issued on May 13, 1994. The applicant operates the Cypress District Operations & Service Center which provides aid to various operating departments in the transmission and distribution of electric power. The plant site is located at 1808 Huffmeister Road northwest of the intersection of Huffmeister Road and Cypress-Rosehill Road; and approximately 25 miles northwest of the City of Houston, Harris County, Texas.

DR. ALBERT PRESCOTT RIBISI has applied for a renewal of TNRCC Permit Number 12284-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The plant site is located approximately 300 feet northwest of Cain Road on Old Wellborn Road, approximately 3,500 feet south-southeast of the intersection of Farm-to-Market Road 2818 (West-By-Pass) and Farm-to-Market Road 2154 in Brazos County, Texas.

SABINE RIVER AUTHORITY OF TEXAS has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit Number 12134-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 3,000 gallons per day. The plant site is located at the southwest corner of the intersection of State Highway 62 and the Southern Pacific Railroad, approximately 2.7 miles northeast of Orangefield in Orange County, Texas.

SEBASTIAN MUNICIPAL UTILITY DISTRICT has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit Number 13742-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 225,000 gallons per day. The plant site is located 1 mile west of U.S. Highway 77 and 1/3 mile south of State Highway 506 in Cameron County, Texas.

SILICA PRODUCTS, INC. has applied for a National Pollutant Discharge Elimination System (NPDES) wastewater permit. The applicant has an existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 03969 issued December 5, 1997. The draft permit authorizes the discharge of process wastewater, utility wastewater, domestic wastewater, and stormwater at a daily average flow not to exceed 636,000 gallons per day via Outfall 001 and non-process area stormwater on a intermittent and flow variable basis via Outfall 002. The plant site is located approximately 0.5 miles north of State Highway 332, 1.5 miles west of the intersection of State Highway 332 and FM 523, and 2.5 miles north of the city of Freeport in Brazoria County, Texas.

STAN TRANS, INC. has applied for a renewal of TNRCC Permit Number 02564, which authorizes the discharge of stormwater runoff on an intermittent and flow variable basis via Outfalls 001, 002, and 003. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit Number TX0089761 issued on September 25, 1987 and TNRCC Permit Number 02564, issued on February 12, 1993. The applicant operates a bulk liquid petroleum storage facility. The plant site is located adjacent to the north and west side of the south slip of the Texas City Harbor, in the city of Texas City, Galveston County, Texas.

CHARLES ELLIOT STROMIRE has applied for renewal of existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 13033-001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 12,000 gallons per day. The plant site is located approximately 1.4 mile east of the intersection of State Highway 146 and Interstate Highway 10 in Chambers County, Texas.

SUNBELT CEMENT, INC. has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit Number 02179, which authorizes the discharge of truck washwater and stormwater runoff on an intermittent and flow variable basis via Outfall 001. The applicant operates a cement manufacturing plant. The plant site is located at the intersection of Wald Road and Solms Road, approximately 0.75 miles north of Interstate Highway 35, and approximately 1.8 miles southwest of the City of New Braunfels, Comal County, Texas.

TXU ELECTRIC COMPANY has applied for a renewal of an existing wastewater permit. The applicant has an existing National Pollutant Discharge Elimination System (NPDES) Permit Number TX0068021 and an existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 01986. The draft permit authorizes the discharge of once-through cooling water and auxiliary cooling water via Outfall 001 at a daily maximum flow not to exceed 1,470,000,000 gallons during any 24-hour period; storm water runoff from the lignite/limestone storage area via Outfall 002 on an intermittent and flow variable basis; treated domestic wastewater via Outfall 003 at a daily average flow not to exceed 25,000 gallons per day; low volume waste and storm water runoff via Outfall 004 on an intermittent and flow variable basis; low volume waste, metal cleaning waste, ash transport water, and storm water runoff via Outfall 005 on an intermittent and flow variable basis; flue gas desulfurization system wastewater, ash transport water, and storm water runoff via Outfall 006 on an intermittent and flow variable basis; and storm water runoff from the railroad area via Outfall 007 on an intermittent and flow variable basis. The applicant operates the Twin Oak Steam Electric Station. The plant site is located located on the west shore of Twin Oak Reservoir, approximately 8.5 miles south of Texas Highway 7, off Farm-to-Market Road 979, and approximately 12 miles north of the City of Franklin in Robertson County, Texas.

THE TEXAS 4-H YOUTH DEVELOPMENT FOUNDATION has applied for a renewal of Permit Number 11664- 001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 18,000 gallons per day via irrigation of 6.48 acres of public access land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facilities and disposal site are located south of Lake Brownwood and north of Farm-to- Market Road 3021, approximately 1.25 miles east-northeast of the intersection of State Highway 279 and Farm-to- Market Road 3021 in Brown County, Texas.

TEXAS WATER SERVICES, INC. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 14057-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 24,000 gallons per day. The plant site is located approximately 2,000 feet west and 4,500 feet south of the northeast corner of the Bandera/ Medina County line and 3,000 feet north of Henderson Hollow and 6,000 feet west of Brushy Creek in Medina County, Texas.

ESTATE OF THOMAS MICHAEL EVANS AND LONE STAR BEEF PROCESSING, LLC. has applied for a major amendment of Permit Number 03574 to authorize an increase in the daily average flow from the facility from 200,000 gallons per day to 288,000 gallons per day of process wastewater, wash water, and utility wastewater; reduce total nitrogen limit from 150 mg/l to 100 mg/l; change effluent limits to "not to exceed" for daily average instead of "not to exceed" for single grabs; change the oil and grease limit from a concentration limit to "report only". The current permit authorizes the disposal of process wastewater, wash water, cooling tower blowdown, and stormwater at a daily average flow not to exceed 200,000 gallons per day via irrigation of 190 acres. The applicant operates a meat packing plant. This permit will not authorize a discharge of pollutants into waters in the State. The plant site is located approximately 2000 feet northeast of the intersection of 37th Street and Pruitt Drive, in the extra territorial jurisdiction of the City of San Angelo, Tom Green County, Texas.

TIFCO INDUSTRIES, INC. has applied for a renewal of TNRCC Permit Number 12465-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 35,000 gallons per day. The plant site is located approximately 3,000 feet northwest of the intersection of U.S. Highway 290 and Huffmeister Road in Harris County, Texas.

TRAVIS COUNTY has applied for renewal of an existing wastewater permit. The applicant has an existing National Pollutant Discharge Elimination System (NPDES) Permit Number TX0086576 and an existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 12347-001. The draft permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 8,000 gallons per day. The plant site is located approximately 1300 feet southeast of Burleson-Manor Road and 1.1 miles northeast of the intersection of Burleson- Manor Road and Farm-to-Market Road 969 in Travis County, Texas.

CITY OF TRINITY has applied for a Texas Pollutant Discharge Elimination System (TPDES) wastewater permit. The applicant has an existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 10617-001. The draft permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 610,000 gallons per day. The plant site is located approximately 1,500 feet east-southeast of the intersection of Pegoda Road (Farm-to-Market Road 356) and Ramey Street in southeast Trinity in Trinity County, Texas.

CITY OF WEIMAR has applied for a renewal of TNRCC Permit Number 10311-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The plant site is located approximately 2500 feet east of Farm-to-Market Road 155 between U.S. Highway 90 and Interstate Highway 10 in Colorado County, Texas.

WELLBORN RESOURCES LLC has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit Number 13850-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 120,000 gallons per day. The plant site is located 4,500 feet southwest of Farm-to-Market Road 2154 on Koppe Bridge Road and approximately 1 mile south of Wellborn in Brazos County, Texas.

Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 30 DAYS OF THE ISSUED DATE OF THIS NOTICE

AMERADA HESS CORPORATION has applied for a Texas Pollutant Discharge Elimination System (TPDES) wastewater permit. The applicant has an existing Texas Natural Resource Conservation Commission (TNRCC) Permit Number 02568. The draft permit authorizes the discharge of stormwater on an intermittent and flow variable basis via Outfall 001. Issuance of the proposed Texas Pollutant Discharge Elimination System (TPDES) Permit Number 02568 will replace the existing TNRCC Permit Number 02568. The applicant operates a petroleum products bulk storage terminal. The plant site is located at 15001 Moore Road in the community of Channelview, in Harris County, Texas.

PIRATES COVE WATER SUPPLY AND SEWER SERVICE CORPORATION has applied for a new permit, proposed Texas Pollutant

Discharge Elimination System (TPDES) Permit Number 13992-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 17,000 gallons per day. The plant site is located approximately 1250 feet south of State Highway 185 between 15th and 16th Streets in the City of Port O'Connor in Calhoun County, Texas. The wastewater treatment facility serves the Pirates Cove Condominiums and was previously permitted under TNRCC Permit Number 12553-001 which was allowed to expire.

Concentrated Animal Feeding Operation

Written comments and requests for a public meeting may be submitted to the Office of the Chief Clerk, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

GERARD HOEKMAN has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a TPDES Permit Number 03808 to amend and replace a state permit to expand an existing dairy operation from a maximum capacity of 990 head to 1,500 head in Comanche County, Texas. No discharge of pollutants into the waters in the state is authorized by this permit. All waste and wastewater will be beneficially used on agricultural land.The existing facility is located on the north side of Farm-to-Market Road 591 approximately 1.5 miles east of the intersection of Farm-to-Market Road 1476 and Farm-to-Market Road 591 in Comanche County, Texas. The facility is located in the drainage area of Leon River below Proctor Lake in Segment Number 1221 of the Brazos River Basin.

TRD-9905975
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: September 14, 1999

♦ ♦ ♦

Notice of Water Rights Applications

Olympia Realty Corporation, 601 Jefferson, Suite 3600, Houston, Texas 77002, applicant, seeks a permit pursuant to §11.121, Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC §§ 295.1, et seq. The applicant seeks authorization to construct and maintain two reservoirs for in-place recreational use: 1. Reservoir 1: on Dad's Creek, tributary of Caney Creek, tributary of the Trinity River, Trinity River Basin, Trinity County. Aforesaid reservoir to impound an amount not to exceed 75 acre-feet of water with a surface area of plus or minus 12.5 acres. The reservoir is located approximately 12 miles in a southern direction from Groveton, Texas and Station 1+00 on the centerline of the dam is S 63 degrees E, 2420 feet from the northeastern corner of Wm. McKim Original Survey, Abstract Number A-411, Trinity County, also being 30.9428 degrees N Latitude and 95.2522 degrees W Longitude. 2. Reservoir 2: on an unnamed tributary of Caney Creek, tributary of the Trinity River, Trinity River Basin, Trinity County, Texas. Aforesaid reservoir to impound not more than 15 acre-feet of water with a surface area of 2.5 acres. The reservoir is located approximately 12 miles in a southern direction from Groveton, Texas and Station 2+00 on the centerline of the dam is S 20 degrees E, 2350 feet from the northwest corner of the Jacob Cline Survey, Abstract Number A-376, Trinity County, also being 30.9513 degrees N Latitude and 95.2385 degrees W Longitude. Applicant will initially fill the two reservoirs and maintain the reservoirs full with water purchased from the Trinity River Authority.

Muenster Water District, P.O. Box 208, Muenster, TX 76252-0208, applicant, seeks an extension of time to complete construction of an authorized reservoir included in Certificate of Adjudication Number 08-2323, pursuant to §11.145, Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC §§ 295.72, et seq. The applicant seeks authorization to extend the date by which commencement of construction of the authorized reservoir must occur, from the current date of January 2, 2000 to December 31, 2001. The applicant seeks to extend the authorized completion date from December 17, 2003 to December 31, 2004. The proposed 4,700 acre-foot reservoir is to be located on Brushy Elm Creek in Cooke County. Certificate of Adjudication 08-2323 authorizes the applicant to divert 500 acre-feet of water per year from the aforesaid reservoir for municipal purposes. Brushy Elm Creek is a tributary of the Elm Fork of the Trinity River, a tributary of the Trinity River, in the Trinity River Basin, in Cooke County, Texas.

Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application.

The TNRCC may grant a contested case hearing on this application if a written hearing request is filed within 30 days from the date of newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed within 30 days after newspaper publication of this notice.

To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit any proposed conditions to the requested amendment which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TNRCC Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not issue the requested amendment and may forward the application and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103 at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-9905974
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: September 14, 1999

♦ ♦ ♦

Proposal for Decision

The State Office Administrative Hearing has issued a Proposal for Decision and Order to the Texas Natural Resource Conservation

Commission on September 8 1999. Petition Against Mitchell Martin dba Suburban Utility Company, Community Utility Company, & Pitcairn Subdivision Water System, and Elaine Johnson dba Montgomery Place Water System, Inc. SOAH Docket Number 582-98-0611; TNRCC Docket Number 96-1015-PWS-E. In the matter to be considered by the Texas natural Resource Conservation Commission on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 North Interstate 35, Austin, Texas. This posting is Notice of Opportunity to comment on Proposal for Decision and Order. Comment period will end 30 days from date of publication. If you have any questions or need assistance, please contact Doug Kitts, Chief Clerk's Office, (512) 239-3317.

TRD-9905970
Douglas A. Kitts
Agenda Coordinator
Texas Natural Resource Conservation Commission
Filed: September 14, 1999

♦ ♦ ♦

Waste Reduction Advisory Committee Meeting Announcement

The Waste Reduction Advisory Committee (WRAC) will be meeting at the Texas Natural Resource Conservation Commission (TNRCC) in Austin on October 11-12 to identify future opportunities for pollution prevention and waste minimization in Texas and to review the committee's mission, strategic direction, and future workplan activities.

The meeting will be held at the TNRCC, 12100 Park 35 Circle, Austin in Building E, Room 201S. Registration will begin at 9:30 a.m. and the meeting will start at 10:00 a.m.

Contact Mr. Ken Zarker, WRAC Coordinator, at 512-239-3144 or E-mail kzarker@tnrcc.state.tx.us for a copy of the draft agenda or additional information.

TRD-9905985
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: September 15, 1999

♦ ♦ ♦

Public Utility Commission of Texas

Notice of Application for Authority to Revise Fixed Fuel Factors and Implement Interim Surcharge of Fuel Cost Under-Recoveries

Notice is given to the public of the filing with the Public Utility Commission of Texas an application for authority to revise fixed fuel factors and implement an interim surcharge of fuel cost under-recoveries on September 8, 1999, pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §36.203 (Vernon 1998).

Docket Style and Number: Application of West Texas Utilities Company for Authority to Increase Fuel Factors and to Implement an Interim Surcharge of Fuel Cost Under-Recoveries. Docket Number 21385.

The Application: West Texas Utilities Company (WTU) requests authority to increase its fixed fuel factors and implement an interim surcharge of fuel cost under-recoveries, pursuant to the Public Utility Regulatory Act §36.203 and P.U.C. Substantive Rule §25.237. WTU's proposed fixed fuel factors would increase WTU's retail fuel and purchased power revenues by approximately $15.9 million annually, effective November 30, 1999. WTU's proposed interim surcharge of fuel and purchased power cost under-recoveries would recover approximately $6.4 million, effective January 3, 2000. The application, if granted, will affect all Texas retail customers of WTU throughout its service area to which fuel factors apply.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact, not later than October 8, 1999, the Public Utility Commission of Texas, 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 telephones (TTY) may contact the commission at (512) 936-7136.

TRD-9905800
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 9, 1999

♦ ♦ ♦

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 10, 1999, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151-54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of IntraLinc Corporation for a Service Provider Certificate of Operating Authority, Docket Number 21391 before the Public Utility Commission of Texas.

Applicant intends to provide enhanced telecommunications services utilizing advanced switched platforms, including local dial tone, enhanced calling features, enhanced services, intraLATA, intrastate, interLATA, and international long distance service.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than September 29, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9905949
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 14, 1999

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on September 13, 1999, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151-54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of HJN Telecom, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 21395 before the Public Utility Commission of Texas.

Applicant intends to provide all forms of intrastate local exchange telecommunications services including basic residential services, residential custom calling and CLASS features, basic business exchange services, business custom calling and CLASS features, adjunct provided features, and business and residentially ancillary services.

Applicant's requested SPCOA geographic area includes the entire state of Texas currently served by Southwestern Bell Telephone Company, GTE Southwest, Inc., and United Telephone Company of Texas, Inc.

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 6, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9905981
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 15, 1999

♦ ♦ ♦

Notice of Petition for Declaratory Order

Notice is given to the public of the filing with the Public Utility Commission of Texas a petition for declaratory order on September 8, 1999. The commission is authorized to issue a declaratory order upon request by a party, pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.003(13), 14.001 and 14.051 (Vernon 1999).

Docket Style and Number: Petition of Voice Connections for Declaratory Order. Docket Number 21228.

The Application: Voice Connections seeks an order declaring that resellers and other non- taxable telecommunications providers may claim a credit for any duplicate or erroneous Texas Universal Service Fund charges in their reports to National Exchange Carriers Association.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, 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 telephones (TTY) may contact the commission at (512) 936-7136.

TRD-9905804
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 9, 1999

♦ ♦ ♦

Notice of Workshop on Project Number 20956- Implementation of SB560: Adoption of Interim Process for Informational Notice Filing

The staff of the Public Utility Commission of Texas (commission) will hold a workshop on Thursday, October 7,1999, in Project Number 20956 to address issues related to the use of total element long run incremental cost (TELRIC) based pricing versus total service long run incremental cost (TSLRIC) based pricing to prevent anti-competitive behavior.

The workshop will be held from 1:30 p.m. to 5:00 p.m. in the Commissioners Hearing Room on the seventh floor of the William B. Travis Building at 1701 North Congress Avenue, Austin, Texas 78701.

Under the Interim Informational Notice Filing Requirement approved by the commission, incumbent local exchange companies (ILECs) are required to respond with "yes", "no" or "not applicable" (with explanation) to the following question:

"Are the components needed for provision of the retail service available to competitors at a TELRIC based wholesale price that is at or below the retail price set forth in this filing?" If the response is "yes" or "no", please identify the components needed for the provision of the retail service, along with a list of relevant wholesale and retail prices.

This requirement was intended to inform commission staff and other parties of a potential price squeeze or other anti-competitive act. For the purpose of utilizing the information provided by the ILECs in response to the question above, the commission staff would like to hold a workshop as a discussion forum to address the following issues:

1. How can the commission best use the interim guidelines to address any anti-competitive concerns related to price squeeze or other issues?

2. What is the appropriate analysis or comparison for the purpose of addressing anti- competitive concerns: comparison of cost to cost versus comparison of price to price?

3. Comparison of TSLRIC and TELRIC:

A. Similarity in economic rationale and methodology

B. Difference in costing object, purpose and application, calculation etc.

4. What are the other alternatives available to address anti-competitive concerns?

Interested parties are encouraged to bring their experts on costing and pricing to the workshop. Persons who plan to attend the October 7 workshop should register with Sharon Chapman at (512) 936-7329. If there are any questions, please contact B. J. Sheu at (512) 936-7395. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9905966
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 14, 1999

♦ ♦ ♦

Public Notices of Amendments to Interconnection Agreements

On September 2, 1999, Southwestern Bell Telephone Company and Premiere Network Services, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001-63.063 (Vernon 1998)

(PURA). The joint application has been designated Docket Number 21317. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 21317. 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 5, 1999, 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 21317.

TRD-9905959
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 14, 1999

♦ ♦ ♦

On September 8, 1999, Southwestern Bell Telephone Company and Fort Bend Long Distance d/b/a Fort Bend Communications, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 21386. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 21386. 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 11, 1999, 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 21386.

TRD-9905960
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 14, 1999

♦ ♦ ♦

On September 2, 1999, Southwestern Bell Telephone Company and Birch Telecom of Texas, Ltd., L.L.P., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal

Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001 - 63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 21316. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 21316. 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 5, 1999, 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 21316.

TRD-9905802
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 9, 1999

♦ ♦ ♦

On September 2, 1999, Southwestern Bell Telephone Company and GTE Communications Corporation, collectively referred to as applicants, filed a joint application for approval of an amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001 - 63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 21315. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 21315. 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 5, 1999, 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 21315.

TRD-9905803
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 9, 1999

♦ ♦ ♦

Public Notices of Interconnection Agreements

♦ ♦ ♦

On September 7, 1999, DSLnet Communications, LLC and GTE Southwest, Inc., collectively referred to as applicants, filed a joint application for approval of 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 21382. 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 21382. 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 8, 1999, 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 21382.

TRD-9905801
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 9, 1999

On September 1, 1999, GTE Communications Corporation and GTE Southwest, 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 21312. 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 21312. 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 4, 1999, 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 21312.

TRD-9905879
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 13, 1999

♦ ♦ ♦

On July 8, 1999, MFS Communications Company, Inc. and GTE Southwest, Inc., collectively referred to as applicants, filed a joint application for approval of an interim co-carrier Texas 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 21088. 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 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 21088. 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 noon, August 11, 1999, 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 Public Utility Commission 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 21088.

TRD-9905946
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 13, 1999

♦ ♦ ♦

Public Notice of Workshop on Amending the Texas Universal Service Fund Rules to Comply with Senate Bill 560

The Public Utility Commission of Texas (commission) will hold a workshop regarding the rulemaking to amend the Texas Universal Service Fund (TUSF) rules to comply with Senate Bill 560, Act of May 30, 1999, 76th Legislature, Regular Session (1999) (SB 560), on Monday, October 4, 1999, at 9:00 a.m. in the Commissioners' Hearing Room, located on the seventh floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 21163, *Rulemaking to Amend Texas Universal Service Fund Rules to Comply with SB 560,* has been established for this proceeding.

The commission will make available in Central Records under Project Number 21163 a copy of draft rules no later than September 30, 1999. The draft rules will assist in structuring the workshop discussion.

Questions concerning the workshop or this notice should be referred to Melanie Malone, Office of Policy Development, 512-936-7247. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-9905839
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 10, 1999

♦ ♦ ♦

Request for Comments on Forms for Interconnection of Distributed Generation

The Public Utility Commission of Texas (commission) proposes new forms, *Tariff for Interconnection and Parallel Operation of Distributed Generation* and *Interconnection Agreement* to be used by utilities to fulfill the statutory requirements of the Public Utility Regulatory Act (PURA) as amended by Senate Bill 7, 76th Legislature, Regular Session (1999) (SB7) and customer safeguards provision under PURA §39.101(b)(3). Project Number 21220 is assigned to this proceeding. At the September 9, 1999 Open Meeting, the commission approved publication of proposed new rule §25.211 relating to Interconnection of Distributed Generation and §25.212 relating to Technical Requirements for Interconnection and Parallel Operation of On-Site Distributed Generation Units. The proposed new rules may be found in the Texas Register, or in the commission's Central Records under Project Number 21220, or through the commission's web page at www.puc.state.tx.us. The proposed forms will be used in implementing the new rules.

Copies of the proposed forms are available in the commission's Central Records Division, Room G-113, under Project Number 21220. Written comments on the proposed forms may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, Austin, Texas 78701 within 20 days after

publication of this notice. All comments should refer to Project Number 21220.

Any questions pertaining to the proposed forms should be directed to Gillan Taddune at (512) 936-7156. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-9905869
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 13, 1999

♦ ♦ ♦

Request for Comments on Form for Unbundled Cost of Service Rate Filing Package

The Public Utility Commission of Texas (commission) proposes a new form, *Unbundled Cost of Service Rate Filing Package (UCOS-RFP)* to be used by utilities to fulfill the statutory requirements of the Public Utility Regulatory Act (PURA) as amended by Senate Bill 7, 76th Legislature, Regular Session (1999) (SB7) and the separation of competitive energy services under PURA §39.051. Project Number 21083 is assigned to this proceeding. At the August 26, 1999 Open Meeting, the commission approved publication of proposed new rule §§25.341 relating to Definitions, 25.342 relating to Electric Business Separation, 25.343 relating to Competitive Energy Services, 25.344 relating to Cost Separation Proceeding, 25.345 relating to Recovery of Stranded Costs Through Competition Transition Charge, and 25.346 relating to Separation of Electric Utility Metering and Billing Costs and Activities. The proposed new rules may be found in the September 10, 1999 *Texas Register* (24 TexReg 7099), or in the commission's Central Records under Project Number 21083, or through the commission's web page at www.puc.state.tx.us. The proposed form will be used in implementing the new rules.

Copies of the proposed form are available in the commission's Central Records Division, Room G-113, under Project Number 21083. Written comments on the proposed form may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, Austin, Texas 78701 within 24 days after publication of this notice. Reply comments, if any, should be submitted 34 days after publication of this notice. All comments should refer to Project Number 21083.

In addition, the commission requests that interested parties specifically address the following issues:

1. How should decommissioning expense be included in regulated rates following the freeze period? Should decommissioning expense be recovered through inclusion in the cost of service of the transmission and distribution system (as a separate line item), or as a non-bypassable charge, or some other mechanism?

2. What supporting documentation is necessary to review the reasonableness of the stranded cost calculation using the ECOM model? The commission seeks to standardize the supporting documentation provided by the utilities by delineating specific guidelines for the supporting documentation based on the comments received. For example, what level of support (e.g. promod-type runs) should be required for parties to review the reasonableness of the sales forecast used to determine market revenues?

3. How should the statewide stranded costs amount including regulatory assets for the purpose of determining the allocation of stranded costs pursuant to PURA §39.253 (i.e., the $5 billion test) be calculated? The ECOM model will calculate stranded costs as of January 1, 2002 including regulatory assets that are not securitized, but excluding regulatory assets that have been securitized. Should the statewide aggregate stranded cost amount resulting from the ECOM model calculation be used for this test or should the securitized assets also be included? If the securitized assets should be included, how can an appropriate balance as of January 1, 2002, be determined since the securitized regulatory assets are no longer on the utilities' books? Should a second ECOM model calculation be required including all regulatory assets?

4. The natural gas price used in stranded-cost modeling has a very significant impact on the level of stranded costs that the model forecasts. This price has been an important issue to many parties in the unbundling effort. A group that has varied in number from five to eight of the most interested of these parties has reduced the areas of disagreement from ten to two. The two areas that remain unresolved are: (1) Does the change in the volume of gas used in different seasons of the year bias the average price of gas significantly? (2) Do utilities add non-commodity costs to the market price of gas that are not included in the market price of electricity?

5. Should the UCOS-RFP include schedules that define and format the data that is to be subject to confidentiality?

Any questions pertaining to the proposed form should be directed to Connie Corona at (512) 936-7380 or Kit Pevoto at (512) 936-7375. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-9905976
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 14, 1999

♦ ♦ ♦

Texas Department of Transportation

Public Notice

In accordance with, Transportation Code, §201.602, the Texas Transportation Commission will conduct a public hearing to receive data, comments, views, and/or testimony concerning the commission's highway project selection process and the relative importance of the various criteria on which the commission bases its project selection decisions. It is emphasized that the subject of the hearing will be the procedure by which projects are selected and not the merits or details of specific projects themselves.

The public hearing will be held on Thursday, October 28, 1999, at 9:00 a.m., in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas. The hearing will be held in accordance with the procedures specified in 43 TAC §1.5. Any interested person may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding authority as may be necessary to ensure a complete record. While any person with pertinent comments or testimony concerning the selection procedure will be granted an opportunity to present them during the course of the hearing, the presiding authority reserves the right to restrict testimony in terms of time and repetitive comment. Organizations, associations, or groups are encouraged to present their commonly-held views, and same or similar comments, through a representative member where possible. Presentations must remain pertinent to the issue being discussed. A person may not assign a portion of his or her time to another speaker. A person who disrupts a public hearing must

leave the hearing room if ordered to do so by the presiding officer. Persons with disabilities who plan to attend the hearing and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Eloise Lundgren, Director, Public Information Office, at 125 East 11th Street, Austin, Texas, 78701-2383, (512) 463-2810 at least two working days prior to the hearing so that appropriate arrangements can be made.

Copies of the criteria/information will be available beginning September 28, 1999, at the department's Riverside Annex, 118 East Riverside Drive, Building 118, Room 2B-6, Austin, Texas, (512) 486-5050. Written comments may be submitted to the Texas Department of Transportation, Attention: Alvin R. Luedecke, Jr., P.E., P.O. Box 149217, Austin, Texas, 78714-9217. The deadline for receipt of comments is 5:00 p.m. on November 8, 1999.

TRD-9905860
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: September 10, 1999

♦ ♦ ♦

Texas Workers' Compensation Commission

Invitation to Applicants for Appointment to the Medical Advisory Committee

The Texas Workers' Compensation Commission invites all qualified individuals to apply for openings on the Medical Advisory Committee in accordance with the eligibility requirements of the Standards and Procedures for the Medical Advisory Committee. Each member must be knowledgeable and qualified regarding work-related injuries and diseases.

Commissioners for the Texas Workers' Compensation appoint the Medical Advisory Committee members, which is composed of 17 primary and 17 alternate members representing health care providers, employees, employers, insurance carriers, and the public.

The purpose and tasks of the Medical Advisory Committee are outlined in the Texas Workers' Compensation Act, §413.005, which includes advising the Commission's Medical Review Division on the development and administration of medical policies and guidelines.

The Medical Advisory Committee meets approximately once every six weeks. Members are not reimbursed for travel, per diem, or other expenses associated with Committee activities and meetings.

During a primary member's absence, an alternate member must attend meetings for the Medical Advisory Committee, subcommittees, and work groups to which the primary member is appointed. The alternate may attend all meetings and shall fulfill the same responsibilities as primary members, as established in the Standards and Procedures for the Medical Advisory Committee as adopted by the Commission.

Medical Advisory Committee positions currently open:

1. Primary member–Registered Nurse, term through August 31, 2000

2. Primary member–General Public 1, term through August 31, 2001

3. Primary member–Insurance Carrier, term through August 31, 2001

4. Alternate member–Public Health Care Facility, term through August 31, 2000

5. Alternate member–Chiropractor, term through August 31, 2001

6. Alternate member–Employee, term through August 31, 2000

7. Alternate member–Dentist, term through August 31, 2001

8. Alternate member–Insurance Carrier, term through August 31, 2001

For an application, call Teresa Barajas at (512) 440-3962 or Ruth Richardson at (512) 440-3518.

TRD-9906008
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: September 15, 1999

♦ ♦ ♦

Notice of Hearing

The Texas Workers' Compensation Commission will hold public hearings on the following proposed rulemaking actions on October 6, 1999, at the Austin central office of the Commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 440-5690 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the Commission's website at *http://www.twcc.state.tx.us.*

Hearings on the following proposals will start at 10:00 a.m.:

Chapter 124–Carriers: Required Notices and Mode of Payment

§124.3. Investigation of a Claim and a Denial/Dispute. (new)

§124.5. Mode of Payment Made by Carriers. (amendment)

§126.6. Notice of Refused or Disputed Claim. (repeal)

Chapter 129–Temporary income Benefits.

§129.11. Agreement for Monthly Payment of Temporary Income Benefits. (new)

Chapter 130–Impairment and Supplemental Income Benefits

§130.11. Agreement for Monthly Payment of Impairment Income Benefits. (new)

Chapter 131–Lifetime Income Benefits

§131.4. Change in Payment Period; Purchase of Annuity for Lifetime Income Benefits. (new)

Chapter 132–Death & Burial Benefits

§132.13. Burial Benefits. (amended)

§132.16. Change in Payment Period; Purchase of Annuity for Death Benefits. (new)

Hearings on the following proposals will start at 2:00 p.m.:

Chapter 134–Guidelines for Medical Services, Charges, and Payments Subchapter G Treatment and Services Requiring Pre-Authorization

§134.601. Definitions. (new)

§134.602. Carrier Liability. (new)

§134.603. Applicability. (new)

§134.604. The Processes. (new)

§134.605. Record Keeping. (new)

§134.606. The List. (new)

§134.607. Severability. (new)

§134.600. Procedure for Requesting Preauthorization of Specific Treatments and Services. (repeal)

TRD-9906009
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: September 15, 1999

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 24 (1999) is cited as follows: 24 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "23 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 23 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code*** (***TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), LOIS, Inc. (1-800-364-2512 ext. 152), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 8, April 9, July 9, and October 8, 1999). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

Texas Register
Services

The *Texas Register* offers the following services. Please check the appropriate box (or boxes).

Texas Natural Resource Conservation Commission, Title 30

❑ **Chapter 285** $25 ❑ update service $25/year *(On-Site Wastewater Treatment)*
❑ **Chapter 290** $25 ❑ update service $25/year *(Water Hygiene)*
❑ **Chapter 330** $50 ❑ update service $25/year *(Municipal Solid Waste)*
❑ **Chapter 334** $40 ❑ update service $25/year *(Underground/Aboveground Storage Tanks)*
❑ **Chapter 335** $30 ❑ update service $25/year *(Industrial Solid Waste/Municipal Hazardous Waste)*

Update service should be in ❑ printed format ❑ 3 1/2" diskette ❑ 5 1/4" diskette

Texas Workers Compensation Commission, Title 28

❑ Update service $25/year

Texas Register Phone Numbers	**(800) 226-7199**
Documents	(512) 463-5561
Circulation	(512) 463-5575
Marketing	(512) 305-9623
Texas Administrative Code	(512) 463-5565

Information For Other Divisions of the Secretary of State's Office

Executive Offices	(512) 463-5701
Corporations/	
Copies and Certifications	(512) 463-5578
Direct Access	(512) 475-2755
Information	(512) 463-5555
Legal Staff	(512) 463-5586
Name Availability	(512) 463-5555
Trademarks	(512) 463-5576
Elections	
Information	(512) 463-5650
Statutory Documents	
Legislation	(512) 463-0872
Notary Public	(512) 463-5705
Public Officials, State	(512) 463-6334
Uniform Commercial Code	
Information	(512) 475-2700
Financing Statements	(512) 475-2703
Financing Statement Changes	(512) 475-2704
UCC Lien Searches/Certificates	(512) 475-2705

Please use this form to order a subscription to the *Texas Register*, to order a back issue, or to indicate a change of address. Please specify the exact dates and quantities of the back issues required. You may use your VISA or Mastercard. All purchases made by credit card will be subject to an additional 2.1% service charge. Return this form to the Texas Register, P.O. Box 13824, Austin, Texas 78711-3824. For more information, please call (800) 226-7199.

❒ **Change of Address**
(Please fill out information below)

❒ **Paper Subscription**
❒ One Year $150 ❒ Six Months $100 ❒ First Class Mail $250

❒ **Back Issue ($10 per copy)**

_____ Quantity

Volume _____, Issue #_____.
(Prepayment required for back issues)

NAME _____

ORGANIZATION_____

ADDRESS _____

CITY, STATE, ZIP _____

PHONE NUMBER _____

FAX NUMBER _____

Customer ID Number/Subscription Number _____
(Number for change of address only)

❒ **Bill Me** ❒ **Payment Enclosed**

Mastercard/VISA Number _____

Expiration Date _____ Signature _____

Please make checks payable to the Secretary of State. Subscription fees are not refundable.
Do not use this form to renew subscriptions.
Visit our home on the internet at http://www.sos.state.tx.us.

_____
_____
Periodical Postage

PAID

Austin, Texas
and additonal entry offices
_____
_____