TEXAS REGISTER

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This month's front cover artwork:

Artist: *Maricela Lopez*
12th grade
Universal Goval

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.

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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.*

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ATTORNEY GENERAL

EMERGENCY RULES

PROPOSED RULES

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.

Opinions

Opinion No. JC-0259.

The Honorable Jeri Yenne, Brazoria County, Criminal District Attorney, 111 East Locust, Suite 408A, Angleton, Texas 77515

Regarding whether a recent amendment to article 42.01, §2 of the Code of Criminal Procedure precludes a court clerk from preparing a judgment (RQ-0198-JC).

S U M M A R Y.

Article 42.01, §2 of the Code of Criminal Procedure does not preclude a court clerk from preparing a judgment. However, a court clerk may prepare a judgment only under the supervision of an attorney. It is for the judge ordering a court clerk to prepare a judgment to determine which attorney will supervise the clerk and what that supervision will entail.

Opinion No. JC-0260.

The Honorable Glen Wilson, Parker County, Attorney, One Courthouse Square, Weatherford, Texas 76086

Regarding whether §232.0015(a) of the Local Government Code permits a county to except "specific divisions of land" from the subdivision-plat requirement in §232.001, and related questions (RQ-0200-JC).

S U M M A R Y.

Section 232.0015(a) of the Local Government Code authorizes a county to "define and classify divisions" to except from the platting requirement particular subdivisions that would otherwise be subject to the requirement, even though the exception is not one listed in §232.0015(b) through (k). See Tex. Loc. Gov't Code Ann. §232.0015 (Vernon Supp. 2000). A division of real property that is required to be platted under §232.001 and §232.0015 must be platted "regardless of whether [the division] is made by using a metes and bounds description in a deed of conveyance or in a contract for a deed, by using a contract of sale or other executory contract to convey, or by using any other method." Id. §232.001(a-1).

Section 232.009 of the Local Government Code, "Revision of Plat," applies to real property located outside the corporate limits of any municipality, but not within the extraterritorial jurisdiction of a municipality with a population of 1.5 million or more. See id. §232.009. With respect to a proposed revision of a plat of a subdivision that is subject to §232.009, a commissioners court must notify, by certified or registered mail, return receipt requested, each owner of "all or part" of the subdivided tract. See id. The boundaries of a particular subdivision will be set forth in the recorded plat.

Opinion No. JC-0261.

William R. Archer III, M.D., Commissioner of Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199

Regarding whether the salary cap established by §659.0115 of the Government Code applies to a retired state employee who is reemployed by a state agency to perform the same services he performed for the agency for the last six months prior to his retirement, and related questions (RQ-0203-JC).

S U M M A R Y.

A retired state employee who is reemployed by a state agency is subject to the salary cap set forth in §659.0115 of the Government Code if he or she is rehired to perform services substantially similar to those he or she performed for less than the entire twelve month period before retirement. Section 659.0115 does not cap the salary of a reemployed retiree who performs "substantially similar" services for less than six months and then transfers to a position that does not involve "substantially similar" services before the end of the first six months of reemployment.

Opinion No. JC-0262.

The Honorable Judith Zaffirini, Chair, Human Services Committee, Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068

Regarding whether an area of northeastern Bexar County may be disannexed from the Alamo Community College District (RQ 0202-JC).

S U M M A R Y.

Because the disannexation of part of a junior college district requires specific statutory authorization, see Tex. Att'y Gen. Op. No. DM-297 (1994) at 1, and because none of the statutes authorizing disannexation would appear to apply to a proposed disannexation of a part of northeastern Bexar County from the Alamo Community College District, in all reasonable probability no such disannexation is legally permissible.

For further information, please call (512) 463-2110

TRD-200005384
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: August 2, 2000

♦ ♦ ♦

Request for Opinions

RQ-0256-JC.

The Honorable Ken Armbrister, Chair, Committee on Criminal Justice, Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068

Regarding whether a municipal employee retirement fund constitutes a "fire fighter or police officer's pension fund" under §143.073, Local Government Code, for purposes of compensating a firefighter a police officer absent for an injury or illness related to his line of duty (Request No. 0256-JC).

Briefs requested by August 20, 2000.

RQ-0257-JC.

Mr. Jim Muse, Executive Director, General Services Commission, 1711 San Jacinto Street, Austin, Texas 78711-3047

Regarding whether "reverse auctions" constitute a permissible method of conducting competitive bidding by state agencies (Request No. 0257-JC).

Briefs requested by August 20, 2000.

RQ-0258-JC.

The Honorable Tim Curry, Tarrant County Criminal District Attorney, Justice Center, 401 West Belknap, Fort Worth, Texas 76196-0201.

Regarding whether a person who pleads guilty to a lesser included offense is entitled to an expunction of his arrest record (Request No. 0258-JC).

RQ-0259-JC.

The Honorable Robert L. Busselman, Karnes County Attorney, 101 North Panna Maria, Suite 10 Karnes City, Texas 78118

Regarding whether a medical clinic owned by the Karnes County Hospital District and leased to private physicians is exempt from ad valorem taxation (Request No. 0259-JC).

Briefs requested by August 28, 2000.

RQ-0260-JC.

The Honorable Ed C. Jones, Angelina County Attorney, P. O. Box 1845, Lufkin, Texas 75902-1845

Regarding constitutionality of §11.161, Tax Code, which exempts from ad valorem taxation "implements of husbandry used in the production of timber" (Request No. 0260-JC).

Briefs requested by August 28, 2000.

TRD-200005368
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: August 2, 2000

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EMERGENCY RULES

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

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

TITLE 25. HEALTH SERVICES

PART 8. INTERAGENCY COUNCIL ON EARLY CHILDHOOD INTERVENTION

CHAPTER 621. EARLY CHILDHOOD INTERVENTION

SUBCHAPTER B. EARLY CHILDHOOD INTERVENTION SERVICE DELIVERY

25 TAC §621.22

The Interagency Council on Early Childhood Intervention (ECI) adopts on an emergency basis an amendment to §621.22, concerning Definitions. Elsewhere in this issue of the *Texas Register*, the ECI contemporaneously proposes this amendment to §621.22.

This section amends the definition for "Parent". In review of the Texas Interagency Council on Early Childhood Intervention annual application for funding, the United States Department of Education, Office of Special Education Programs required immediate changes in ECI Rule and policies and procedures.

This section is adopted on an emergency basis to comply with federal regulations.

The amendment is adopted on an emergency basis under the Human Resources Code, Chapter 73, which authorizes the Interagency Council on Early Childhood Intervention to establish rules regarding services provided for children with developmental delays.

§621.22. Definitions.

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

(1) Assessment--The ongoing procedures used by appropriate qualified personnel throughout the period of a child's eligibility to identify:

(A) the child's unique needs and strengths;

(B) the resources, priorities, and concerns of the family and identification of supports and services necessary to enhance developmental needs of the children; and

(C) the nature and extent of intervention services needed by the child and the family in order to resolve the determinations of this paragraph.

(2) Child find--Activities and strategies designed to locate and identify, as early as possible, infants and toddlers with developmental delay.

(3) Children--Infants and toddlers with disabilities.

(4) Committee--Advisory Committee to the Interagency Council on Early Childhood Intervention. Its functions are those of the Interagency Coordinating Council described in the Individuals with Disabilities Education Act, Public Law 105-17.

(5) Complaint--A formal written allegation submitted to the council stating that a requirement of the Individuals with Disabilities Education Act, or an applicable federal or state regulation has been violated.

(6) Comprehensive services--Individualized intervention services, as determined by the interdisciplinary team and listed in the Individualized Family Service Plan (IFSP). Services are further defined in §621.23(5)(C)-(E) of this title (relating to Service Delivery Requirements for Comprehensive Services). Programs receiving funds from the Interagency Council on Early Childhood Intervention are required to have the capacity to provide or arrange for all services listed in §621.23(5)(C) of this title (relating to Service Delivery Requirements for Comprehensive Services).

(7) Council--The entity designated as the lead agency by the governor under the Individuals with Disabilities Education Act. The council has the final authority and responsibility for the administration, supervision, and monitoring of programs and activities under this system. The council has the final authority for the obligation and expenditure of funds and compliance with all applicable laws and rules. The council board includes eight lay members who are family members of children with developmental delay, appointed by the governor with the advice and consent of the senate, and one member from the Texas Education Agency appointed by the commissioner of education. Five of the lay members must be the parents of children who are receiving or have received early childhood intervention services. The board shall also have fully participating, non voting representatives appointed by the commissioner or executive head of the following agencies: Texas Department of Health (TDH), Texas Department of Human Services (TDHS), Texas Department of Mental Health and Mental Retardation (TDMHMR), Texas Commission on Alcohol and Drug Abuse (TCADA), Texas Department of Protective and Regulatory Services (TDPRS), and the Texas Workforce Commission (TWC).

(8) Days--Calendar days.

(9) Developmental delay--A significant variation in normal development in one or more of the following areas as measured and

determined by appropriate diagnostic instruments or procedures administered by an interdisciplinary team and by informed clinical opinion: cognitive development; physical development, including vision and hearing, gross and fine motor skills, and nutrition status; communication development; social and emotional development; and adaptive development.

(10) Early Childhood Intervention Program (ECI)--The total effort in Texas directed toward meeting the needs of children eligible under this chapter and their families.

(11) Evaluation--The procedures used by appropriate qualified personnel to determine the child's initial and continuing eligibility, consistent with the definition of infants and toddlers with developmental delay, including determining the status of the child in areas of cognitive development, physical development, communication development, social-emotional development, and adaptive development or self-help skills.

(12) Family Educational Rights and Privacy Act of 1974 (FERPA)--Requirements for the protection of parents and children under the General Education Provisions Act, §438, which include confidentiality, disclosure of personally identifiable information, and the right to inspect records.

(13) Full year services--The availability of an array of comprehensive services throughout the calendar year.

(14) Include(ing)--The items named are not all of the possible items that are covered whether like or unlike the ones named.

(15) Individual professional development plan (IPDP)--A written plan for inservice or continuing education to be prepared annually for each staff person in a program.

(16) Individualized family service plan (IFSP)--A written plan, developed by the interdisciplinary team, based on all assessment and evaluation information, including the family's description of their strengths and needs, which outlines the early intervention services for the child and the child's family.

(17) Intake--The first face-to-face contact with a parent following initial referral.

(18) Interdisciplinary team--The child's parent(s) and a minimum of two professionals from different disciplines who meet to share evaluation information, determine eligibility, assess needs, and develop the IFSP. The team must include the service coordinator who has been working with the family since the initial referral or the person responsible for implementing the IFSP and a person directly involved in conducting the evaluations and assessments.

(19) Parent-A natural or adoptive parent of a child, a guardian, a person acting in the place of a parent (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare), or an appointed surrogate parent, Term does not include state if child is ward of the state. [~~A parent, a guardian, a person acting as a parent of a child or an appointed surrogate parent.~~]

(20) Personally identifiable information--Information which includes:

(A) the name of the child;

(B) the name of the child's parent, or other family member;

(C) the address of the child, parent, or other family member;

(D) a personal identifier, such as the child's or parent's social security number; or

(E) a list of personal characteristics or other information that would make it possible to identify or trace the child, the parent, or other family member, with reasonable certainty.

(21) Primary referral sources--Individuals or organizations which refer children including, but not limited to:

(A) hospitals, including prenatal and postnatal care facilities;

(B) physicians;

(C) parents;

(D) day care programs;

(E) local educational agencies;

(F) public health facilities;

(G) other social service agencies;

(H) other health care providers; and

(I) congregate care facilities.

(22) Program--A division of a local agency with the express and sole purpose of implementing comprehensive early childhood intervention services to children with developmental delays and their families.

(23) Provider--A local private or public agency with proper legal status and governed by a board of directors that accepts funds from the Interagency Council on Early Childhood Intervention to administer the Early Childhood Intervention (ECI) Program.

(24) Public agency--The Interagency Council on Early Childhood Intervention and any other political subdivision of the state that is responsible for providing early intervention services to eligible children under the Individuals with Disabilities Education Act, Part C.

(25) Public health clinic--Any clinic that provides pediatric physical examinations and receives public funding from federal, state, city, or county governments.

(26) Qualified--A person who has met state approval or recognized certificate, license, registration, or other comparable requirements that apply to the area in which the person is providing early intervention services.

(27) Referral date--The date the child's name and sufficient information to contact the family was obtained by the agency receiving funds from the Interagency Council on Early Childhood Intervention.

(28) Service coordinator (case manager)--A staff person assigned to a child or family who is the single contact point for families, and who is responsible for assisting and empowering families to receive the rights, procedural safeguards, and services authorized by these rules and ECI policy and procedures. The service coordinator is from the profession most immediately related to the child's or family's needs. (The term profession includes service coordination.)

(29) Services--Individualized intervention services, as determined by the interdisciplinary team and listed in the IFSP. Services are further defined in §621.23(5)(C)-(E) of this title (relating to Service Delivery Requirements).

(30) Supplanting--The withdrawal of local, private, or other public funds for services which were available during the previous year of funding.

(31) Surrogate parent--An individual appointed or assigned to take the place of a parent for the purposes of Chapter 73 of the Human Resources Code when no parent can be identified or located or when the child is under managing conservatorship of the state. A surrogate parent appointed under this chapter shall act to advocate for or represent the child, relating to the identification, evaluation, educational placement, and provision of the Individuals with Disabilities Education Act, Part C services.

(32) Transportation services--Travel and other related costs that are necessary to enable a child or family to receive early intervention services.

(33) UGCMS--Uniform grant management standards adopted by the governor's Office of Budget and Planning in 1 TAC §§5.141-5.167 under authority of Texas Civil Statutes, Article 4413(32g).

Filed with the Office of the Secretary of State, on July 24, 2000.

TRD-200005090
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Effective date: July 24, 2000
Expiration date: November 21, 2000
For further information, please call: (512) 424-6750

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SUBCHAPTER C. PROCEDURAL SAFEGUARDS AND DUE PROCESS PROCEDURES

25 TAC §621.42

The Interagency Council on Early Childhood Intervention (ECI) adopts on an emergency basis an amendment to §621.42, concerning Early Childhood Intervention Council Procedures for Resolving Complaints.

Elsewhere in this issue of the *Texas Register*, the ECI contemporaneously proposes this amendment to §621.42.

This section amends §621.42(d)(6) by adding the following new language: "In resolving a complaint in which it finds a failure to provide appropriate services, the executive director will remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child and the child's family; and appropriate future provision of services for all infants and toddlers with disabilities and their families". Current §621.42(d)(6) will be renumbered to new paragraph (7).

This section is adopted on an emergency basis to comply with federal regulations.

The amendment is adopted on an emergency basis under the Human Resources Code, Chapter 73, which authorizes the Interagency Council on Early Childhood Intervention to establish rules regarding services provided for children with developmental delays.

§621.42. Early Childhood Intervention Council Procedures for Resolving Complaints.

(a) An individual or organization may file a complaint with the Interagency Council on Early Childhood Intervention (council) alleging that a requirement of the Individuals with Disabilities Education Act, Part C (Act) or applicable federal and/or state regulations has been violated. The complaint must be in writing, be signed, and include a statement of the facts on which the complaint is based.

(b) A complaint may be filed directly with the council without having been filed with the local provider.

(c) Procedures for receipt of complaint are as follows.

(1) All complaints received by the council shall be forwarded to the deputy executive director. The deputy executive director will log and assign all complaints, monitor the resolution of those complaints, and maintain a copy of all complaints for a five-year period.

(2) The council will have the following information entered in the data file: name of complainant, name of program if applicable, date received, type of complaint, action taken, followup, and case-closed date. Letters of acknowledgment will be mailed by the deputy executive director to the program and to the complainant or to the third party if the complaint was forwarded by someone other than the complainant, such as the governor's office.

(3) A complaint should be clearly distinguished from a request for an administrative proceeding.

(4) Complaints referred by other government offices will also be considered under these procedures.

(d) Procedures for investigation and resolution of complaints.

(1) After receipt of the complaint, the deputy executive director will assign a staff person to conduct an individual investigation, on-site if necessary, to make a recommendation to the executive director for resolution of the complaint.

(A) The complainant will have the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint.

(B) All relevant information will be reviewed and an independent determination made as to whether a violation to the requirements of the Act, occurred.

(2) Within 60 days of the receipt of the complaint the executive director must resolve the complaint.

(3) An extension of the time limit under paragraph (2) of this subsection shall be granted only if exceptional circumstances exist with respect to a particular complaint.

(4) Complainants shall be informed in writing of the final decision of the executive director and of their right to request the secretary of the United States Department of Education to review the final decision of the executive director. The executive director's written decision to the complainant will address each allegation in the complaint and contain:

(A) findings of fact and conclusions; and

(B) reasons for the final decision.

(5) To ensure that effective implementation of the executive director's final decision, the deputy executive director will assign a staff person to provide technical assistance and appropriate followup to the parties involved in the complaint to achieve compliance with any corrective actions when necessary.

(6) In resolving a complaint in which it finds a failure to provide appropriate services, the executive director will remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the

needs of the child and the child's family; and appropriate future provision of services for all infants and toddlers with disabilities and their families.

(7) [~~(6)~~] When a compliant is filed, the deputy executive director will offer mediation services as an alternative to proceeding with the complaint investigation. Mediation may be used when both parties agree. A parent's right to a due process hearing or complaint investigation will not be denied or delayed because they chose to participate in mediation. The complaint investigation will continue and be resolved within 60 days even if mediation is used as the resolution process.

Filed with the Office of the Secretary of State, on July 24, 2000.

TRD-200005091
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Effective date: July 24, 2000
Expiration date: November 21, 2000
For further information, please call: (512) 424-6750

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PROPOSED RULES

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

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

TITLE 7. BANKING AND SECURITIES

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER D. POWERS OF CREDIT UNIONS

7 TAC §91.401

The Texas Credit Union Commission proposes republication of an amendment to §91.401 pertaining to operational powers of credit unions. The first request for comments was published in the May 26, 2000 issue of the *Texas Register* (25 TexReg 4684). The proposed amendment, if adopted, establishes new requirements and limits certain types of activities as they related to a credit union making insurance products available to its members. The amendment is contained in a new subsection (f).

Lynette Pool, Deputy Commissioner, has determined that there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule amendment.

Ms. Pool has also determined that for each year of the first five years the proposed amendment is in effect, the public benefits anticipated as a result of enforcing the rule will be that state-chartered credit unions will have clearly defined requirements for making available insurance products for the benefit of their members. There is no anticipated effect on small businesses as a result of adopting the new amendment. There is no economic cost anticipated to entities that are required to comply with the new amendment as a result of its future adoption.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Lynette Pool, Deputy Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas, 78752-1699.

The amendment is proposed under the provisions of §123.107 of the Texas Finance Code that is interpreted as authorizing the Credit Union Commission to adopt rules that facilitate the provision of insurance by credit unions for the benefit and convenience of their members.

The specific section affected by this proposed rule is Texas Finance Code §123.107.

§91.401. Operational Powers.

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

(f) Insurance for members. A credit union may make insurance programs available to its members, including insurance programs at the individual member's own expense, if the following conditions are complied with:

(1) The purchase of any type of insurance coverage by a member is voluntary, except as provided in paragraph (2) of this subsection, and a copy of the written election to purchase the insurance is on file at the credit union.

(2) Subject to reasonable requirements, if the insurance is a condition of a loan, the member who is borrowing may purchase or provide the insurance from a carrier of the member's choice, or the member who is borrowing may assign any existing insurance coverage.

(3) An officer, director, employee, or committee member of a credit union may not accept anything of value from an insurance agent, insurance company, or other insurance provider offered to corruptly induce the credit union to sell or offer to sell insurance or other related products or services to the members of the credit union.

(4) A credit union may furnish to an insurance carrier or an agent any membership lists of addresses, without compensation, other than reimbursement of actual costs, from the insurance carrier or agent. A credit union, for an appropriate fee, may mail marketing materials to its membership.

(5) If a credit union replaces an existing loan or renews a loan and sells the member new credit life or disability insurance, the credit union shall cancel the prior insurance and provide the member with a refund or credit of the unearned premium or identifiable charge before selling the new insurance to the member.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005344
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 837-9236

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TITLE 16. ECONOMIC REGULATION

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 41. AUDITING
SUBCHAPTER C. RECORDS AND REPORTS BY LICENSEES AND PERMITTEES

16 TAC §41.22

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

The Texas Alcoholic Beverage Commission proposes the repeal of §41.22 relating to the content of invoices to be prepared by package store permittees for sales of liquor over three gallons. This proposal is made because it imposes an administrative burden on the affected members of the alcoholic beverage industry that is not necessary for the efficient supervision and regulation of that industry.

Jeannene Fox, Director of Licensing and Compliance, has determined that for the first five year period the repeal of this rule is in effect there will be no adverse impact on units of state and local government.

Ms. Fox has also determined that for the first five year period the repeal of this rule is in effect the pubic will benefit from this proposal by the removal of a regulation that adds unnecessary cost to business. There is no anticipated cost to small businesses or individuals as a result of this proposal.

Comments may be addressed to Jeannene Fox, Director of Licensing and Compliance, Texas Alcoholic Beverage Commission, P.O. Box 13127, Austin, Texas 78711.

This action is proposed under Alcoholic Beverage Code, §5.31, which provides the commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code.

Cross Reference: Alcoholic Beverage Code, §5.32, is affected by this action.

§41.22. Package Store Sales over Three Gallons.

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

Filed with the Office of the Secretary of State, on July 26, 2000.

TRD-200005162
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 206-3204

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CHAPTER 45. MARKETING PRACTICES
SUBCHAPTER D. ADVERTISING AND PROMOTION--ALL BEVERAGES

16 TAC §45.103

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

The Texas Alcoholic Beverage Commission proposes the repeal of §45.103 relating to regulation of "happy hour" promotions in on-premises establishments. This proposal is made in order to allow the commission to adopt a new rule governing the same subject matter. The new proposed rule is published contemporaneously with this proposed repeal.

Lou Bright, General Counsel, has determined that for the first five year period the repeal of this rule is in effect there will be no fiscal impact on state or local governments or small businesses.

Mr. Bright has also determined that for the first five year period the repeal of this rule is in effect the public will benefit from this action in that repeal of this rule will allow for the adoption of a revised, improved rule.

Comments may be addressed to Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, P.O. Box 13127, Austin, Texas 78711.

This action is proposed under Alcoholic Beverage Code, §5.31, which provides the commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code.

Cross Reference: Alcoholic Beverage Code, §§11.61(b)(2), (7), (14) and 61.71(a)(1), (6), (17), are affected by this action.

§45.103. Regulations of "Happy Hour."

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

Filed with the Office of the Secretary of State, on July 26, 2000.

TRD-200005163
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 206-3204

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The Texas Alcoholic Beverage Commission proposes a new §45.103 relating to promotional activities by retail establishments authorized to sell alcoholic beverages for on- premises consumption. This rule is proposed to replace the rule currently found at §45.103, repeal of which is contemporaneously proposed by the commission. This rule is proposed to curtail

methods of promotion, sales and service that are reasonably calculated to cause excessive consumption of alcoholic beverages by consumers.

Lou Bright, General Counsel, has determined that for the first five years this rule is in effect, there will be no fiscal impact on units of state and local government as a result of enforcing the rule.

Mr. Bright has determined that the public will benefit from this rule in that the rule will serve to curtail those practices of retailers of alcoholic beverages that are reasonably calculated to result in excessive consumption of alcoholic beverages and the injuries to person and property that are the result of such consumption. The rule governs the activities of establishments authorized to sell alcoholic beverages for on-premises consumption, many of which are small businesses. The rule proposes to curtail various methods of marketing and promoting those businesses. The rule will, therefore, have some fiscal impact on the operation of small businesses. The amount of that impact is not amenable to calculation as it will vary widely from one establishment to another.

Comments should be addressed to Lou Bright, General Counsel, P.O. Box 13127, Austin, Texas 78711.

This rule is proposed under Alcoholic Beverage Code, §5.31, which provides the commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code.

Cross Reference: Alcoholic Beverage Code, §11.61(b)(2), (7), (14) and §61.71(a)(1), (6), (17), are affected by this rule.

§45.103. On-Premises Promotions.

(a) This rule is adopted to prohibit those practices by on-premise retail establishments that are reasonably calculated to result in excessive consumption of alcoholic beverages by consumers. Such practices constitute a manner of operation contrary to the public welfare, health and safety of the people in violation of §11.61(b)(7) and §61.71(a)(17) of the Alcoholic Beverage Code.

(b) Excessive consumption of alcoholic beverages shall be determined by the standard of public intoxication articulated in §49.02 of the Penal Code.

(c) Retail licensees and permittees may not:

(1) serve, sell, or offer to serve or sell, two or more open containers of alcoholic beverages at a price less than the number of containers actually sold or served;

(2) increase the volume of alcohol contained in a drink without increasing proportionally the price thereof;

(3) serve or offer to serve more than one free alcoholic beverage to any identifiable segment of the population during the course of one business day. Licensees and permittees may, however, without prior advertising, give one free alcoholic beverage to individual consumers in celebration of birthdays, anniversaries or similar events;

(4) sell, serve, or offer to sell or serve an undetermined quantity of alcoholic beverages for a fixed price or "all you can drink" basis;

(5) sell, serve, or offer to sell or serve, alcoholic beverages at a reduced price to those consumers paying a fixed "buy in" price;

(6) sell, serve, or offer to sell or serve, alcoholic beverages at a price contingent on the amount of alcoholic beverages consumed by an individual;

(7) reduce drink prices after 11:00 p.m.;

(8) sell, serve or offer to sell or serve more than two drinks to a single consumer at one time;

(9) impose an entry fee, cover or door charge for the purpose of recovering financial losses incurred by the licensee or permittee because of reduced or low drink prices;

(10) conduct, sponsor or participate in, or allow any person on the licensed premises to conduct, sponsor or participate in, any game or contest to be determined by the quantity of alcoholic beverages consumed by an individual or group, or where alcoholic beverages or reduced price alcoholic beverages are awarded as prizes;

(11) engage in any practice, whether listed in this rule or not, that is reasonably calculated to induce consumers to drink alcoholic beverages to excess, or that would impair the ability of the licensee or permittee to monitor or control the consumption of alcoholic beverages by consumers.

(d) The provisions of subsection (c)(1) - (9) of this section do not apply where:

(1) the permittee or licensee has entered into an agreement under the terms of which all or a portion of the licensed premises are utilized for a private party or a meeting of a particular organization; or

(2) a caterer's or other temporary permit or license is used for a private party or a meeting of a particular organization.

(e) Notwithstanding the provisions of subsection (c)(1) - (7) of this section, licensees and permittees may:

(1) offer free or reduced-price food or entertainment at any time, provided the offer is not based on the purchase of an alcoholic beverage;

(2) include alcoholic beverages as part of a meal or hotel/motel package;

(3) sell, serve or deliver wine by the bottle to individual consumers;

(4) sell, serve or deliver alcoholic beverages in pitchers, carafes, buckets or similar containers to two or more consumers at one time.

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

Filed with the Office of the Secretary of State, on July 26, 2000.

TRD-200005164
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 206-3204

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TITLE 22. EXAMINING BOARDS

PART 10. TEXAS FUNERAL SERVICE COMMISSION

CHAPTER 201. LICENSING AND ENFORCEMENT--PRACTICE AND PROCEDURE

22 TAC §201.13

The Texas Funeral Service Commission proposes an amendment to §201.13, concerning Inspections.

The Texas Funeral Service Commission proposes an amendment to change the language regarding how often a licensed establishment is to be inspected. The minimum length of time indicated "annual" is being added and the minimum length of time indicated "biennial" is being deleted. The changes are proposed to conform the section with the wording of Occupations Code, Sec. 651.52(H)(1) which requires all licensed funeral establishments to be thoroughly examined annually.

O. C. "Chet" Robbins, Executive Director, Texas Funeral Service Commission, has determined that for the first five-year period this 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. Robbins, Executive Director, Texas Funeral Service Commission, has determined that for each year of the first five years the section is in effect the public benefit will insure the protection of the consumer. There will be no effect on local government. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal may be submitted to O. C. "Chet" Robbins, Executive Director, Texas Funeral Service Commission, 510 South Congress Avenue, Suite 206, Austin, Texas 78704, (512) 936-2474 or 1-888-667-4881. Comments may also be submitted electronically to crob@tfsc.state.tx.us or faxed to (512) 479-5064.

The amendment is proposed under Section 651.152 of the Texas Occupation Code, as amended by Section 18 of House Bill 3516, 76th Legislature which authorizes the Commission to issue such rules and regulations as may be necessary to effect the provisions of this Section.

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

§201.13. Inspections.

(a) (No change.)

(b) Each licensed establishment shall be, at [~~as~~] a minimum, inspected on an annual [~~a biennial~~] basis.

(c)-(e) (No change.)

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

Filed with the Office of the Secretary of State, on July 25, 2000.

TRD-200005138
O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 936-2474

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PART 11. BOARD OF NURSE EXAMINERS

CHAPTER 213. PRACTICE AND PROCEDURE

22 TAC §213.30

The Board of Nurse Examiners proposes an amendment to §213.30, Declaratory Order of Eligibility for Licensure. The Board is proposing to amend §213.30(b)(5) to eliminate a $100.00 fee for those petitioners seeking license who have mental health issues. This $100.00 fee is normally charged pursuant to §223.1(15) to cover the investigations costs for eligibility cases.

This amendment would eliminate the fee for those individuals who petition the BNE for an eligibility order exclusively because the petitioner has, "within the last five years, been diagnosed with, treated or hospitalized for schizophrenia and/or other psychotic disorders, bi-polar disorder, antisocial personality disorder or borderline personality disorder." See §223.1(15) of this title (relating to Fees).

Petitions for a declaratory order based on past criminal convictions and chemical dependency will be unaffected by this proposed rule amendment. Therefore, any petitioner seeking a declaratory order who has a criminal history or chemical dependency history will still be required to pay the fee.

Katherine A. Thomas, MN, RN, Executive Director, has determined that for the first five-year period this amendment to the rule is in effect there will be fiscal implications as a result of enforcing or administering this amended rule. Ms. Thomas has determined that the effect on state government for the first five-year period the section is in effect will be the loss of fees used in eligibility investigations not to exceed $1,000.00 per fiscal year.

Ms. Thomas also has determined that for each year of the first five years the amended rule is in effect the public benefit anticipated as a result of enforcing the rule will be greater protection for the people of Texas. There will be no effect on small businesses. There is not an anticipated economic cost to persons who are required to comply with the section as proposed.

Questions about the content of this proposal may be directed to Katherine A. Thomas, MN, RN, Executive Director, Board of Nurse Examiners, P.O. Box 430, Austin, Texas, 78767-0430. Comments will be accepted no later than 30 days from the date that this proposed amended rule is published in the *Texas Register*.

The amendment is proposed under §301.151 of the Texas Occupations Code which provide 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.

No code, statute, or rule is affected by this proposed amendment.

§213.30. Declaratory Order for Eligibility for Licensure.

(a) (No change.)

(b) The individual must submit a petition on forms provided by the Board which includes:

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

(5) the required fee which is not refundable. Notwithstanding any provision to the contrary, no fee will be required for petitions submitted pursuant to this section when the potential ineligibility is due to mental illness only.

(c)-(e) (No change.)

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

Filed with the Office of the Secretary of State, on July 28, 2000.

TRD-200005239
Katherine A. Thomas, MN, RN
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 305-6811

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CHAPTER 223. FEES

22 TAC §223.1

The Board of Nurse Examiners proposes an amendment to §223.1, concerning Fees. The Board is proposing to amend §223.1 by adding to subsection (a), paragraphs (21) and (22). As amended, §223.1(a)(21) and (22) establishes fees for initial registration for the Outpatient Anesthesia Registry, biennial renewal of registration, and fees for inspections and advisory opinions.

In the 76th Texas Legislative Session, the Nursing Practice Act was amended to include Article 4527(e). Texas Senate Bill 1340, 76th Legislature, Regular Session (1999) expressly provided the authority for the Board to establish any fees for registration, renewals, and inspections and advisory opinions.

On April 2000, §221.14 became effective and this rule meets the statutory requirement for adoption of rules relating to the practice of nurse anesthesia in such settings. Pursuant to §221.14, the Board is required to develop a registry for nurse anesthetists practicing in the applicable settings.

The Board, having considered such factors as travel expenses, time, and materials in development of the recommended fees, request that the fees be assessed as follows: $35 for renewal of registration, $625 for inspection and advisory opinion

Katherine A. Thomas, MN, RN, Executive Director, has determined that for the first five-year period this amendment to the rule is in effect there will be fiscal implications as a result of enforcing or administering this amended rule. The effect on state government for the first five-year period the section is in effect is $35,000-$36,000 per year. This number represents the average cost per year to the Board to implement this amended rule. There will be no cost to local government.

Ms. Thomas also has determined that for each year of the first five years the amended rule is in effect the public benefit anticipated as a result of enforcing the rule will be greater protection for the people of Texas. There will be no effect on small businesses except those outpatient anesthesia businesses subject to the rule. There is an anticipated economic cost to persons who are required to comply with the amended section as proposed.

Comments on the proposal may be submitted to Katherine A. Thomas, MN, RN, Executive Director, Board of Nurse Examiners, P.O. Box 430, Austin, Texas, 78767-0430. Comments will be accepted no later than 30 days from the date that this proposed amended rule is published in the *Texas Register*.

The amendment is proposed under §301.151 of the Texas Occupations Code which provide 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.

No code, statute, or rule is affected by this proposed amendment.

§223.1. Fees.

(a) The Board of Nurse Examiners has established reasonable and necessary fees for the administration of its functions.

(1)-(20) (No change.)

(21) outpatient anesthesia registry renewal--$35.00;

(22) outpatient anesthesia inspection and advisory opinion--$625.00.

(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 July 28, 2000.

TRD-200005240
Katherine A. Thomas, MN, RN
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 305-6811

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 128. PERMITS FOR CONTACT LENS DISPENSERS

25 TAC §§128.1, 128.2, 128.6, 128.10

The Texas Department of Health (department) proposes amendments to §§128.1-128.2, 128.6 and a new §128.10 concerning the regulation of persons filling contact lens prescriptions. Specifically, the amendments and new section cover introduction; definitions; violations, complaints, and disciplinary actions; and fees. Amendments are necessary to correct citations throughout 25 Texas Administrative Code, Chapter 128. House Bill 3155, 76th Legislature, 1999, compiled relevant laws into the Texas Occupations Code without altering meaning or legal effect. The Contact Lens Prescription Act, Vernon's Texas Civil Statutes, Article 4552-A was codified as the Texas Occupations Code, Chapter 353; the Opticians' Registry Act, Vernon's Texas Civil Statutes, Article 4551-1, became Texas Occupations Code, Chapter 352; and Vernon's Texas Civil Statutes, Article 6252-13c and 6252-13d were codified as the Texas Occupations Code, Chapter 53. New §128.10 sets out a schedule of fees for obtaining a contact lens dispensing permit.

L. Jann Melton-Kissel, Director of Budget and Legislative Policy Analysis, Bureau of Licensing and Compliance 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 sections as proposed. The proposed increase

in permit fees and the establishment of late renewal penalties are estimated to generate additional revenues of $46,000 each year of the first five years for state government. The increase in permit fees will offset current costs associated with enforcing and administering the Contact Lens Prescription Act. There will be no effect on local government.

Ms. Melton-Kissel 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 the sections will be to protect public health by requiring that contact lenses are only dispensed by persons and entities holding a contact lens dispensing permit.

There will be a varying impact on small businesses, micro-businesses and large businesses that sell or dispense contact lenses to consumers in Texas. Actual costs will vary significantly because the Contact Lens Prescription Act allows a business entity with at least ten contact lens dispensing locations to obtain a single permit for the entity and its employees. Business entities with one to nine locations will incur additional costs of $200 per location; however, business entities with ten or more locations will only incur an additional cost of $200. The cost to persons registered with the department under the Opticians' Registry Act will be an additional $40 per year and the cost to persons who are not registered under the Opticians' Registry Act is an increase of $50 per year. Additionally, business entities and persons who fail to renew timely will incur late renewal penalty fees of one and one-half times the annual permit fee if renewed within 90 days following the expiration date or two times the annual permit fee if renewed after 90 days but within one year of the expiration date. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Stephen Mills, Program Administrator, Contact Lens Permit Program, Professional Licensing and Certification Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3183, (512) 834-4515. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendments and new section are proposed under Texas Occupations Code, Chapter 353, Chapter 352, and Chapter 53, which provide the Board of Health (board) with the authority to adopt rules; 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.

The amendments and new section affect the Texas Occupations Code, Chapter 353, Chapter 352, and Chapter 53.

§128.1. Introduction.

(a) Purpose. This chapter implements the applicable provisions of the Texas Contact Lens Prescription Act, Texas Occupations Code, Chapter 353 [~~Texas Civil Statutes, Article 4552-A~~], concerning the issuance of a contact lens prescription, a patient's right of access to that prescription, and the regulation of persons filling contact lens prescriptions.

(b) (No change.)

§128.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words and terms defined in the Texas Contact Lens Prescription Act shall have the same meaning in this chapter that they are assigned in the Act.

(1) Act - The Texas Contact Lens Prescription Act, Texas Occupations Code, Chapter 353 [~~Texas Civil Statutes, Article 4552-A~~].

(2) Administrator - The department employee designated as the administrator of the permitting activities authorized by the Act.

(3) Applicant - A person or entity who applies for a permit under the Act.

(4) Board - The Texas Board of Health.

(5) Commissioner - The Commissioner of the Texas Department of Health.

(6) Department - The Texas Department of Health.

(7) Optician - A person, other than a physician, optometrist, therapeutic optometrist, or pharmacist who is in the business of dispensing contact lenses.

(8) Permit - A contact lens dispensing permit issued under the Act to an optician, a corporation, or other business entity that fills a contact lens prescription in this state or sells, delivers, or dispenses contact lenses to any person in this state.

§128.6. Violations, Complaints, and Disciplinary Actions.

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

(d) Department actions.

(1) The board may deny a permit application or permit renewal application or suspend or revoke the permit, or place the permit on probation for a violation of the Act or this chapter. The board may also impose an administrative penalty of not more than $1,000 for a violation of the Act. Administrative penalties shall be assessed in accordance with the procedures set forth in the Opticians' Registry Act, Texas Occupations Code, Chapter 352, Subchapter G (relating to Administrative Penalty) [~~Texas Civil Statutes, Article 4551-1, §10A~~].

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

(e) Formal hearings.

(1) A formal hearing shall be conducted in accordance with the Administrative Procedure Act, Government Code, Chapter 2001[~~, and Chapter 1 of this title (relating to Texas Board of Health)~~].

(2) (No change.)

(f) Guidelines concerning criminal convictions.

(1) The purpose of this section is to comply with the requirements of the Texas Occupations Code, Chapter 53, Subchapter C (Notice and Review of Suspension, Revocation, or Denial of License) [~~Texas Civil Statutes, Article 6252-13d (Suspension, Revocation, or Denial of License to Persons with Criminal Backgrounds; Guidelines and Application of Law)~~].

(2) The department may deny a permit application or a permit renewal application, or revoke, suspend, or place on probation an existing permit if an applicant or permit holder has been convicted of a crime (felony or misdemeanor) according to the following guidelines:

(A) (No change.)

(B) the factors and evidence listed in Chapter 53, Subchapter B [~~Article 6252-13c, §4~~] (Ineligibility for License [~~Eligibility of Persons with Criminal Backgrounds for Certain Occupations, Professions, and Licenses~~]) shall be considered in determining eligibility for a permit.

§128.10. Fees.

(a) The annual permit fees are as follows:

(1) $50 for an optician who has registered with the department under the Opticians' Registry Act, Texas Occupations Code, Chapter 352;

(2) $75 for an optician who has not registered with the department under the Opticians' Registry Act, Texas Occupations Code, Chapter 352; and

(3) $300 for a business entity.

(b) A person whose permit has been expired for 90 days or less may renew the permit by paying to the department a renewal fee that is equal to one and one-half times the normally required annual permit fee.

(c) A person whose permit has been expired for more than 90 days but less than one year may renew the permit by paying to the department a renewal fee that is equal to two times the normally required annual permit fee.

(d) A person whose permit has been expired for one year or more may not renew the permit. The person may obtain a new permit by complying the requirements and procedures for an original permit.

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

Filed with the Office of the Secretary of State, on July 27, 2000.

TRD-200005198
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 458-7236

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CHAPTER 221. MEAT SAFETY ASSURANCE

The Texas Department of Health (department) proposes the repeal of existing §221.1 and §221.2, and new §§221.1-221.9, concerning minimum standards for transporting dead animals and rendering. New §§221.1-221.9 covers general provisions; definitions; licensing requirements, construction permit requirements, exemptions, fees, and procedures; vehicles, identification of vehicles, and vehicle permit decals; records, rendering business construction, operational requirements, and grounds; prohibited acts; assessment of administrative penalties; and denial, suspension or revocation of license or permit, enforcement provisions and reinstatement.

Section 221.1 and §221.2 are being proposed for repeal for the purpose of implementing Senate Bill (SB) 1532 which was enacted during the 76th Texas Legislature, Regular Session, 1999. SB 1532 became effective September 1, 1999, and makes application of the Act prospective to January 1, 2001. The new §§221.1-221.9 contain new language to clarify existing requirements for rendering businesses and dead animal or renderable raw material haulers. The new sections establish new license fees for certain rendering businesses. The new sections clarify the department's inspection authority and enforcement options available under Health and Safety Code, Chapter 144, Texas Renderers' Licensing Act (the Act).

Pursuant to the Government Code, §2001.39, each state agency is required to review and consider for readoption each rule adopted by that agency. The current rules have been reviewed and the department has determined that reasons for adopting the sections continue to exist. However, for the purpose of implementing Senate Bill 1532, the current rules are being repealed and new rules are being proposed.

The department published a Notice of Intention to Review for §221.1 and §221.2 as required by Government Code, §2001.039 in the *Texas Register* on December 17, 1999 (24 TexReg 11542). No comments were received as a result of the publication of the notice.

Lee C. Jan, D.V.M., Director, Meat Safety Assurance 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. It is estimated that the costs to the department to enforce the new provisions will be approximately $90,000 per year. Since SB 1532 was amended to allow the department to set the fees by rule, the new provisions propose a new fee schedule, which will generate an estimated $90,000 per year in revenue to recover the department's costs in implementing and enforcing the Act and the new rules.

Dr. Jan has also determined that for each year of the first five years the sections are in effect, the anticipated public benefit will be continued assurance of consumer safety by enforcing new regulations relating to transporting dead animals and rendering. The anticipated cost to micro-businesses and small businesses will be a graduated annual fee increase, an annual vehicle permit fee, and a one-time permit fee increase for new construction or renovation. Annual fee increases are commensurate with the size of the business, from $50 to $1,200 per year for operating licenses, $100 to $200 per year for various station and hauler licenses, and $25 per year per vehicle. One-time permit fee increases are commensurate with the cost of the construction process from $150 to $500. There will be no impact to local employment.

Comments on the proposal may be submitted to Bobby G. Blackwell, Meat Safety Assurance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756; (512) 719-0205. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*. In addition, a public hearing will be held at 1:00 p.m. on Tuesday, August 28, 2000, in Room K-100 at the Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

SUBCHAPTER A. TRANSPORTING DEAD ANIMALS

25 TAC §221.1, §221.2

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of 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 §144.074, which provides the Texas Board of Health with the authority to adopt necessary regulations pursuant to the enforcement of this chapter, and §12.001, which provides the Texas Board of Health 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 proposed repeals affect Health and Safety Code, Chapter 144.

§221.1. Identifying Vehicles Transporting Dead Animals.

§221.2. 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 July 27, 2000.

TRD-200005214
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 458-7236

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SUBCHAPTER A. TRANSPORTING DEAD ANIMALS AND RENDERING

25 TAC §§221.1 - 221.9

The new sections are proposed under the Health and Safety Code §144.074, which provides the Texas Board of Health with the authority to adopt necessary regulations pursuant to the enforcement of this chapter, and §12.001, which provides the Texas Board of Health 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 Health and Safety Code, Chapter 144.

§221.1. General Provisions.

(a) These sections provide for the licensing and regulation of rendering businesses; transporters of renderable raw materials and dead animals; and locations where a rendering business is being conducted.

(b) The Texas Renderers' Licensing Act, Health and Safety Code, Chapter 144, provides the department with the authority to adopt rules consistent with the chapter as necessary pursuant to the enforcement of this chapter.

(c) No person may cause, suffer, or allow the operation, management, or maintenance of a rendering business or rendering business location without a license issued by the department in accordance with these sections.

(d) All rendering businesses and rendering business locations shall comply with the minimum standards specified in these sections in addition to existing standards contained in the Texas Renderers' Licensing Act and the Texas Meat and Poultry Inspection Act, Health and Safety Code, Chapter 433, relating to adulteration and misbranding.

(e) Any person who transports renderable raw materials and/or dead animals from any place within this state to any place outside of borders of this state must have a valid rendering business license issued by the department.

(f) As a condition of licensing, the department may prescribe other responsible and appropriate construction, operational, maintenance and inspection requirements to ensure compliance with this chapter and other applicable rules of the department.

§221.2. Definitions.

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

(1) Act--The Texas Renderers' Licensing Act, Texas Health and Safety Code, Chapter 144.

(2) Authorized agent--An employee of the department designated by the commissioner to enforce the Act.

(3) Commissioner--Commissioner of the Texas Department of Health.

(4) Department--The Texas Department of Health.

(5) Dead animal--The whole or substantially whole carcass of a dead or fallen domestic animal, or domesticated wild animal, that was not slaughtered for human consumption.

(6) Dead animal hauler--A person who collects and disposes of dead animals for commercial purposes.

(7) Disposal--The burying, burning, cooking, processing, or rendering of dead animals or of renderable raw materials.

(8) Employee--A person who:

(A) is a legal employee of a rendering establishment; and

(B) handles or operates rendering equipment, utensils, containers, packaging materials or vehicles, owned or leased by the rendering establishment which are used to transport renderable raw material, recyclable cooking oil and/or waste cooking grease, and dead animals.

(9) Feed grade fats and oils--Those fats or oils which have been obtained from edible fat and oil processing and include fatty acid products that result from the commercial rendering of animal tissues and from the processing of edible vegetables and plants.

(10) Grease trap/grit trap waste--Industrial grade oil as defined in paragraph (11) of this section and as such is not suitable for use as animal feed or topical cosmetics.

(11) Industrial grade oil--A product not suitable for use in livestock feeds, and includes:

(A) tall oils--resinous by-product from the manufacturing of chemical wood pulp;

(B) by-products which have been used in or derived from nonfood manufacturing processes;

(C) salvage or sludge type oils which may consist in part of feed grade material, but which may also contain potential contaminants from a manufacturing process or the environment; and

(D) oils exposed to pesticides, polychlorinated biphenyls (PCBs), industrial chemicals, heavy metals, or other adulterants.

(12) Inedible kitchen grease--Any unprocessed or partially processed grease, fat, or oil previously used in the cooking or preparation of food for human consumption and no longer suitable for such use.

(13) Nuisance--Any situation or condition that constitutes a nuisance under the Health and Safety Code, §341.011.

(14) Operating license--A valid operating license issued by the department for each of the following:

(A) a rendering establishment;

(B) a related station;

(C) a transfer station;

(D) a renderable raw material hauler;

(E) a dead animal hauler; or

(F) a combination dead animal and renderable raw material hauler.

(15) Person--An individual, firm, partnership, association, corporation, trust, company, or organization, and includes an agent, officer, or employee of that individual or entity.

(16) Pests--Any objectionable animal or insect including, but not limited to: rodents, flies, larvae, and birds.

(17) Processing--An operation or combination of operations through which materials derived from a dead animal or renderable raw material sources are:

(A) prepared for disposal at a rendering establishment;

(B) stored; or

(C) treated for commercial use or disposition, other than as food for human consumption.

(18) Recyclable cooking oil--Any unprocessed or partially processed grease, fat, or oil previously used in the cooking or preparation of food for human consumption and intended for recycling by being used or reused as:

(A) an ingredient in a process to make a product; or

(B) an effective substitute for a commercial product.

(19) Related station--An operation or facility that is necessary, useful, or incidental to the operation of a rendering establishment and that is operated or maintained separately from the rendering establishment.

(20) Rendering business--The collection, transportation, disposal, or storage of dead animals or renderable raw materials for commercial purposes at locations where dead animals or renderable raw materials are rendered, boiled, processed, stored, transferred, or otherwise prepared, either as a separate business or in connection with any other established business.

(21) Rendering establishment--An establishment or part of an establishment, a plant, or any other premises at which dead animals or renderable raw materials are rendered, boiled, processed, or otherwise prepared to obtain a product for commercial use or disposition, other than as food for human consumption. The term includes all other operations and facilities that are necessary or incidental to the establishment.

(22) Renderable raw material--Any unprocessed or partially processed material of animal or plant origin, other than a dead animal, that is to be processed by rendering establishments. The term includes:

(A) animals, poultry, or fish slaughtered or processed for human consumption but that are unsuitable for that use;

(B) the inedible products and by-products of animals, poultry, or fish slaughtered or processed for human consumption;

(C) parts from dead animals;

(D) whole or partial carcasses of dead poultry or fish;

(E) waste cooking greases; and

(F) recyclable cooking oil.

(23) Renderable raw material hauler--A person who collects or transports renderable raw materials for commercial purposes.

(24) Renderable raw material hauling vehicle--Any motorized vehicle or detachable trailer used in the collection, receipt, transportation, delivery, transfer, or storage of renderable raw materials for commercial purposes.

(25) Transfer station--A facility at which renderable raw materials are transferred from one conveyance to another.

(26) Vehicle permit decal--A valid registration decal issued by the department.

(27) Waste cooking grease--Any unprocessed or partially processed grease, fat, or oil previously used in the cooking or preparation of food for human consumption and no longer suitable for such use, also defined as inedible kitchen grease.

(28) Waste cooking grease hauler--Any person who collects, receives, transports, delivers, transfers, or stores incidental to such activities renderable raw material for commercial purposes, whether or not such person is required to obtain a renderable raw material hauler license.

§221.3. Licensing Requirements, Construction Permit Requirements, Exemptions, Fees and Procedures.

(a) Licensing requirements. All rendering businesses, renderable raw material haulers and/or dead animal haulers shall obtain a license annually from the department for each business and/or place of business operated as a:

(1) rendering establishment;

(2) related station;

(3) transfer station;

(4) renderable raw material hauler;

(5) dead animal hauler; or

(6) combination dead animal and renderable raw material hauler.

(b) Construction permit requirements. A person shall, prior to construction, obtain a construction permit (except as provided by the Act, §144.042) to construct a new rendering business or initiate construction involving replacement, addition, renovations or expansion of a rendering business as a:

(1) rendering establishment;

(2) related station; or

(3) transfer station.

(c) Exemptions from licensing requirements. Rendering business licensing requirements do not apply to the following:

(1) a person who slaughters, butchers, manufactures, or sells animal flesh or products only for use as food for human consumption, unless the person also performs rendering operations or processes as defined in this subchapter;

(2) a person who transports or disposes of the bodies of animals slaughtered for use as food for human consumption or the products of these bodies only for that purpose;

(3) an individual who disposes of the individual's own animal; or

(4) a governmental agency that collects, transports, or disposes of dead animals and renderable raw materials.

(d) Exemption from construction permit requirements. A construction permit fee is not required if the following conditions are met.

(1) The construction of a new rendering business is less than $10,000.

(2) The construction at a licensed rendering business is less than $10,000.

(e) The construction and layout requirements established under the Act applies to the construction.

(f) The department may prescribe other reasonable and appropriate construction, operational, and maintenance requirements to ensure compliance with the Act and rules of this chapter.

(g) License fee. All rendering businesses, renderable raw material haulers and/or dead animal haulers operating in Texas shall obtain a license annually with the department except as provided for in subsection (c) of this section and shall pay a licensing fee for each rendering business operated as follows:

(1) $350 for rendering establishments having gross annual sales not exceeding $100,000;

(2) $500 for each rendering establishments having gross annual sales exceeding $100,000 but not more than $200,000;

(3) $750 for each rendering establishments having gross annual sales exceeding $200,000 but not more than $500,000;

(4) $1,000 for each rendering establishment having gross annual sales exceeding $500,000 but not more than $1 million;

(5) $1,500 for each rendering establishment having gross annual sales exceeding $1 million;

(6) $400 for each related station license;

(7) $400 for each transfer station license;

(8) $250 for each dead animal hauler license;

(9) $250 for each renderable raw material hauler license; and

(10) $250 for each combination dead animal and renderable raw material hauler license.

(h) Vehicle permit decal fee. Except as exempted under subsection (c) of this section, a renderable raw material and/or dead animal hauling vehicle shall not be allowed to collect and transport dead animals or renderable raw materials unless such vehicle displays a decal as prescribed by the department and shall pay a permit decal fee of $25 for each vehicle.

(i) Construction permit fee. An application for a construction permit must be accompanied by a fee payable to the department and will be based on the dollar value of construction cost as listed in this paragraph. The applicant must provide validated information and any other information required by the department to verify the construction cost. If construction cost is:

(1) Less than $10,000, then there is no permit fee required;

(2) $10,000 - $49,999, the fee is $250;

(3) $50,000 - $99,999, the fee is $500;

(4) $100,000 - $249,999, the fee is $1,000;

(5) $250,000 - $499,999, the fee is $1,500; and

(6) $500,000 and over, the fee is $2,500.

(j) License forms. License forms may be obtained by mail from the Meat Safety Assurance Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3182, or from the Bureau of Food and Drug Safety website at http://www.tdh.state.tx.us/bfds/lic/apps.html.

(k) License applications and construction permits. A license or construction permit application for each rendering business, renderable raw material hauler and/or dead animal hauler shall be signed by the applicant and notarized, shall be made on the license application furnished by the department, shall be completed in its entirety, and shall be submitted with the license or construction permit fee.

(l) Issuance of license. The department may issue a license to the owner of a rendering business, renderable raw material hauler, and/or dead animal hauler after determining that the application is complete and the applicant is in compliance with the Act and rules in this chapter.

(1) A rendering business, renderable raw material hauler and/or dead animal hauler operating license shall be valid from the date of issuance until 12:00 midnight, December 31 of the calendar year in which the license was issued.

(2) The license shall be displayed in a prominent place at the physical rendering business location.

(3) A photocopy of the license should be placed in each rendering business vehicle used to collect dead animals and/or renderable raw material.

(m) Renewal of license--applicable to all operations subject to the Act.

(1) Each year the license holder shall renew his operator's license in accordance with the requirements of this section.

(2) The license holder shall renew the license by filing an application for renewal on the form prescribed by the department accompanied by the required licensing fee set by the department. A licensee must file for renewal before the expiration date of the current license.

(3) If the renewal fee is not paid before the expiration of the 15th day after the date on which written notice of delinquency is provided to the license holder by the department, the license expires.

(4) If an operating license expires, a new application for an operating license must be submitted along with the appropriate fee.

(5) Failure to submit the renewal application annually may subject the rendering business to the enforcement provision of this chapter, §221.8 (relating to Assessment of Administrative Penalties) and §221.9 (relating to Denial, Suspension, or Revocation of License or Permit and Enforcement Provisions.)

(6) Falsification of an application will be grounds for denial or revocation of a license.

(n) Transferability of license. A rendering business license is not transferable.

§221.4. Vehicles, Identification of Vehicles and Vehicle Permit Decals.

(a) Vehicles:

(1) must be leak proof;

(2) must be sanitized each day of use and maintained in a manner to preclude the creation of a nuisance;

(3) may not be used to transport articles intended for use as, or for the preparation of, human food; and

(4) must comply with each applicable requirement of the Texas Department of Public Safety for operation on public roads or highways as follows:

(A) Verification of vehicle compliance with applicable insurance requirements must either be kept in the vehicle or be in the possession of the driver.

(B) Vehicle must comply with gross vehicle weight limitations.

(b) Identifying vehicles. Each licensee operating vehicles used in transporting dead animals and/or rendering raw materials under the

provisions of this chapter shall have such vehicles identified in the following manner.

(1) Every vehicle used in the transportation of renderable raw materials and/or dead animals shall display the name of the owner of the vehicle in letters not less than two inches high on the outside of the driver side front doors of the vehicle or on the driver side lower front corner of the box or trailer in a color contrasting distinctly with the background.

(2) The license number shall be permanently affixed to the outside of each front door of the vehicle or on each side of the lower front corner of the box or trailer in letters two inches high, and in a color contrasting distinctly with the background. Preceding the license number shall be the inscription "TRLA".

(3) The identification shall be an integral part of the license, and shall expire with said license. Upon sale or trade of any vehicle bearing such identification, it shall be the responsibility of the licensee to remove the identification.

(4) Collection vehicles being operated and licensed under the provision of this chapter shall bear, in addition to the identification described in this section, an identifying decal issued by the department by which it may be distinguished from all other vehicles. The decal will be displayed in the windshield of the vehicle or in another location as approved by the department (i.e., combination truck/trailer transport).

(5) In the event a mechanical failure of a permitted vehicle, the licensee should immediately contact the department and provisions will be made for the issuance of a temporary permit for a period not exceeding 30 days, provided the replacement vehicle meets all requirements of this section.

(c) Vehicle permit decal.

(1) The owner of a renderable raw material and/or dead animal transport vehicle may not operate or allow operation of a vehicle on public roads and highways to haul dead animals or renderable raw materials unless the vehicle bears a permit decal issued by the department.

(2) To obtain a vehicle permit decal or a temporary vehicle permit from the department, the owner must provide the following information:

(A) the name, address and phone number where the owner or operator of the vehicle can be contacted;

(B) a description of the operations to be performed;

(C) the year, make, model, license plate number, and manufacturer's vehicle identification number for the vehicle;

(D) the vehicle's gross weight limitation;

(E) verification of insurance;

(F) a list of drivers' names, and respective Texas drivers license numbers, of employees who operate the vehicle; and

(G) other information as may be required by the department to verify information in this paragraph.

§221.5. Records.

(a) Each licensed rendering business, renderable raw material hauler and/or dead animal hauler must maintain records identifying locations where renderable materials were obtained and delivered. These records must be maintained for a period of 12 months from the date the record was created.

(b) Each licensed rendering business and/or animal hauler shall have a log bearing the name of the licensed rendering business or dead animal hauler on the front of the log. The following information shall be entered into the log immediately upon receipt of a dead animal:

(1) the date and time of pickup and the number of dead animal(s) picked up at each location;

(2) the collection vehicle driver's name;

(3) a description of the dead animal(s);

(4) the location and county where the dead animal(s) was/were picked up;

(5) the name of the owner or person in possession of the dead animal(s); and

(6) the general route followed in making the collection and delivery to the rendering establishment. (This information may be kept in an appendix to the log.)

(c) The log is subject to inspection at all reasonable times by an authorized employee of the department.

(d) Refusal to present the log for inspection by an authorized employee of the department constitutes grounds for license revocation and/or other enforcement as provided in the Act and the rules in this chapter.

(e) Compliance with this chapter does not excuse violation of the requirements in Health and Safety Code, Chapter 433, §433.029 relating to articles not intended for human consumption; §433.034 relating to records; §433.056 relating to inedible animal products, §433.083 relating to investigation by the commissioner; §433.085 relating to reporting to the commissioner; and §433.091 relating to false reports, failure to report.

§221.6. Rendering Business Construction, Operational Requirements and Grounds.

(a) Construction. All construction of a rendering establishment, related station or transfer station must meet the minimum requirements of Health and Safety Code, §§144.051-144.055, except to the extent the department grants a written variance. The construction:

(1) must provide for sanitary operations and environmental conditions;

(2) must prevent the spread of disease-producing organisms and infectious or noxious materials;

(3) must prevent the development of a malodorous condition or a nuisance; and

(4) shall be suitable in size, construction, and design to facilitate maintenance and sanitary operations for the rendering process.

(A) Plant buildings and structures must provide sufficient space for placement of equipment and storage of materials as is necessary for the maintenance of sanitary operations.

(B) Plant buildings and structures must be constructed in such a manner that floors, walls, ceilings, and equipment may be adequately cleaned and kept clean and in good repair.

(i) All exposed surfaces, including, but not limited to, floors, ceilings, doors, equipment, and overhead structures shall be a smooth washable surface of concrete, metal, or other equally impervious and easily cleanable material.

(ii) Floors in all raw material processing areas should be sloped for drainage purposes.

(C) Plant buildings and structures must provide protection against the entrance and harborage of pests including, but not limited to:

(i) eliminating crevices and/or openings that may provide shelter or harborage for pests; and

(ii) providing, where necessary, screening or other protection against pests.

(D) Plant buildings and structures must be equipped with, and provide for, adequate sanitary facilities and accommodations, including, but not limited to:

(i) toilet and dressing room facilities for employees of each sex, adequately vented to outside air;

(ii) hand wash facility with hot and cold running water-utilizing fixtures, such as waste control valves, designed and constructed to protect against recontamination of clean hands;

(iii) suitable sanitizing preparation to clean hands; and

(iv) sanitary towels or other suitable drying device(s).

(E) Water supply shall be sufficient for the operations intended and shall be derived from a potable source, either a public water supply or a private supply, tested and treated, if necessary, to insure a safe sanitary quality.

(i) Hot and cold running water under ample pressure shall be provided in all areas where required for the cleaning of floors, walls, equipment, utensils, vehicles and employee sanitary facilities.

(ii) The hot water system must have sufficient capacity to furnish ample water with a temperature of at least 180 degrees Fahrenheit during processing and cleanup.

(iii) Water from unsafe or questionable sources may be used only for limited purposes such as fire control or condenser systems and such supply lines must be clearly identified.

(iv) Other than hand-operated sinks with hot and cold water, sanitary towels or other suitable drying devices and hand cleaning sanitizer must be placed at strategically acceptable locations throughout the plant to ensure employee hygiene.

(v) A potable source of drinking water must be provided in a readily accessible area.

(F) Plumbing must be installed in compliance with state law and applicable local plumbing ordinances and must be designed, installed and maintained to protect the establishment's water supply from contaminants through cross-connections, back siphonage or backflow leakage.

(i) Drainage must be provided in all areas where floors are subject to wash down type cleaning or when normal operations release or discharge water or other liquid waste on the floor.

(ii) Discharge into the drainage system of solid wastes likely to clog the drainage system should be prevented.

(iii) Liquid wastes containing solid material must be passed through a separator or indirect receptor that retains the solids before discharge into the drainage system.

(iv) Toilet soil lines must be separate from house drain lines and must connect to the sanitary sewage system at a point past the grease trap or separator system.

(G) Truck washing. A rendering business shall provide a paved, curbed area sloped to drain, adequate in size for washing and sanitizing vehicles. This area must be provided with adequate hot water sufficient to sanitize the vehicle. The paved area must be provided with adequate drainage that leads to a sewer system.

(H) Equipment and utensils shall be so designed and of such material and workmanship as to be cleanable and properly maintained.

(i) The design, construction and use of equipment and utensils shall preclude the adulteration of renderable materials with contaminants unacceptable for use as animal feed or topical cosmetics.

(ii) All equipment should be so installed and maintained as to facilitate cleaning of the equipment and all adjacent spaces.

(iii) Holding, conveying and manufacturing systems should be designed and constructed so as to be maintained in a clean condition.

(iv) Freezer and cold storage compartments used to store and hold renderable raw materials shall be so designed and of such materials and workmanship as to be easily cleaned and properly maintained.

(I) A rendering business shall provide and maintain a sufficient odor abatement system to dispel disagreeable odor, condensate, and vapor.

(J) A rendering business shall prevent malodorous condition in a manner acceptable to the Texas Natural Resource Conservation Commission (TNRCC).

(b) Operational requirements. All rendering business operations including, but not limited to, the receiving, transporting, segregating, preparing, manufacturing, and storing of renderable raw materials, dead animals and finished products, shall be conducted in accordance with good public health sanitation principles.

(1) Appropriate quality control measures shall be employed to ensure products intended for use as animal foods or topical cosmetics are suitable for such use.

(2) Overall sanitation of the rendering business shall be under the supervision of one or more competent individuals assigned responsibility for this function. Renderable raw materials and/or dead animals received by a rendering business should be immediately placed in the rendering process; but may be stored for a period that shall not exceed 48 hours and in a manner that shall preclude the creation of a nuisance or a malodorous condition.

(3) During operations, the floors in the processing areas shall be kept reasonably free from processing wastes, including but not limited to:

(A) blood;

(B) manure;

(C) scraps;

(D) grease;

(E) water;

(F) dirt;

(G) litter; or

(H) other objectionable conditions.

(4) Floors shall be thoroughly cleaned at the end of each day's operations.

(5) Cooking and/or other dehydration operations shall be conducted in a manner that prevents the survival of disease-producing organisms in the processed materials.

(6) All cooked or finished materials shall be kept separate and apart from dead animals and/or renderable raw materials in a manner that prevents contamination.

(7) Conditions or storage facilities that lend themselves to the possibility and/or probability of cross-contamination of finished product should be corrected, eliminated, or replaced in a manner acceptable to the department.

(8) Protein derived from mammalian tissue may not be used in feed for ruminant animals as prohibited by Title 21, Code of Federal Regulations, Part 589.2000. Renderers that do not separate prohibited from nonprohibited material shall do the following to be in compliance with U.S. Food and Drug Administration (FDA) requirements:

(A) label all products that contain or may contain prohibited material with the following statement, "Do not feed to cattle or other ruminants"; and

(B) maintain records sufficient to trace the materials through their receipt, processing, and distribution.

(9) A rendering business, renderable raw material hauler and/or dead animal hauler may not contaminate or commingle waste cooking greases or recyclable cooking oils with grease trap waste or grit trap waste, or any other substance that would render the greases or oil harmful or otherwise unsuitable for use as an ingredient intended for use in livestock feed or topical cosmetic products.

(c) Grounds. The premises of a rendering business, under the control of the operator shall be kept clean and neat, in good repair, and reasonably free from refuse, waste materials, rodent infestation, insect breeding places, standing water, and other objectionable conditions. The methods for adequate maintenance of grounds include, but are not limited to:

(1) properly storing equipment, removing litter and waste, and cutting weeds or grass within the immediate vicinity of the plant buildings or structures that may constitute an attractant, breeding place, or harborage for pests;

(2) constructing and/or maintaining refuse receptacles in a manner that does not create a nuisance and/or become an attractant for pests;

(3) conveying, storing and disposing of rubbish and waste materials so as to minimize the development of odor; minimize the potential for the waste becoming an attractant, harborage, or breeding place for pests; and protect against contamination of the water supply and ground surfaces;

(4) maintaining roads, yards, and parking lots so that they:

(A) do not have standing pools of water;

(B) become an attractant for pests; or

(C) constitute a nuisance.

(5) draining areas that may contribute to, or provide, a breeding place for pests; and

(6) operating waste treatment and disposal systems such as grease traps, separators, and similar equipment in a manner that does not create a nuisance.

§221.7. Prohibited Acts.

Prohibited acts include but are not necessarily limited to the following.

(1) A person shall not operate a rendering business without first obtaining a license issued by the department.

(2) A person shall not steal or misappropriate renderable raw materials of any type.

(3) A person shall not contaminate or otherwise cause adulteration of waste cooking grease by commingling it with unacceptable materials, such as, but not limited to, grease trap waste, if such waste cooking grease is intended for use in livestock feed or topical cosmetics.

(4) No licensed rendering business or any other person shall take possession of renderable raw material from a person not licensed by the department and whose vehicle does not display a vehicle permit decal issued by the department in a manner prescribed by the department.

(5) A person shall not take possession of stolen renderable raw materials, which include waste cooking grease.

(6) A person not licensed by the department may not transport renderable raw materials from any place within this state to any place outside the borders of the state.

(7) A person may not receive, hold, slaughter, butcher, or otherwise process any animal as food for human consumption in a building or compartmented area of a building used as a rendering establishment or related station.

(8) A person may not transport items intended for use as, or in the preparation of, food, in vehicles used to transport dead animals or renderable raw materials.

§221.8. Assessment of Administrative Penalties.

(a) Administrative penalties and hearings. Administrative penalties may be assessed against a person who violates this chapter or the Act. A person who receives notice that an administrative penalty is proposed to be assessed, shall have the right to request a formal hearing, or to show compliance with the rules. A hearing shall be held under the provisions of the Administrative Procedures Act, Government Code, Chapter 2001, and the State Office of Administrative Hearings (SOAH) rules contained in 1 TAC, Chapter 155.

(b) Criteria for the assessment of administrative penalties. The department shall assess administrative penalties in accordance with the following criteria:

(1) the seriousness of the violation;

(2) history of previous violations:

(A) the department may consider previous violations;

(B) the base penalty may be reduced or increased based on past performance; and

(C) past performance involves the consideration of the following factors:

(i) how similar the previous violation was;

(ii) how recent the previous violation was; and

(iii) the number of previous violations in regard to correction of the problem.

(3) demonstrated good faith:

(A) the department may consider demonstrated good faith;

(B) the base penalty may be reduced if good faith efforts to correct a violation have been made, or are being made; and

(C) good faith effort may be determined by the department on a case-by-case basis and shall be fully demonstrated by the alleged violator.

(4) hazard to the health and safety of the public:

(A) the department may consider the hazard to the health and safety of the public;

(B) the base penalty shall be increased when a direct hazard to the health and/or safety of the public is involved; and

(C) the department may take into account, but need not be limited to, the following facts:

(i) whether any disease or injuries have occurred from the violation;

(ii) whether any existing condition contributed to a situation that could expose humans to a health hazard; or

(iii) whether the consequences would be of an immediate or long-range hazard; and

(5) other factors. The department may consider other factors as justice may require.

(c) Severity levels.

(1) Violations. The violations may be categorized by one of the following severity levels.

(A) Severity Level I covers violations that are most significant and have a direct negative impact on, or represent a threat to, the public health and safety. Examples of Severity Level I violations include, but are not limited to:

(i) operation of any licensable rendering related activity without a license;

(ii) willfully diverting inedible products into human food channels; or

(iii) the adulteration of any product intended for use in animal food or topical cosmetics which would make it unsuitable for such use.

(B) Severity Level II covers violations that are very significant and have impact on the public health and safety. Examples of Severity Level II violations include, but are not limited to:

(i) taking possession of stolen renderable raw materials, which includes waste cooking grease;

(ii) continuing to operate any rendering business following expiration of a license;

(iii) failure to provide access to premises to department representatives for the purpose of conducting a compliance inspection or complaint investigation; or

(iv) any other act that results in fraud.

(C) Severity Level III covers violations that are significant and which, if not corrected, could threaten the public and have adverse impact on the public health and safety. Examples of Severity Level III violations include, but are not limited to:

(i) operating a renderable raw material collection vehicle which does not display a vehicle permit decal issued by the department in a manner prescribed by the department;

(ii) purchasing renderable raw materials from a hauler that is not licensed by the department if required by the Act;

(iii) purchasing renderable raw materials from a person whose collection vehicle does not display a vehicle permit decal; or

(iv) construction of new facilities and/or additions to existing facilities without a construction permit.

(D) Severity Level IV covers violations that are of more than minor significance, and if left uncorrected, would lead to more serious circumstances. Examples of Severity Level IV violations include, but are not limited to:

(i) falsifying any information on an application for a rendering business operator's license or a hauler's license;

(ii) creating a nuisance as defined by Health and Safety Code §341.011;

(iii) failing to provide upon request, a record of all purchases and sales of renderable raw material as required by §221.5 of this title (relating to Records).

(iv) operating any rendering related activity in excess of fifteen days following notification of expiration of a current license; or

(v) constructing any facility or addition to an existing facility without having a construction permit as required by the Act and the rules of this chapter.

(E) Severity Level V covers violations that are of minor safety or fraudulent significance. Examples of Severity Level V violations include, but are not limited to:

(i) failing to maintain a minimum level of sanitation;

(ii) failing to maintain a clean leak-proof vehicle; or

(iii) failing to display the required and correct Texas Renderers' Licensing Act number and business name on vehicles used in his/her rendering business.

(2) Severity of a violation. The severity of a violation may be increased if the violation involves deception, fraud, or other indication of willfulness. In determining the severity of a violation, the department shall take into account the economic benefit gained through noncompliance.

(d) Levels of penalties. The department will impose the following penalties according to the severity level:

(1) Level I--$15,000;

(2) Level II--$10,000;

(3) Level III--$6,250;

(4) Level IV--$3,750; and

(5) Level V--$1,250.

(e) Each day a violation continues may be considered a separate violation.

§221.9. Denial, Suspension or Revocation of License or Permit and Enforcement Provisions.

(a) Basis. The department may, after providing notice and opportunity for hearing, deny, suspend or revoke a license or permit for violations of the requirements in the Act and the rules in this chapter.

(b) Hearing. All hearings for the denial, suspension or revocation of a license or permit are governed by the SOAH rules contained in 1 TAC, Chapter 155, and the Administrative Procedures Act, Government Code, Chapter 2001.

(c) Injunction. If it appears that a person has violated or is violating the Act, or an order issued or a rule adopted under the Act, the commissioner may request the Attorney General bring an action in any district court of this state that has jurisdiction for an injunction to compel compliance with this chapter.

(d) Reinstatement. The commissioner may reinstate a suspended license or permit, if the person corrects the violations that were the basis for the suspension.

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

Filed with the Office of the Secretary of State, on July 27, 2000.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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PART 2. TEXAS DEPARMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 406. ICF/MR PROGRAMS
SUBCHAPTER G. ADDITIONAL FACILITY RESPONSIBILITIES

25 TAC §406.311

The Texas Department of Mental Health and Mental Retardation (department) proposes new §406.311, concerning living options, of Chapter 406, Subchapter G, concerning additional facility responsibilities.

The new section requires an intermediate care facility for persons with mental retardation (ICF/MR)--other than a state mental retardation facility operated by the department--to discuss living options at least annually with each resident or the resident's legally authorized representative (LAR). The facility must use the Living Options instrument developed by the department as the basis for the discussion. The facility must notify the local mental retardation authority (MRA) about each resident who expresses a preference for an alternate living arrangement or whose LAR expresses a preference on the resident's behalf. Once the MRA is notified, the MRA must contact the resident or LAR to discuss alternate living arrangements, enter the resident's name in CARE system if the service requested is not available and assist the resident is accessing the service when it becomes available. The new section is responsive to a recommendation from the Promoting Independence Advisory Board to the Texas Health and Human Services Commission that the department develop procedures to identify each individual residing in an ICF/MR who prefers, or whose LAR prefers, an alternate living arrangement.

The new section does not apply to state mental retardation facilities (state schools and those state centers with a residential component) because department policy requires each state mental retardation facility to discuss alternate living arrangements with residents or LARs on an annual basis.

William R. Campbell, deputy commissioner, Finance and Administration, has determined that for each year of the first five years the proposed new section is in effect, enforcing or administering the new section does not have foreseeable implications relating to costs or revenues of the state or local governments.

Barry Waller, director, Long Term Services and Supports, has determined that for each year of the first five-year period the new section is in effect, the public benefit expected is the identification of individuals residing in community ICFs/MR who prefer an alternate living arrangement and the provision of alternate living arrangements for as many of those individuals as possible. In addition, the information derived from the Living Options assessment instrument will assist the department and local MRAs in planning and developing home and community-based services. It is not anticipated that the new section will have an adverse economic effect on small businesses or micro businesses because the ICF/MR may choose to have the discussion of living options during an already scheduled meeting of the resident's interdisciplinary team. It is not anticipated that the proposed new section will affect a local economy.

Comments concerning this proposal must be submitted in writing to Linda Logan, director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas 78711, or by fax to (512) 206-4750, within 30 days of publication of this notice.

The new section is proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the ICF/MR program.

The proposed new section affects Texas Government Code, §531.021(a) and the Texas Human Resources Code, §32.021(a) and (c).

§406.311. Living Options.

(a) The following words and terms, when used in this section, shall have the following meanings:

(1) Facility--An intermediate care facility for persons with mental retardation or a related condition, as described in 42 Code of Federal Regulations, §440.150, other than a state mental retardation facility operated by the department.

(2) Individual--A person enrolled in the ICF/MR program and residing in a facility.

(3) IDT (interdisciplinary team)--A group of people assembled by the facility who possess the knowledge, skills, and expertise to develop an individual's Individual Program Plan, including mental retardation professionals and paraprofessionals and, with approval from the individual or LAR, other concerned persons.

(4) LAR (legally authorized representative)--A person authorized by law to act on behalf of an individual with regard to a matter

described in this section, and may include a parent, guardian, or managing conservator of a minor individual, or the guardian of an adult individual.

(5) MRA (mental retardation authority)--An entity to which the Texas Mental Health and Mental Retardation Board delegates its authority and responsibility within a specified region for planning, policy development, coordination, and resource development and allocation and for supervising and ensuring the provision of mental retardation services to persons with mental retardation in one or more local service areas. A local service area consists of one or more counties.

(b) At least annually or upon the request of an individual or the individual's LAR, the IDT must discuss living options with the individual or LAR using the Living Options instrument, copies of which are available on the department's website at www.mhmr.state.tx.us or by contacting Office of Medicaid Administration, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711.

(1) The facility must document the discussion in the IDT summary and file the summary in the individual's facility record.

(2) If the individual or the individual's LAR expresses interest in an alternate living arrangement, the facility must send a copy of the IDT summary to the MRA for the county in which the facility is located.

(c) If an MRA receives an IDT summary, the MRA must:

(1) contact the individual or the individual's LAR to discuss the alternate living arrangements in which the individual or LAR has expressed an interest;

(2) enter on the Client Assignment and Registration (CARE) system the individual's name and the specific type of service requested if that service will not be available within 30 calendar days of the date of request; and

(3) assist the individual in accessing the service requested when it becomes available.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005317
Charles Cooper
Chair, Texas Mental Health and Mental Retardation Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 206-4516

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PART 8. INTERAGENCY COUNCIL ON EARLY CHILDHOOD INTERVENTION

CHAPTER 621. EARLY CHILDHOOD INTERVENTION

SUBCHAPTER B. EARLY CHILDHOOD INTERVENTION SERVICE DELIVERY

25 TAC §621.22

The Interagency Council on Early Childhood Intervention (ECI) proposes an amendment to §621.22, concerning Definitions.

This section amends the definition for "Parent". In review of the Texas Interagency Council on Early Childhood Intervention annual application for funding, the United States Department of Education, Office of Special Education Programs required immediate changes in ECI Rule and policies and procedures.

Elsewhere in this issue of the *Texas Register*, the ECI contemporaneously adopts on an emergency basis, this amendment to §621.22.

Donna Samuelson, Deputy Executive Director, Interagency Council on Early Childhood Intervention, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Ms. Samuelson also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the rule will be a current and updated rule per federal requirements . There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Donna Samuelson, Deputy Executive Director, Interagency Council on Early Childhood Intervention, 4900 North Lamar Boulevard, Austin, Texas 78751-2399.

The amendment is proposed under the Human Resources Code, Chapter 73, which authorizes the Interagency Council on Early Childhood Intervention to establish rules regarding services provided for children with developmental delays.

No other statute, article, or code is affected by this amendment.

§621.22. Definitions.

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

(1) Assessment--The ongoing procedures used by appropriate qualified personnel throughout the period of a child's eligibility to identify:

(A) the child's unique needs and strengths;

(B) the resources, priorities, and concerns of the family and identification of supports and services necessary to enhance developmental needs of the children; and

(C) the nature and extent of intervention services needed by the child and the family in order to resolve the determinations of this paragraph.

(2) Child find--Activities and strategies designed to locate and identify, as early as possible, infants and toddlers with developmental delay.

(3) Children--Infants and toddlers with disabilities.

(4) Committee--Advisory Committee to the Interagency Council on Early Childhood Intervention. Its functions are those of the Interagency Coordinating Council described in the Individuals with Disabilities Education Act, Public Law 105-17.

(5) Complaint--A formal written allegation submitted to the council stating that a requirement of the Individuals with Disabilities Education Act, or an applicable federal or state regulation has been violated.

(6) Comprehensive services--Individualized intervention services, as determined by the interdisciplinary team and listed in the Individualized Family Service Plan (IFSP). Services are further defined in §621.23(5)(C)-(E) of this title (relating to Service Delivery Requirements for Comprehensive Services). Programs receiving funds from the Interagency Council on Early Childhood Intervention are required to have the capacity to provide or arrange for all services listed in §621.23(5)(C) of this title (relating to Service Delivery Requirements for Comprehensive Services).

(7) Council--The entity designated as the lead agency by the governor under the Individuals with Disabilities Education Act. The council has the final authority and responsibility for the administration, supervision, and monitoring of programs and activities under this system. The council has the final authority for the obligation and expenditure of funds and compliance with all applicable laws and rules. The council board includes eight lay members who are family members of children with developmental delay, appointed by the governor with the advice and consent of the senate, and one member from the Texas Education Agency appointed by the commissioner of education. Five of the lay members must be the parents of children who are receiving or have received early childhood intervention services. The board shall also have fully participating, non voting representatives appointed by the commissioner or executive head of the following agencies: Texas Department of Health (TDH), Texas Department of Human Services (TDHS), Texas Department of Mental Health and Mental Retardation (TDMHMR), Texas Commission on Alcohol and Drug Abuse (TCADA), Texas Department of Protective and Regulatory Services (TDPRS), and the Texas Workforce Commission (TWC).

(8) Days--Calendar days.

(9) Developmental delay--A significant variation in normal development in one or more of the following areas as measured and determined by appropriate diagnostic instruments or procedures administered by an interdisciplinary team and by informed clinical opinion: cognitive development; physical development, including vision and hearing, gross and fine motor skills, and nutrition status; communication development; social and emotional development; and adaptive development.

(10) Early Childhood Intervention Program (ECI)--The total effort in Texas directed toward meeting the needs of children eligible under this chapter and their families.

(11) Evaluation--The procedures used by appropriate qualified personnel to determine the child's initial and continuing eligibility, consistent with the definition of infants and toddlers with developmental delay, including determining the status of the child in areas of cognitive development, physical development, communication development, social-emotional development, and adaptive development or self-help skills.

(12) Family Educational Rights and Privacy Act of 1974 (FERPA)--Requirements for the protection of parents and children under the General Education Provisions Act, §438, which include confidentiality, disclosure of personally identifiable information, and the right to inspect records.

(13) Full year services--The availability of an array of comprehensive services throughout the calendar year.

(14) Include(ing)--The items named are not all of the possible items that are covered whether like or unlike the ones named.

(15) Individual professional development plan (IPDP)--A written plan for inservice or continuing education to be prepared annually for each staff person in a program.

(16) Individualized family service plan (IFSP)--A written plan, developed by the interdisciplinary team, based on all assessment and evaluation information, including the family's description of their strengths and needs, which outlines the early intervention services for the child and the child's family.

(17) Intake--The first face-to-face contact with a parent following initial referral.

(18) Interdisciplinary team--The child's parent(s) and a minimum of two professionals from different disciplines who meet to share evaluation information, determine eligibility, assess needs, and develop the IFSP. The team must include the service coordinator who has been working with the family since the initial referral or the person responsible for implementing the IFSP and a person directly involved in conducting the evaluations and assessments.

(19) Parent-A natural or adoptive parent of a child, a guardian, a person acting in the place of a parent (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare), or an appointed surrogate parent, Term does not include state if child is ward of the state. [~~A parent, a guardian, a person acting as a parent of a child or an appointed surrogate parent.~~]

(20) Personally identifiable information--Information which includes:

(A) the name of the child;

(B) the name of the child's parent, or other family member;

(C) the address of the child, parent, or other family member;

(D) a personal identifier, such as the child's or parent's social security number; or

(E) a list of personal characteristics or other information that would make it possible to identify or trace the child, the parent, or other family member, with reasonable certainty.

(21) Primary referral sources--Individuals or organizations which refer children including, but not limited to:

(A) hospitals, including prenatal and postnatal care facilities;

(B) physicians;

(C) parents;

(D) day care programs;

(E) local educational agencies;

(F) public health facilities;

(G) other social service agencies;

(H) other health care providers; and

(I) congregate care facilities.

(22) Program--A division of a local agency with the express and sole purpose of implementing comprehensive early childhood intervention services to children with developmental delays and their families.

(23) Provider--A local private or public agency with proper legal status and governed by a board of directors that accepts funds from the Interagency Council on Early Childhood Intervention to administer the Early Childhood Intervention (ECI) Program.

(24) Public agency--The Interagency Council on Early Childhood Intervention and any other political subdivision of the state that is responsible for providing early intervention services to eligible children under the Individuals with Disabilities Education Act, Part C.

(25) Public health clinic--Any clinic that provides pediatric physical examinations and receives public funding from federal, state, city, or county governments.

(26) Qualified--A person who has met state approval or recognized certificate, license, registration, or other comparable requirements that apply to the area in which the person is providing early intervention services.

(27) Referral date--The date the child's name and sufficient information to contact the family was obtained by the agency receiving funds from the Interagency Council on Early Childhood Intervention.

(28) Service coordinator (case manager)--A staff person assigned to a child or family who is the single contact point for families, and who is responsible for assisting and empowering families to receive the rights, procedural safeguards, and services authorized by these rules and ECI policy and procedures. The service coordinator is from the profession most immediately related to the child's or family's needs. (The term profession includes service coordination.)

(29) Services--Individualized intervention services, as determined by the interdisciplinary team and listed in the IFSP. Services are further defined in §621.23(5)(C)-(E) of this title (relating to Service Delivery Requirements).

(30) Supplanting--The withdrawal of local, private, or other public funds for services which were available during the previous year of funding.

(31) Surrogate parent--An individual appointed or assigned to take the place of a parent for the purposes of Chapter 73 of the Human Resources Code when no parent can be identified or located or when the child is under managing conservatorship of the state. A surrogate parent appointed under this chapter shall act to advocate for or represent the child, relating to the identification, evaluation, educational placement, and provision of the Individuals with Disabilities Education Act, Part C services.

(32) Transportation services--Travel and other related costs that are necessary to enable a child or family to receive early intervention services.

(33) UGCMS--Uniform grant management standards adopted by the governor's Office of Budget and Planning in 1 TAC §§5.141-5.167 under authority of Texas Civil Statutes, Article 4413(32g).

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

Filed with the Office of the Secretary of State, on July 24, 2000.

TRD-200005092
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 424-6750

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SUBCHAPTER C. PROCEDURAL SAFEGUARDS AND DUE PROCESS PROCEDURES

25 TAC §621.42

The Interagency Council on Early Childhood Intervention (ECI) proposes an amendment to §621.42, concerning Early Childhood Intervention Council Procedures for Resolving Complaints. Elsewhere in this issue of the *Texas Register*, the ECI contemporaneously adopts on an emergency basis, this amendment to §621.42.

This section amends §621.42(d)(6) by adding the following new language: "In resolving a complaint in which it finds a failure to provide appropriate services, the executive director will remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child and the child's family; and appropriate future provision of services for all infants and toddlers with disabilities and their families". Current §621.42(d)(6) will be renumbered to new paragraph (7).

Donna Samuelson, Deputy Executive Director, Interagency Council on Early Childhood Intervention, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Ms. Samuelson also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the rule will be a current and updated rule per federal requirements . There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Donna Samuelson, Deputy Executive Director, Interagency Council on Early Childhood Intervention, 4900 North Lamar Boulevard, Austin, Texas 78751-2399.

The amendment is proposed under the Human Resources Code, Chapter 73, which authorizes the Interagency Council on Early Childhood Intervention to establish rules regarding services provided for children with developmental delays.

No other statute, article, or code is affected by this amendment.

§621.42. Early Childhood Intervention Council Procedures for Resolving Complaints.

(a) An individual or organization may file a complaint with the Interagency Council on Early Childhood Intervention (council) alleging that a requirement of the Individuals with Disabilities Education Act, Part C (Act) or applicable federal and/or state regulations has been violated. The complaint must be in writing, be signed, and include a statement of the facts on which the complaint is based.

(b) A complaint may be filed directly with the council without having been filed with the local provider.

(c) Procedures for receipt of complaint are as follows.

(1) All complaints received by the council shall be forwarded to the deputy executive director. The deputy executive director will log and assign all complaints, monitor the resolution of those complaints, and maintain a copy of all complaints for a five-year period.

(2) The council will have the following information entered in the data file: name of complainant, name of program if applicable, date received, type of complaint, action taken, followup, and case-closed date. Letters of acknowledgment will be mailed by the deputy executive director to the program and to the complainant or to the third party if the complaint was forwarded by someone other than the complainant, such as the governor's office.

(3) A complaint should be clearly distinguished from a request for an administrative proceeding.

(4) Complaints referred by other government offices will also be considered under these procedures.

(d) Procedures for investigation and resolution of complaints.

(1) After receipt of the complaint, the deputy executive director will assign a staff person to conduct an individual investigation, on-site if necessary, to make a recommendation to the executive director for resolution of the complaint.

(A) The complainant will have the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint.

(B) All relevant information will be reviewed and an independent determination made as to whether a violation to the requirements of the Act, occurred.

(2) Within 60 days of the receipt of the complaint the executive director must resolve the complaint.

(3) An extension of the time limit under paragraph (2) of this subsection shall be granted only if exceptional circumstances exist with respect to a particular complaint.

(4) Complainants shall be informed in writing of the final decision of the executive director and of their right to request the secretary of the United States Department of Education to review the final decision of the executive director. The executive director's written decision to the complainant will address each allegation in the complaint and contain:

(A) findings of fact and conclusions; and

(B) reasons for the final decision.

(5) To ensure that effective implementation of the executive director's final decision, the deputy executive director will assign a staff person to provide technical assistance and appropriate followup to the parties involved in the complaint to achieve compliance with any corrective actions when necessary.

(6) In resolving a complaint in which it finds a failure to provide appropriate services, the executive director will remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child and the child's family; and appropriate future provision of services for all infants and toddlers with disabilities and their families.

(7) [~~(6)~~]When a compliant is filed, the deputy executive director will offer mediation services as an alternative to proceeding with the complaint investigation. Mediation may be used when both parties agree. A parent's right to a due process hearing or complaint investigation will not be denied or delayed because they chose to participate in mediation. The complaint investigation will continue and be resolved within 60 days even if mediation is used as the resolution process.

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

Filed with the Office of the Secretary of State, on July 24, 2000.

TRD-200005093
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 424-6750

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER R. VIATICAL AND LIFE SETTLEMENTS

28 TAC §§3.1701 - 3.1717

The Texas Department of Insurance proposes amendments to §§3.1701 - 3.1703, 3.1705, 3.1707 - 3.1715, and new §§3.1704, 3.1706, 3.1716, and 3.1717 concerning regulation of viatical and life settlements. The proposed amendments and new sections are necessary to implement the provisions of Texas Insurance Code Article 3.50-6A, as amended by Acts 1999, 76th Legislature, in House Bill (HB) 792. Prior to HB 792, Insurance Code Article 3.50-6A only applied to viatical settlements, the sale of a life insurance policy on an individual with a catastrophic or life-threatening illness or condition. House Bill 792 amends Insurance Code Article 3.50-6A by addressing life settlements, which are defined as the sale of life insurance policies on individuals who do not have a catastrophic or life-threatening illness or condition. The proposal adds language to address life settlements, clarifies filing requirements, and requires additional disclosures, contract provisions, and reporting requirements.

The proposed amendments and new sections are necessary to: provide additional consumer protections; establish requirements for registration, disclosure, and form approval for persons engaged in the business of life settlements; streamline the process for renewal of registration, disclosure and form approval; more clearly define prohibited practices; ensure that a viator's, life settlor's, and owner's rights remain protected in the event the life insurance policy or certificate is re-sold or transferred to another person, or the viatical or life settlement company elects to no longer engage in the business; protect the confidentiality of the personal information of viators, life settlors, and owners; designate the responsibilities of viatical or life settlement companies or brokers; and provide enforcement mechanisms to ensure compliance with the Insurance Code and this subchapter.

The proposed amendment to §3.1701 applies the subchapter to life settlors, life settlements, and owners. The proposed amendments §3.1702 add, delete, or modify various definitions. The new definition of owner in this proposed section clarifies that, in some situations, the owner, viator, or life settlor are separate persons under an insurance policy.

The proposed amendments to §3.1703 set out new requirements for obtaining a certificate of registration to operate as a viatical or

life settlement company or broker, including doing business under an assumed name, or having more than one business location. The proposed amendments also create a new structure for paying fees to obtain a certificate of registration, and change the certificate of registration from a one-year certificate to a two-year certificate. Currently, fees are paid annually at a rate of $250.00 for company registrations and $125.00 for broker registrations. The amendment proposes to charge the same annual rate, but requires payment of fees every two years, since the certificate will be valid for two years. As such, a company will pay $500.00 every two years and a broker will pay $250.00 every two years. The proposed amendment also sets forth requirements for notifying the department of a change in information both during the application process and any time a change occurs thereafter. Proposed §3.1704 sets forth the requirements for renewing, nonrenewing, or surrendering a certificate of registration. Proposed amendments to §3.1705 modify the content and format of the reports required to be filed with the department. Although the proposed amendments require annual reports to be filed both in hard and electronic copy, the amendments also allow a company who does not have the means to file an electronic copy, to contact the department to request permission to file only a hard copy.

Proposed §3.1706 sets forth the requirements for the filing of viatical or life settlement forms, and the process for departmental action on forms filed with the department. Proposed amendments to §3.1707 address life settlements in the filing requirements for advertising, sales, and solicitation materials. Proposed amendments to §3.1708 modify existing requirements, and add new, required disclosure materials. The proposed amendments to §3.1709 modify existing, and add new, mandatory contract and application provisions, including those provisions that allow the owner of a policy to retain an interest in the policy. The proposed section also addresses acknowledgement forms, escrow and/or trust agreements, and the provisions that must be contained in those forms.

Additional prohibitions are proposed in §3.1710 to the list of prohibited practices related to advertising and solicitation of applications and contracts for viatical and life settlements. The proposed amendments to §3.1711 address prohibited practices relating to the payment of commissions and other forms of compensation, modify the section to add life settlement terminology, and create a fiduciary duty between an independent viatical or life settlement broker and the viator, life settlor, and owner.

Section 3.1712 is proposed to be amended to set forth new guidelines outlining the prohibited practices when contacting a viator, life settlor, or owner for information, including contacts for health status inquiries after the settlement contract has been entered into and proceeds have been paid to viators or life settlors. Proposed §3.1713 is amended to add life settlement language and to address the assignment, sale, or transfer of insurance policies subsequent to the initial purchase of the policy by the viatical or life settlement company. Proposed amendments to §3.1714 set forth the limits and practices relating to obtaining confidential information, such as prohibiting the disclosure of an owner's, viator's, or life settlor's confidential information without first obtaining proper written consent; restricting the period of time for medical consent forms to a period not longer than twelve months; and prohibiting use of medical consent forms as a means to continue to monitor a viator's health status.

The proposed amendment to §3.1715 addresses agent licensing requirements for escrow agents and trustees who receive moneys to pay continuing premiums on insurance policies that are the subject of viatical or life settlement transactions. Proposed §3.1716 sets forth the authority and the procedures for the commissioner to deny, suspend, or revoke a broker's or company's certificate of registration. Proposed §3.1717 authorizes the department to examine the business and affairs of any viatical or life settlement company or broker, with expenses for such examinations to be paid by the viatical or life settlement company or broker.

In conjunction with these proposed amendments and new sections, the department is proposing the repeal of existing §§3.1704, 3.1706 and 3.1716 - 3.1718. Notice of the proposed repeal is published elsewhere in this issue of the *Texas Register*.

Ana M. Smith-Daley, Deputy Commissioner, Life/Health Division, has determined that for each year of the first five years the proposed amendments and new sections will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the sections. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Smith-Daley has also determined that for each year of the first five years the sections are in effect, the public benefits anticipated as a result of the proposed amendments and new sections will be: increased consumer protection for those persons entering into viatical or life settlement transactions; reduced administrative costs for companies and brokers who will only have to renew their certificates every two years instead of annually as currently required; and a more efficient and expedited review process which streamlines the procedures and requirements for filing forms used in viatical or life settlement transactions.

Ms. Smith-Daley estimates that the costs to viatical or life settlement companies or brokers to create or modify the forms they use to effectuate viatical or life settlements will vary depending upon which forms the viatical or life settlement company or broker uses in its operations, and which of its forms requires amending due to the changes in this proposal. The department estimates that the average cost for viatical and life settlement companies and brokers to prepare new forms or modify existing forms for submission to the department, is approximately $1.00 - $5.00 for each page of information required by this proposal. This figure represents labor, printing, and paper costs for the total amount of language that would have to be added to the existing language used by the company or broker. The labor figures are based upon the Texas Workforce Commission 1998 - 1999 Occupational Wage Survey, with figures adjusted for the year 2000. The department's cost estimate assumes that labor could be provided by either an in-house person or outside consultant, at an estimated cost of $20 - $35 per hour of labor. Paper and printing costs are estimated at a range of $.05 - $.10 per page of additional language using both the front and back of a page. In order to help minimize the costs associated with creating and modifying forms, the department has created some forms available for downloading from the department's web site. Use of these forms may also reduce costs associated with filing forms with the department, for small, micro, and large businesses.

Because the existing sections currently require registration for persons engaging in the business of viatical settlements, viatical settlement companies and brokers will incur no additional costs as a result of the registration requirements added by this

proposal. For all applicants that are required to provide a fingerprint card to the department, it is estimated that the cost will be $15.00 per fingerprint card. A life settlement company or broker seeking registration will incur a cost of $500 every two years for companies; and $250 every two years for brokers.

The proposal requires the annual reports to be submitted to the department in both electronic and hard copy, and also requires additional items of information to be included. The estimated hourly costs for companies and brokers submitting annual reports under the proposed rule is approximately $9.00 - $11.00. This hourly cost considers such variables as labor, printing, and paper costs, and costs associated with sending the information electronically via a 3.5" floppy computer disc. These costs will vary according to the volume of business, which will determine the size of the annual report. Therefore, any paper costs are based upon the additional pages of information required by the proposal (approximately 1 - 3 additional pages). Additionally, the proposed amendments attempt to minimize costs associated with the report by allowing a company or broker to request to file only a paper copy of the report if it does not have the capability to file an electronic copy.

There is no anticipated adverse economic impact on small or micro businesses as a result of the proposed amendments and new sections. The cost per hour of labor will not vary between the smallest and largest businesses, assuming that small viatical/life settlement companies and brokers are reporting on a smaller volume of business than the largest viatical/life settlement companies and brokers. By considering the statute's purposes, it is neither legal nor feasible to waive or modify the requirements of these sections for small and micro businesses, as doing so would result in a disparate effect on persons wishing to sell their life insurance policies.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on September 11, 2000 to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. An additional copy of the comment must be simultaneously submitted to Diane Moellenberg, Chief Director, Regulatory Development, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. A request for a public hearing should be submitted separately to the Office of the Chief Clerk.

The amendments and new sections are proposed under the Insurance Code Article 3.50-6A and §36.001. Article 3.50-6A provides that the commissioner shall adopt reasonable rules to implement this article as it relates to viatical and life settlements. Section 36.001 provides that the commissioner of Insurance may adopt rules to execute the duties and functions of the Texas Department of Insurance only as authorized by statute.

The following articles are affected by this proposal: Insurance Code Article 3.50-6A

§3.1701. Purpose[~~, Scope~~] and Severability.

(a) Purpose [~~Scope and purpose~~]. This subchapter implements the provisions of [~~the~~] Insurance Code[~~,~~] Article 3.50-6A. The commissioner implements this subchapter [~~enacts these rules~~] for the following purposes:

(1) to provide consumer protection in a viatical or life settlement transaction for a viator or life settlor and owner [~~the person with a terminal illness~~] who assigns, sells, or otherwise transfers a [~~life insurance~~] policy or its net death benefit, or who attempts to do so;

(2) to establish requirements for registration, disclosure, and form approval for persons engaged in the business of viatical or life settlements;

(3) to define prohibited practices for persons engaged in[~~,~~] or involved in transactions relating to[~~,~~] the business of viatical or life settlements;

(4) to ensure that a viator's or life settlor's and owner's rights under the Insurance Code and this subchapter remain protected if a viatical or life settlement company assigns, sells, or otherwise transfers a [~~the life insurance~~] policy or net death benefit [~~benefits~~] under the policy which served as the basis for a viatical or life settlement transaction [~~to another person~~];

(5) to protect the confidential [~~confidentiality of the personal, financial and medical~~] information of viators or life settlors and owners [~~persons~~] who assign, sell, or otherwise transfer their [~~life insurance~~] policies or net death benefits under such policies, or who seek to do so; and

(6) to provide enforcement mechanisms to ensure that persons engaged in, or involved in transactions relating to[~~,~~] the business of viatical or life settlements comply with the Insurance Code, [~~and~~] this subchapter, or any other applicable law of this state or the United States.

(b) (No change.)

§3.1702. Definitions.

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

(1) Advertisement--Includes, but is not limited to:

(A) printed and published material, audio-visual material, and descriptive literature of a viatical or life settlement company or broker, including materials used in direct mail, newspapers, magazines, the internet, radio, telephone and television scripts, billboards, and similar displays;

(B) descriptive literature and sales aids of all kinds used by a viatical or life settlement company or broker and distributed to members of the public, including circulars, leaflets, booklets, depictions, illustrations, and form letters;

(C) prepared sales talks, presentations, and materials for use by a viatical or life settlement company or broker, and those representations made to members of the public;

(D) materials used to solicit policies for viatical or life settlements;

(E) material included with a viatical or life settlement or an application for a viatical or life settlement, when the settlement is solicited or when the contract is delivered, including materials used in connection therewith;

(F) lead card solicitations, which are communications that, regardless of form, content, or stated purpose, are used to compile a list containing names or other personal information regarding individuals who have expressed a specific interest in a product and are used to solicit persons in this state for a viatical or life settlement; and

(G) any other communication directly or indirectly related to a viatical or life settlement or application for a viatical or life settlement, and used in the eventual sale or solicitation of a viatical or life settlement or application for a viatical or life settlement.

(H) The term "advertisement" does not include:

(i) communications or materials used within a viatical or life settlement company's or broker's own organization, not used as sales aids and not disseminated to members of the public;

(ii) communications with individuals, other than materials urging individuals to purchase or inquire into the potential purchase of a viatical or life settlement;

(iii) materials used solely for the recruitment, training, and education of a viatical or life settlement company's or broker's personnel, provided it is not also used to induce individuals to inquire into the potential purchase of a viatical or life settlement or application for a viatical or life settlement.

(2) Business of viatical or life settlements--The making of, or proposing to make, as a viatical or life settlement company or broker, a viatical or life settlement contract, or taking or receiving any application for a viatical or life settlement, or doing the acts of a viatical or life settlement company or broker.

(3) Captive broker--A viatical or life settlement broker who is employed by, or contracts with, a viatical or life settlement company, and who, by agreement or by nature of the broker's employment, refers viators, life settlors, or owners exclusively to the viatical or life settlement company with whom the broker is employed or contracted.

(4) Catastrophic or life-threatening illness--An illness or physical condition that is likely to cause premature death, including but not limited to acquired immunodeficiency syndrome (AIDS), cancer, or other illness.

(5) Certificate holder--An individual, including any dependent, who is insured under a group policy.

(6) Confidential information--A viator's, life settlor's, or owner's name, address, telephone number, facsimile number, electronic mail address, photograph or likeness, employer, employment status, social security number, genetic information, medical information, financial information, or any other information that is likely to lead to the identification of a viator, life settlor, or owner, including the identity of any family member, spouse, or significant other.

(7) Control--As defined in Insurance Code Article 21.49-1, §2.

(8) Escrow account--An account established by a viatical or life settlement company for the sole purpose of entering into viatical or life settlements wherein the funds payable to the owner are placed with an independent third party to be paid to the owner on the fulfillment of the conditions of the viatical or life settlement contract.

(9) Escrow agent or trustee--An attorney, certified public accountant, financial institution, or other person providing escrow or trust services whose acts are governed under the authority of a regulatory body.

(10) Escrow or trust agreement--An agreement establishing an escrow account or a trust.

(11) Financing entity--An underwriter, placement agent, lender, purchaser of securities, purchaser of a policy from a viatical or life settlement company, credit enhancer, reinsurer, or any person whose sole activity related to the viatical or life settlement is providing funds to effect the viatical or life settlement, and who has an agreement in writing with a registered viatical or life settlement company to act as a participant in financing the viatical or life settlement.

(12) Genetic information--Information derived from the results of a genetic test.

(13) Genetic test--A laboratory test of an individual's DNA, RNA, proteins, or chromosomes to identify by analysis of the DNA, RNA, proteins, or chromosomes, the genetic mutations or alterations in the DNA, RNA, proteins, or chromosomes that are associated with a predisposition for a clinically-recognized disease or disorder. The term does not include:

(A) a routine physical examination or a routine test performed as part of a physical examination;

(B) a chemical, blood, or urine analysis;

(C) a test to determine drug use; or

(D) a test for the presence of the human immunodeficiency virus.

(14) Independent broker--A viatical or life settlement broker who is not a captive broker, and who, by representing the viator, life settlor, or owner, acts as a middleman or negotiator between the viator, life settlor, or owner and various viatical or life settlement companies to find the best offer for the viator's, life settlor's, or owner's policy.

(15) Insured--An individual covered by a policy.

(16) Life expectancy--The mean number of months a viator or life settlor can be expected to live as determined by the viatical or life settlement company considering medical records and appropriate experiential data.

(17) Life settlement--A transaction whereby a written agreement is solicited, negotiated, offered, entered into, delivered, or issued for delivery in this state, under which a life settlement company acquires, through assignment, sale, or transfer, a policy insuring the life of an individual who does not have a catastrophic or life-threatening illness or condition by paying the owner or certificate holder compensation or anything of value that is less than the net death benefit of the policy.

(18) Life settlor--An individual who:

(A) is the insured under an individual policy or a certificate holder under a group policy, and who does not have a catastrophic or life-threatening illness or condition; and

(B) enters into a life settlement contract with a life settlement company or attempts to do so through inquiry to, negotiation with, or by providing or consenting to the provision of confidential information to, a life settlement company or broker. The term does not include a life settlement company that assigns, sells, or otherwise transfers a policy that it has purchased from a life settlor and owner.

(19) Mature or matured--

(A) as it relates to viatical or life settlement brokers, occurs when the owner has received full payment of the settlement for the assignment, sale, or transfer of the policy that served as the basis for the viatical or life settlement; and

(B) as it relates to viatical or life settlement companies, occurs when the viator or life settlor has died.

(20) Net death benefit--The amount of the death benefit under a policy to be purchased, less any outstanding debts or liens.

(21) Owner--The person who has all the rights and responsibilities under the policy. This definition recognizes that, in some instances, the owner and viator or life settlor may not be the same person under the policy.

~~[(1) Identity--The complete name, last known business address and last known business telephone number of a person, and, if the person is an entity rather than an individual, the form of the entity.]~~

(22) [~~(2)~~] Person--An individual, corporation, trust, partnership, association, or any other legal entity.

(23) [~~(3)~~] Policy--An individual life insurance policy, a rider to an individual life insurance policy, or a certificate or a rider to a certificate evidencing coverage under a group life insurance policy. This term does not include a rider to, or a provision of, a life insurance policy insuring the viator's or life settlor's spouse or dependent, providing an additional death benefit for accidental death, or future increases in the death benefit. [~~The term also is used to refer to the death benefit of a policy (that is, a reference to selling or otherwise transferring a policy also encompasses selling, or otherwise transferring the death benefit of a policy or irrevocably designating a beneficiary to receive the death benefit).~~]

(24) Settlement application--A written form provided by a viatical or life settlement company or broker to be completed by a viator or life settlor and owner for the purpose of applying to a viatical or life settlement company or broker to be considered by the company or broker for the sale of the policy insuring the life of a viator or life settlor.

(25) Settlement contract--The written document evidencing the agreement entered into between a viatical or life settlement company and a viator or life settlor and owner that establishes the terms under which the viatical or life settlement company will pay compensation or anything of value in return for the viator's or life settlor's and owner's assignment, sale, or transfer of the net death benefit or ownership of all or a portion of the policy or benefit which served as the basis for the viatical or life settlement.

(26) Trust--An account or trust established by a viatical or life settlement company for the sole purpose of entering into viatical or life settlements wherein the funds payable to the owner are placed with a trustee to be paid to the owner on the fulfillment of the conditions of the viatical or life settlement contract.

[~~(4) Referral agent--A person who, for compensation, refers or introduces a viator to a viatical settlement company or broker, but does not advertise his or her services as a referral agent, the availability of viatical settlements or on behalf of any viatical settlement company or broker, or perform services or take part in negotiations relating to effecting a viatical settlement. A referral agent who makes five or more such referrals in a calendar year must register as a viatical settlement broker.~~]

(27) [~~(5)~~] Viatical settlement--A transaction whereby a written [~~An~~] agreement [~~that~~] is solicited, negotiated, offered, entered into, delivered, or issued for delivery in this state, under which a viatical settlement company[~~person~~] acquires[~~,~~] through assignment, sale, or transfer, [~~sale, devise, bequest, or otherwise,~~] a policy insuring the life of an individual who has [~~with~~] a catastrophic or life-threatening illness or condition by paying the owner or certificate holder [~~of the policy~~] compensation[~~,~~] or anything of value[~~,~~] that is less than the net [~~expected~~] death benefit of the policy.

(28) Viatical or life settlement broker--A person who is either a captive broker or an independent broker, and who for a commission or other form of compensation, or in the hopes of obtaining such compensation:

(A) offers or attempts to negotiate a viatical or life settlement between a viator or life settlor and owner and one or more viatical or life settlement companies;

(B) performs services related to the gathering, organization, or analysis of confidential information about a viator, life settlor, or owner, including contacting a viator, life settlor, or owner, or a viator's or life settlor's designee as provided in §3.1712 of this subchapter (relating to Contacting the Viator, Life Settlor, or Owner for Health Status Inquiries: Limits and Prohibited Practices) for the purpose of monitoring or tracking the viator's or life settlor's health status after a viatical or life settlement has been signed by all necessary parties and payments have been made to the owner; or

(C) refers or introduces a viator, life settlor, or owner to a viatical or life settlement company or another broker.

(D) The term does not include: an owner of a policy insuring the life of a viator or life settlor; a family member of a viator or life settlor who does not receive, or expect to receive, any form of compensation from a viatical or life settlement company or broker for referring a family member; an attorney, accountant, estate planner, financial planner, or individual acting under power of attorney from the viator, life settlor, or owner, who is retained to represent the viator, life settlor, or owner and whose compensation is paid entirely by the viator, life settlor, or owner or at the direction and on behalf of the viator, life settlor, or owner without regard to whether a viatical or life settlement is effected; an attorney or accountant representing the viator, life settlor, or owner in relation to the viatical or life settlement, who receives a contingent fee from the viator, life settlor, or owner; a person who solicits only potential investors in viatical or life settlements, and who does not in any way advertise, solicit, or promote viatical or life settlements in a manner that reasonably could attract viators, life settlors, or owners; or any physician acting within the scope of the physician's medical license who provides medical analysis for the physician's own patient or who, on a contract or employment basis, performs medical analysis for a person who performs services for a viatical or life settlement company or broker related to the gathering, organization, or analysis of confidential information about a viator or life settlor for the purpose of effecting a viatical or life settlement.

[~~(6) Viatical settlement broker--A person, including an insurance agent licensed by the commissioner, who is not a viatical settlement company and who for a commission or other form of compensation, or in the hopes of obtaining such compensation:~~]

[~~(A) offers or advertises the availability of viatical settlements;~~]

[~~(B) offers or attempts to negotiate a viatical settlement between a viator and a viatical settlement company;~~]

[~~(C) in regards to a potential viatical settlement, performs services relating to the gathering, organization or analysis of medical, financial or personal information about a viator; or~~]

[~~(D) acting as a referral agent, refers or introduces a viator to a viatical settlement company or broker five or more times in a calendar year. The term does not include: an attorney, accountant, or person acting under power of attorney from the viator, who is retained to represent the viator and whose compensation is paid entirely by the viator without regard to whether a viatical settlement is effected; an attorney or accountant representing the viator in relation to the viatical settlement, who receives a contingent fee from the viator; a person who solicits only potential investors in viatical settlements, and who does not in any way advertise, solicit, or promote viatical settlements in a manner that reasonably could attract viators; or any print, broadcast or other media which prints or broadcasts advertisements of a viatical settlement company or broker.~~]

(29) [~~(7)~~] Viatical or life settlement company--A person, other than a viator, life settlor, or owner of an individual policy or certificate holder under a group policy insuring the life of a viator or life settlor, who enters into a viatical or life settlement with a viator or life settlor and owner or certificate holder [~~either on the person's own behalf or as an attorney in fact or other agent for persons referenced in~~

subparagraph (D) of this paragraph], or who attempts to do so through negotiation [negotiations], solicitation, or acquisition of confidential [medical, financial or personal] information from or about a viator, life settlor, or owner. The term does not include:

(A) a bank, savings bank, savings and loan association, credit union, or other licensed lending institution that takes an assignment of a policy as collateral for a loan;

(B) the issuer of a policy that makes a loan or pays benefits, including accelerated benefits, under the policy or in exchange for surrender of the policy;

(C) a financing entity [any person who, within a three-year period, enters into viatical settlements with no more than one viator, provided that the person enters into no more than three viatical settlements with that viator]; or

(D) a trustee or escrow agent [any person who may be a party to a viatical settlement, but whose sole activity related to the transaction is providing funds to effect the viatical settlement in exchange for future investment proceeds, and who has appointed in writing a registered viatical settlement company to act as the person's agent in such transactions].

(30) [(8)] Viator--An individual who:

(A) is the insured under an individual policy or a certificate holder under a group policy, and who has a catastrophic or life-threatening illness or condition [owner or holder of a policy insuring the life of an individual who has a catastrophic or life-threatening illness or condition]; and

(B) enters into a viatical settlement contract with a viatical settlement company[,] or attempts to do so through inquiry to, [or] negotiation with, or by [a viatical settlement company or broker, or through] providing[,] or consenting to the provision of[,] confidential [medical, financial or personal] information to a viatical settlement company or broker. The term does not include a viatical settlement company that assigns, sells, or otherwise transfers [or pledges] a policy that it has purchased from a viator and owner.

(b) Insurance Code §§31.001, 31.002, 31.003, and 31.007 [Article 1.01A, Insurance Code,] which include [includes] definitions of "department" and "commissioner" and describe [describes] the structure and duties of the Texas Department of Insurance, apply [applies] to this subchapter and to Insurance Code Article 3.50-6A[, Insurance Code].

§3.1703. Application for Certificate of Registration for Viatical or Life Settlement Companies or Brokers; [and Initial] Fees [and Reports].

(a) A [Subject to the grace period allowed by subsection (e) of this section, a] person shall not engage in the business of [act as a] viatical or life settlements in this state [settlement company or broker] unless the person holds a certificate of registration issued by the department as required by this subchapter [commissioner].

(b) A viatical or life settlement company or broker may hold no more than one certificate of registration of the same type in the same legal name at the same time.

(c) A viatical or life settlement company or broker doing viatical or life settlement business subject to the provisions of this subchapter shall have the viatical or life settlement company's or broker's certificate of registration issued in the company's or broker's legal name, and may only act within the scope of authority granted by the certificate of registration. If a person holds a certificate of registration authorizing the person to act as:

(1) a viatical settlement company or broker, that person need not obtain an additional certificate of registration to participate in a registered partnership or corporate entity of the same type in this state, but the partnership or corporate entity with which the person participates must hold, in its own legal name, a separate certificate of registration to conduct the business of viatical settlements in this state.

(2) a life settlement company or broker, that person need not obtain an additional certificate of registration to participate in a registered partnership or corporate agency of the same type in this state, but the partnership or corporate agency with which the person participates must hold, in its own legal name, a separate certificate of registration to conduct the business of life settlements in this state.

(d) Any registered viatical or life settlement company or broker may have additional offices or do business under assumed names as that term is defined in §19.901 of this title (relating to Definitions Concerning Conduct of Licensed Agents) without obtaining an additional certificate of registration; provided, each viatical or life settlement company or broker shall furnish the department with a list identifying any and all offices from which the viatical or life settlement company or broker will conduct viatical or life settlement business, and show any and all assumed names which the viatical or life settlement company or broker will utilize in conducting viatical or life settlement business at each of those offices.

(1) Where such a filing is required under the Assumed Business or Professional Name Act, Texas Business and Commerce Code §36.01, et seq., or any similar statute, the viatical or life settlement company or broker shall provide the department with a copy of the valid assumed name certificate reflecting proper registration of each assumed name utilized by the viatical or life settlement company or broker.

(2) The assumed name shall comply with subsection (e) of this section.

(e) A viatical or life settlement company or broker desiring to use assumed names in the conduct of viatical or life settlement business under a certificate of registration shall be subject to the requirements of §19.902 of this title (relating to One Agent, One License) except that a separate application shall not be required for a viatical or life settlement company or broker who conducts business under a single assumed name and registers that name with the department on the viatical or life settlement company's or broker's initial application for certificate of registration.

(f) Each person engaging in, or desiring to engage in, business as a viatical or life settlement company or broker in this state shall file with the department a completed application for certificate of registration in such form as the department may require. The application shall be signed and sworn to by the person. Persons may obtain forms for application for a certificate of registration by making a request to the Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9107 or 333 Guadalupe, Austin, Texas, 78701, or by accessing the department's website at www.tdi.state.tx.us.

(g) [(b)] Each completed application for certificate of registration, when filed with the department, shall be accompanied by [To obtain a certificate of registration as a viatical settlement company, a person must apply to the department in the format prescribed by Figure 1 in §3.1718 of this title (relating to Application and Reporting Forms) (Form VIAT-CO.APP). The application form must be accompanied by:]

[(1)] a two-year registration fee in the amount of $500 if the applicant is a viatical or life settlement company, and $250 if the applicant is a viatical or life settlement broker. All registration fees are

non-refundable and non-transferable, except as otherwise provided in §3.1704(f) of this subchapter (relating to Renewal; Fees). [~~$250, in the form of a cashier's check or money order made payable to the Texas Department of Insurance;~~]

[~~(2) samples of all forms that the company uses or plans to use to enter into viatical settlements with viators, and that must be approved by the department pursuant to §3.1706 of this title (relating to Approval of Forms Relating to Viatical Settlements);~~]

[~~(3) the written informational materials that are required by §3.1708 of this title (relating to Required Informational Materials), and must be filed pursuant to §3.1707 of this title (relating to Required Filings for Informational Purposes);~~]

[~~(4) samples of all advertising or other solicitation materials that the company is disseminating or plans to disseminate in Texas, and must be filed pursuant to §3.1707 of this title (relating to Required Filings for Informational Purposes);~~]

[~~(5) (if the viatical settlement company is applying on or before March 1, 1997) historical data regarding the company's conduct of the business of viatical settlements with viators in Texas, in the format prescribed by Figure 3 in §3.1718 of this title (relating to Application and Reporting Forms) (Form VIAT-CO.RPT).~~]

(h) In addition to submitting the application and two-year registration fee required by subsection (g) of this section, a person engaging in, or desiring to engage in, business as a captive broker in this state shall submit to the department with his or her application for certificate of registration, a notice of exclusive representation from the viatical or life settlement company on whose behalf the applicant, as a captive broker, will solicit business. The notice shall include a certification from the viatical or life settlement company stating that the viatical or life settlement company desires to designate the applicant as its captive broker.

(i) A designation made under subsection (h) of this section continues in effect until it is terminated or withdrawn by the viatical or life settlement company. Such termination and withdrawal shall be in writing, a copy of which shall be sent to the department, no later than 10 calendar days after the date the designation is terminated and withdrawn.

(j) If the applicant is domiciled in another state, and if:

(1) the domiciliary state licenses or registers persons engaged in the business of viatical or life settlements, the applicant shall attach to the application for certificate of registration either:

(A) a current copy of a letter of good standing obtained from the regulatory body which issued the license or certificate of registration; or

(B) a copy of the applicant's current license or certificate of registration issued by the domiciliary state.

(2) the domiciliary state does not license or register persons engaged in the business of viatical or life settlements, the applicant shall attach to the application for certificate of registration, a current copy of a letter of good standing obtained from the secretary of state or other regulatory body, as applicable, which maintains records relating to incorporation.

(k) If the applicant is domiciled in another state, the applicant shall complete and execute forms as required by the department for appointment of agent for service of process and for irrevocable consent to jurisdiction of the commissioner of insurance and Texas courts. Both forms shall be attached to the application for certificate of registration. The agent for service of process must be a person with a Texas address who has an established place of business and who can be easily located and served with notices, legal process, and papers.

(l) A partnership may file an application for certificate of registration to engage in business as a viatical or life settlement company or broker provided that all persons having control in the affairs of any such partnership are named in the application for certificate of registration, and the partnership submits with its application for certificate of registration, a copy of its certificate of registration as a registered partnership from the applicant's domiciliary state.

(m) A corporation may file an application for certificate of registration to engage in business as a viatical or life settlement company or broker provided that the corporation submits with its application:

(1) a copy of its articles of incorporation and all amendments thereto, certified with original seal and/or signature by the applicant's domiciliary state;

(2) a copy of its by-laws, signed by the applicant's corporate secretary; and

(3) a copy of its certificate of authority, certified with original seal and/or signature by the applicant's domiciliary state.

[~~(c) To obtain a certificate of registration as a viatical settlement broker, a person must apply to the department in the format prescribed by Figure 2 in §3.1718 of this title (relating to Application and Reporting Forms) (Form VIAT-BR.APP). The application form must be accompanied by:~~]

[~~(1) a registration fee in the amount of $125, in the form of a cashier's check or money order made payable to the Texas Department of Insurance;~~]

[~~(2) (if the viatical settlement broker is not a referral agent) samples of all advertising or other solicitation materials that the broker is disseminating or plans to disseminate in Texas, as must be filed pursuant to §3.1707 of this title (relating to Required Filings for Informational Purposes);~~]

[~~(3) a list identifying all viatical settlement companies or brokers which have paid or shared commissions with the broker in relation to viatical settlement transactions with viators in Texas, or with which the broker intends to transact business in or from Texas during the first year of registration;~~]

[~~(4) (if the viatical settlement broker is applying on or before March 1, 1997) historical data regarding the broker's conduct of the business of viatical settlements in relation to viatical transactions with viators in Texas, in the format prescribed by Figure 4 in §3.1718 of this title (relating to Application and Reporting Forms) (Form VIAT-BR.RPT).~~]

(n) [~~(d)~~] If an applicant for a certificate of registration to operate as a viatical or life settlement company or broker has complied with all application procedures in [~~subsections (b) and (c) of~~] this section, and the department is satisfied that the applicant meets all legal requirements, the department [~~commissioner~~] shall issue the applicant a certificate of registration to engage in business as a viatical or life settlement company or broker [~~a certificate of registration~~] unless the department determines that the application should be denied based on any one or more of the factors set forth in Insurance Code Article 3.50-6A, or other applicable law [~~§3.1716(a) of this title (relating to Enforcement)~~]. If the department denies the application, or if, at any time, the applicant no longer meets the requirements for registration, the procedure for the grant, denial, renewal, revocation, suspension, annulment, or withdrawal of a certificate of registration shall be governed by §1.32 of this title (relating to Licenses).[~~The department shall provide written notice to an applicant of the denial of the application and the applicant~~

may make a written request for a hearing to the Chief Clerk, Texas Department of Insurance, P.O. Box 149104, Mail Code 113-1C, Austin, Texas 78714-9104, within 30 days after denial of the application by the department. The department may use the investigatory or subpoena powers referenced in §3.1716 of this title (relating to Enforcement) to perform any investigation of an applicant that the department deems necessary.]

(o) If there is a change to any information provided in an application for certificate of registration by an applicant, the viatical or life settlement company or broker shall submit written notification of the change to the department within 30 days of the change. This requirement includes changes in information that occur after the certificate of registration has been issued and during which time the certificate of registration remains valid and unexpired. Such notifications of change in information shall be separate from any other submission of information to the department; and

(1) each applicant shall at all times keep the department informed of both the applicant's current mailing and physical addresses;

(2) the mailing and physical addresses on the most recent application or notification shall be considered the viatical or life settlement company's or broker's last known addresses for purposes of notice to the viatical or life settlement company or broker by the department.

(3) Nothing in paragraphs (1) and (2) of this subsection releases a registered viatical or life settlement company or broker relocating outside Texas from complying with subsections (j) - (m) of this section.

(p) A viatical or life settlement company or broker shall notify the department, and shall deliver a copy of any applicable order or judgment to the department not later than the 30th day after the date of the:

(1) suspension or revocation of the viatical or life settlement company's or broker's right to transact business in another state;

(2) receipt of an order to show why the viatical or life settlement company's or broker's license or certificate of registration in another state should not be suspended or revoked; or

(3) imposition of a penalty, forfeiture, or sanction on the viatical or life settlement company or broker for the violation of the laws of this state, any other state, or the United States.

(q) An applicant shall comply with the requirements of Chapter 19, Subchapter S of this title (relating to Fingerprint Card Requirements for Applicants for License).

(r) In addition to the information required in this section, the department may ask for other information necessary to determine whether the applicant complies with the requirements of Insurance Code Article 3.50-6A and this subchapter for purposes of issuing a certificate of registration to the applicant.

[(e) Each viatical settlement company or broker which has filed an application for a certificate of registration and has submitted the accompanying materials required in this section on or before April 1, 1996, or the 90th day after the commissioner promulgates the sections of this subchapter, whichever date is earlier:]

[(1) may do the business of viatical settlements until the commissioner approves the application, or the department issues a notice of denial regarding the application;]

[(2) may continue to use the forms submitted pursuant to this section and §3,1706 of this title (relating to Approval of Forms Relating to Viatical Settlements), until the commissioner has completed the review of the forms and either has approved or disapproved them.]

[(f) In complying with the reporting requirements of this section, viatical settlement companies or brokers shall not include the name of the viator, or in any other way compromise the anonymity of the viator, or the viator's family, spouse or significant other.]

[(g) The registration of any viatical settlement company or broker with a principal place of business outside of Texas shall not be approved unless the application is accompanied by:]

[(1) a written designation of an agent for service of process in Texas; and]

[(2) a written irrevocable consent to the jurisdiction of the commissioner and Texas courts.]

[(h) If there is a material change to any information provided in an application by a viatical settlement company or broker, the company or broker shall submit a new application containing the changed information.]

§3.1704. Renewal; Fees.

(a) Unexpired certificates of registration may be renewed every two years by filing with the department a completed application for renewal in such form as the department may require. Each renewal application, when filed, shall be accompanied by a two-year renewal fee of $500 if the renewal applicant is a viatical or life settlement company, and $250 if the renewal applicant is a viatical or life settlement broker. All renewal fees are nonrefundable and non-transferable, except as otherwise provided in subsection (f) of this section.

(b) If an applicant subsequently adds additional certificates of registration, the department may designate one expiration date per applicant to apply to all certificates of registration held by the applicant. The designated date shall be the date on which the initial certificate of registration would normally expire. For certificates of registration which would normally expire after the designated expiration date, renewal fees shall be adjusted pro rata on a monthly basis. The fee adjustment shall be for the renewal immediately following the institution of the designated expiration date. On each subsequent renewal, the applicant shall pay the full registration fee for each certificate of registration.

(c) If the renewal applicant is domiciled in another state, the renewal applicant shall comply with the requirements of §3.1703(j) - (m) of this subchapter (relating to Application for Certificate of Registration for Viatical or Life Settlement Companies or Brokers; Fees).

(d) Upon filing the completed renewal application and payment of the proper fee, the viatical or life settlement company's or broker's current certificate of registration shall continue in force until the renewal certificate is issued by the department or until the department has refused, for cause, to issue such renewal certificate as provided in Insurance Code Article 3.50-6A, or §3.1716 of this subchapter (relating to Denial, Suspension, or Revocation of Certificate of Registration; Enforcement), or other applicable law, and has given notice of such refusal in writing to the renewal applicant.

(e) If a viatical or life settlement company or broker does not intend to renew or elects to surrender its certificate of registration, the viatical or life settlement company or broker shall notify the department in writing. The company's or broker's written notification of nonrenewal or surrender shall be mailed not later than the 60th day before the date its current certificate of registration expires or is to be surrendered. The viatical or life settlement company or broker that is

nonrenewing or surrendering its certificate of registration shall comply with paragraph (1) or (2) of this subsection.

(1) A viatical or life settlement company that has viatical or life settlements that will not mature by the date the current certificate of registration expires or is to be surrendered shall take one of the following actions:

(A) renew its current certificate of registration, subject to subsection (f) of this section, or not surrender the certificate of registration until the date the last viatical or life settlement has matured and file the report required by §3.1705 of this subchapter (relating to Reporting Requirements);

(B) sell the viatical or life settlements that have not matured and file the report required by §3.1705 of this subchapter; or

(C) appoint in writing a Texas registered viatical or life settlement company to continue to monitor the viator's or life settlor's health status for purposes of continuing the administration of the viatical or life settlement. Appointments shall comply with the following:

(i) The appointed viatical or life settlement company must agree in writing to make all inquiries to the viator or life settlor or the viator's or life settlor's designee in accordance with §3.1712 of this subchapter (relating to Contacting the Viator, Life Settlor, or Owner for Health Status Inquiries: Limits and Prohibited Practices), and include the transferred viatical or life settlement information in its annual reports required by §3.1705 of this subchapter.

(ii) The viatical or life settlement company making the appointment shall transfer all records pertaining to its viatical or life settlements to the appointed viatical or life settlement company; obtain written confirmation from the appointed viatical or life settlement company that the records for all transferred viatical or life settlements have been received; file the report required by §3.1705 of this subchapter; and provide the viator or life settlor and owner with the appointed company's name, address, telephone number, and contact person.

(iii) Copies of the written agreements, confirmations, and reports required by clauses (i) and (ii) of this subparagraph shall be filed with the department no later than the date of expiration or surrender.

(2) A viatical or life settlement broker who elects to surrender, or not renew, the current certificate of registration, shall file the reports required by §3.1705 of this subchapter. A broker appointed by a viatical or life settlement company to provide tracking services who is nonrenewing or surrendering his/her certificate of registration shall:

(A) notify the viatical or life settlement company for which tracking services are being performed of the date the certificate of registration will expire or be surrendered; and

(B) transfer to the viatical or life settlement company all records utilized to track the viator or life settlor not later than the date the certificate of registration will expire or be surrendered.

(f) In the event that a viatical or life settlement company or broker taking one of the actions required by subsection (e)(1) or (e)(2) of this section is not able to fully complete one of the actions before its certificate of registration expires, the viatical or life settlement company or broker shall pay its full two-year renewal fee, and comply fully with subsection (e)(1) or (e)(2), as applicable, and thereafter surrender its certificate of registration to the department. Upon return of the certificate of registration, the viatical or life settlement company or broker shall be eligible for a pro rata, monthly-based refund of its renewal fee.

(g) The surrender of any viatical or life settlement company's or broker's certificate of registration to the department shall not operate to negate any offense committed prior to the effective date of the surrender. In addition, transmitting to the department any or all viatical or life settlement certificates of registration shall in no way affect any disciplinary proceedings by the department or by the commissioner of insurance in respect to any viatical or life settlement company or broker.

(h) Nothing in this section shall require the department to issue a renewal of a certificate of registration to any person.

§3.1705. Reporting Requirements.

(a) On or before March 1 of each year, each viatical or life settlement broker shall submit to the department, for the previous calendar year, a complete and accurate annual report containing the name and address of each viatical or life settlement company and any other brokers with whom the broker transacted the business of viatical or life settlements in Texas, and the number of transactions for each viatical or life settlement company or other broker. A viatical or life settlement broker who is non-renewing or surrendering the certificate of registration, shall file, upon nonrenewal or surrender, a complete and accurate report containing the information required by this subsection for the period from the latter of the last reporting period or the date of initial registration through the date of nonrenewal or surrender. The report shall be submitted as a hard copy and in electronic format as a text file in a comma-delimited format, unless prior to filing the report, the viatical or life settlement broker submits a written request and receives approval from the department to file only a hard copy. The report and/or written request to file only a hard copy shall be submitted to the department's Filings Intake Division at the address specified in §3.1703(f) of this subchapter (relating to Application for Certificate of Registration for Viatical or Life Settlement Companies or Brokers; Fees). [~~If a viatical settlement company has applied for a certificate of registration on or before March 1, 1997, it shall submit to the department quarterly reports, in the format prescribed by the form included as Figure 3 in §3.1718 of this title (relating to Application and Reporting Forms) (Form VIAT-CO.RPT), as such reports become due pursuant to the timetable specified on the first page of Figure 3. The report will consist of data relating to events or transactions that occurred during the three-month period preceding the report. Beginning March 1, 1997, viatical settlement companies shall submit reports to the department annually, as set forth in subsection (b) of this section.~~]

(b) On or before March 1 of each year, each [~~beginning on March 1, 1997,~~] viatical or life settlement company registered to conduct business in this state [~~companies~~] shall submit to the department for the previous calendar year, a complete and accurate [~~an~~] annual report of all viatical or life settlement transactions in Texas, and a separate complete and accurate annual report of all viatical or life settlement transactions for all states in the aggregate. A viatical or life settlement company that is nonrenewing or surrendering its certificate of registration, upon nonrenewal or surrender shall file a complete and accurate report containing the information required by subsection (c) of this section for the period from the latter of the last reporting period or the date of initial registration through the date of nonrenewal or surrender [~~, consisting of data relating to viatical settlement transactions with viators in Texas during the previous calendar year, as specified in Figure 3 in §3.1718 of this title (relating to Application and Reporting Forms) (Form VIAT-CO.RPT)~~].

(c) The viatical or life settlement company's reports required by this section shall be submitted as a hard copy and in electronic format as a text file in a comma-delimited format, unless prior to filing the report, the viatical or life settlement company submits a written request and receives approval from the department to file only a hard copy. The reports and/or written request to file only a hard copy shall be submitted to the department's Filings Intake Division at the address specified

in §3.1703(f) of this subchapter. The reports shall contain the information set forth in paragraphs (1) - (7) of this subsection as follows:

(1) For each viatical or life settlement contracted during the reporting period:

(A) a unique identifying number or other consistent identifier that corresponds to each viator, life settlor, or owner in the report, as a means of identifying the viator, life settlor, or owner, in a manner that does not reveal any confidential information;

(B) date (month and year) the settlement contract was signed by all necessary parties;

(C) insurance carrier's name and, if available, A.M. Best or other rating;

(D) age and mean life expectancy (in months) of the viator or life settlor at the time of contract;

(E) viator's or life settlor's and owner's state of residence at the time of contract;

(F) face amount of policy purchased;

(G) net death benefit purchased;

(H) estimated total premiums to keep policy in force for mean life expectancy, and/or WP--Waiver of Premium in effect, or NA--not applicable because policy is paid up or no premiums are due;

(I) net amount paid to the owner (less any outstanding debts or liens);

(J) source of policy (B-Broker; D-Direct Purchase; SM-Secondary Market, i.e., previously purchased by another person);

(K) type of policy (I-Individual or G-Group);

(L) age of the policy at the time the viatical or life settlement contract was effected;

(M) primary ICD Diagnosis Code, in numeric format, as defined by the International Classification of Diseases, as published by the U.S. Department of Health and Human Services (for life settlors with no diagnosis code, use N/A); and

(N) type of funding (I-Institutional--e.g. a bank, corporation, company, non-individual entity; P-Private--e.g. an individual);

(O) status as of ending date (The allowable status codes are: Death, if applicable; N/A, if the date of death has not been determined or verified; Sold, if the settlement contract has been sold; or Appoint, if the settlement contract has been appointed to another registered settlement company.)

(2) For each viatical or life settlement where death has occurred during the reporting period:

(A) a unique identifying number or other consistent identifier that corresponds to each viator, life settlor, or owner in the report, as a means of identifying the viator, life settlor, or owner, in a manner that does not reveal any confidential information;

(B) date (month and year) the settlement contract was signed by all necessary parties;

(C) age and mean life expectancy (in months) of the viator or life settlor at time of contract;

(D) viator's or life settlor's and owner's state of residence at the time of contract;

(E) net death benefit collected under the policy;

(F) amount of total premiums paid, and/or WP-Waiver of Premium in effect, or NA-not applicable because policy is paid up or no premiums are due;

(G) net amount paid to the owner (less any outstanding debts or liens);

(H) primary ICD Diagnosis Code, in numeric format, as defined by the International Classification of Diseases, as published by the U.S. Department of Health and Human Services (for life settlors with no diagnosis code, use N/A);

(I) date of death;

(J) amount of time (in months) between the date the viatical or life settlement contract was signed by all necessary parties, and the date of death;

(K) difference between the actual number of months the viator or life settlor lived after the date the contract was signed by all necessary parties, and the mean life expectancy used by the reporting viatical or life settlement company.

(3) the name and address of each viatical or life settlement company or broker from which the reporting company was referred a policy;

(4) the name and address of each viatical or life settlement company or broker to whom the reporting company referred a policy;

(5) the number of policies reviewed and rejected;

(6) the number of policies purchased in the secondary market as a percentage of total policies purchased;

(7) the name and address of any person whom the company utilizes to perform medical evaluations of any kind relating to viators or life settlors; and

(8) the name and address of any person whom the viatical or life settlement company utilizes or employs to monitor or track a viator's or life settlor's health status after a settlement contract has been signed by all necessary parties, and payment has been made to the owner.

~~[(c) If a viatical settlement broker has applied for a certificate of registration on or before March 1, 1997, it shall submit to the department quarterly reports relating to viatical settlement transactions with viators in Texas, in the format prescribed by Figure 4 in §3.1718 of this title (relating to Application and Reporting Forms) (Form VIAT-BR.RPT), as such reports become due pursuant to the timetable specified on the first page of Figure 4. The report will consist of data relating to events or transactions that occurred during the three-month period preceding the report. Beginning March 1, 1997, viatical settlement brokers shall submit reports to the department annually, as set forth in subsection (d) of this section.]~~

(d) In addition to the information required in this section, the department may request any other information the department deems necessary to conduct a complete review of the viatical or life settlement company's or broker's conduct of business related to the assignment, negotiation, purchase, sale, or other business related to viatical and life settlements ~~[On or before March 1 of each year, beginning on March 1, 1997, viatical settlement brokers registered in this state must submit to the department data relating to viatical settlement transactions with viators and in Texas that occurred during the previous calendar year, as specified in Figure 4 in §3.1718 of this title (relating to Application and Reporting Forms) (Form VIAT-BR.RPT)~~].

(e) In complying with the reporting requirements of this section, a viatical or life settlement company [~~companies~~] or broker [~~brokers~~] shall not include any confidential information [~~the name of the viator~~], or in any other way compromise the anonymity of any [~~the~~] viator, life settlor, or owner, or the viator's, life settlor's, or owner's family members, spouse, or significant other.

(f) Any viatical or life settlement company or broker that fails or refuses to submit any information required by this section is subject to disciplinary action under §3.1716 of this subchapter (relating to Denial, Suspension, or Revocation of Certificate of Registration; Enforcement).

§3.1706. Form Filing Requirements and Approval, Disapproval, or Withdrawal of Forms.

(a) Upon issuance by the department of a viatical or life settlement certificate of registration, a viatical or life settlement company or broker shall file, for review or approval, any form it uses, or intends to use, to effect a viatical or life settlement contract in this state, prior to any use, issuance, or delivery of the form. A company or broker registered to conduct both viatical and life settlement business in this state may file a form for use in both the viatical and life settlement markets in accordance with subsection (g) of this section.

(b) Forms which must be filed include, but are not limited to, the following:

(1) settlement applications;

(2) settlement contracts, and any amendments thereto;

(3) disclosures, except as provided in subsection (f)(8) and (9) of this section;

(4) escrow or trust agreements;

(5) documents used to obtain or release confidential information, including documents used by the viatical or life settlement company or broker which in any way refer to, affect, request, or relate to a viatical or life settlement company's or broker's obtaining or releasing confidential information;

(6) acknowledgment forms, except as provided in subsection (f)(8) of this section; and

(7) any other form used by a viatical or life settlement company or broker to effect a viatical or life settlement contract in this state.

(c) All forms filed pursuant to this section shall be accompanied by a transmittal checklist, a copy of which is available from the department at the address specified in §3.1703(f) of this subchapter (relating to Application for Certificate of Registration for Viatical or Life Settlement Companies or Brokers; Fees). The transmittal checklist shall be completed and signed by a duly authorized representative or attorney of the viatical or life settlement company or broker, and shall include the following information:

(1) the name of the submitting viatical or life settlement company or broker and its registration number;

(2) a designated contact person for the filing, including the individual's name, address, phone number, and if available, fax number and e-mail address. If the form filing is submitted by anyone other than the viatical or life settlement company or broker, the filing shall be accompanied by an attachment executed by an officer of the viatical or life settlement company or broker, designating the person submitting the filing as the contact for that filing;

(3) a statement indicating the type(s) of settlement for which the form is used (i.e. viatical, life, or both);

(4) a list of all submitted forms, and an explanation of the purpose and use of each form including, if applicable, a designation of any prototype form(s) used;

(5) if applicable, a list of the form numbers and approval dates of all previously approved forms with which the submitted form will be used, and a statement explaining when the submitted form will be used;

(6) a designation indicating whether the form is file and use or review and approval prior to use as those categories are described in subsection (d) of this section;

(7) a designation indicating whether the form is new, informational, substantially similar to a previously approved form, exact copy, substitution of a previously approved form, correction to a pending form, or a resubmission of a previously disapproved form, as those types are described in subsection (e) of this section; and

(8) any applicable information, attachments, and certifications specified in this section.

(d) Categories for viatical or life settlement form filings are file and use or review and approval prior to use, as follows:

(1) File and Use. A form filed under this category may be immediately used and delivered in this state until a request for corrections has been made, or the form has been disapproved by the department. A filing under this category shall include the information and certifications specified in subsection (f)(1) and (2) of this section. Any form that has been previously disapproved by the department pursuant to subsection (k) of this section is not eligible for filing under this category.

(2) Review and approval prior to use. A form filed under this category must be filed with the department not less than 60 days prior to the viatical or life settlement company's or broker's intended use or delivery of such form. A filing under this category prohibits the viatical or life settlement company or broker from using or delivering such form prior to the end of 60 days from the date the form is received by the department, unless the department approves the form during the 60-day period. If the form has not been approved by the 60th day after the date the form is received by the department, the viatical or life settlement company or broker may use the form:

(A) when the form is approved by the department; or

(B) if the form has not been previously disapproved, or corrections have not been requested by the department at any time, and the viatical or life settlement company or broker submits to the department the certifications specified in subsection (f)(3) of this section.

(e) The types of viatical or life settlement form filings are new, informational, substantially similar to a previously approved form, exact copy, substitution of a previously approved form, corrections to a pending form, and resubmission of a previously disapproved form, as follows:

(1) New. A form which has not been previously reviewed or approved by the department under Insurance Code Article 3.50-6A and this subchapter, except for a form withdrawn by a viatical or life settlement company or broker pursuant to paragraph (6) of this subsection.

(2) Informational. A form which is submitted for informational purposes only.

(3) Substantially similar to a previously approved form. A form which is substantially similar to a form that was approved by the department after December 1, 2000. This type of form filing requires

the information and certification specified in subsection (f)(1) and (4) of this section.

(4) Exact copy. A form which, except for the viatical or life settlement company's or broker's name, address, phone number, or other similar viatical or life settlement company's or broker's identification information, is an exact copy of a form approved by the department on or after December 1, 2000. This type of form filing requires the information and certifications specified in subsection (f)(1) and (4)(A) and (C) of this section, and will be approved as of the date of receipt by the department.

(5) Substitution of a previously approved form. A form which substitutes a form previously approved by the department on or after December 1, 2000, for the same viatical or life settlement company or broker wherein the previously approved form has not been issued, or otherwise used in Texas, and will not be used in Texas at any time. This type of form filing requires the information and certifications specified in subsection (f)(1) and (4) of this section.

(6) Correction to a pending form. A form containing corrections to a pending form submitted subsequent to the viatical or life settlement company receiving notification of the form's deficiencies from the department. This type of form filing requires the information and certifications specified in subsection (f)(1) and (5) of this section, and shall be received by the department no later than 30 days following the date the viatical or life settlement company or broker receives oral or written notification from the department of the form's deficiencies. If a corrected form is not received by the department within the 30 days following the date the viatical or life settlement company or broker receives notification of the form's deficiencies, the form shall be considered withdrawn by the viatical or life settlement company or broker, and will receive no further consideration until it is refiled as a new form filing.

(7) Resubmission of a previously disapproved form. A form containing corrections to a form subsequent to the viatical or life settlement company receiving a disapproval letter from the department. This type of form filing requires the information and certifications specified in subsection (f)(1) and (7) of this section.

(f) A viatical or life settlement company or broker shall include the certification(s), attachments(s), and other information referred to in this section as follows:

(1) A viatical or life settlement company or broker, or its duly authorized representative or attorney filing any form with the department shall certify on the transmittal checklist that it has reviewed, and is familiar with, all applicable statutes and regulations of this state and of the United States, has reviewed the form filing, and to the best of their knowledge and belief, states that the filed form complies in all respects with the applicable statutes and regulations of this state and of the United States.

(2) A viatical or life settlement company or broker filing a form under subsection (d)(1) of this section shall, in addition to providing the certification specified in paragraph (1) of this subsection, certify to the following:

(A) that no corrections to the form have been requested by the department; and

(B) that the form has not been previously disapproved by the department.

(3) A viatical or life settlement company or broker filing a form under subsection (d)(2) of this section shall, in addition to providing the certification specified in paragraph (1) of this subsection, certify that the form will not be used until the form is approved by the department. If, following the 60th day from the date the form is received by the department, the viatical or life settlement company or broker elects to use, issue, or deliver such form prior to receiving approval from the department, the viatical or life settlement company shall provide the certifications specified in paragraphs (1) and (2) of this subsection.

(4) A viatical or life settlement company or broker submitting a form under subsection (e)(3), (4) or (5) of this section, shall provide the certification specified in paragraph (1) of this subsection, and shall provide the following information and certification(s):

(A) the form number and approval date of the previously approved form, including the company's or broker's name if different from the submitting company or broker;

(B) a summary of the difference(s) between the previously approved form and the submitted form, including a description of any deleted text. The submitted form shall clearly identify all changes. New or modified text shall be underlined; and

(C) a certification that no changes have been made to the form other than those identified.

(5) A viatical or life settlement company or broker submitting a form pursuant to subsection (e)(6) of this section shall provide the certification specified in paragraph (1) of this subsection, and shall provide the following information and certification(s):

(A) the form number of the pending form;

(B) the name of the department's form review specialist who reviewed the form;

(C) the date of notification of any form deficiencies;

(D) the tracking number of the pending form as assigned by the department;

(E) a summary of the difference(s) between the previously reviewed form and the corrected form, including a description of any deleted text. The corrected form shall clearly identify all changes. New or modified text shall be underlined; and

(F) a certification that no changes have been made to the form other than those identified.

(6) A viatical or life settlement company or broker submitting a form pursuant to subsection (e)(5) of this section shall provide the certification specified in paragraph (1) of this subsection, and a certification that the original version of the form has not been issued in Texas, or otherwise used in Texas, and will not be used in Texas at any time.

(7) A viatical or life settlement company or broker submitting a form pursuant to subsection (e)(7) of this section shall provide the certification specified in paragraph (1) of this subsection, and shall provide the following information and certification(s):

(A) the form number of the disapproved form;

(B) the date of disapproval by the department; and

(C) the information and certification(s) specified in paragraph (5)(B),(D),(E), and (F) of this subsection.

(8) A viatical or life settlement company or broker utilizing either the prototype viatical or life settlement disclosure described in §3.1708(c) of this subchapter (relating to Required Disclosure), or the prototype viatical or life settlement acknowledgment form described in §3.1709(d) of this subchapter (relating to Application and Contract Forms: Required Provisions and Escrow/Trust Agreements), is not required to file the form under this section if the viatical or life settlement

company or broker certifies on the transmittal checklist that no changes have been, or will be made, to the department's language.

(9) A viatical or life settlement company or broker shall certify on the transmittal checklist either that the English/Spanish application disclosure:

(A) appearing on the submitted application is an exact copy of the language specified in §3.1709(a) of this subchapter and that no changes have been or will be made to the application disclosure; or

(B) will be attached as a supplement to the front of the submitted application and that no changes have been or will be made to the English/Spanish application disclosure. A viatical or life settlement company or broker making this certification is not required to file the supplement with the department.

(g) A company or broker registered to conduct both viatical and life settlement business in this state, and who submits a form for use in both the viatical and life settlement business shall certify that:

(1) the company or broker is lawfully registered in this state to conduct both viatical and life settlement business; and

(2) the company or broker will, when issuing the form to viators, life settlors, or owners, clearly delineate on the form itself, whether the form is being used to effectuate a viatical settlement or whether the form is being used to effectuate a life settlement.

(h) Any form filed pursuant to this section shall be:

(1) filled in with specimen language and specimen fill-in material, and shall not contain the confidential information of any viator, life settlor, or owner;

(2) submitted on 8 1/2 by 11-inch paper. Bound forms will not be accepted;

(3) submitted in typewritten, computer generated, or printer's proof format and be clearly legible. Handwritten forms or handwritten corrections will not be accepted;

(4) designated by a unique form number sufficient to distinguish it from all other forms used by the viatical or life settlement company or broker. The form number shall be located in the lower left-hand corner of the cover page or on the first page of the form, if visible with the cover closed.

(i) A form filed under this section may contain variable language, provided that the variable language is:

(1) bracketed; and

(2) accompanied by a clear explanation of how the material will vary and how it will be used.

(j) Form filings that are not accompanied by a completed transmittal checklist, or which do not contain all required information and/or certifications, will not be accepted for review by the department, and will be returned to the viatical or life settlement company or broker as incomplete.

(k) The department may disapprove any form filed pursuant to this section, or withdraw previous approval of any form, if:

(1) the form fails to comply with any applicable statutes or regulations of this state or the United States; or

(2) the content of the form is unjust, encourages misrepresentation, or is in any way deceptive.

(l) The department may request that corrections be made to a form to bring the form into compliance with the provisions of this subchapter, Article 3.50-6, or any law of this state or the United States.

(m) When the department makes a request for corrections, disapproves a form, or withdraws approval of a form pursuant to subsection (k), (l), or (q) of this section, the department may request that the viatical or life settlement company or broker replace the form previously used, issued, or delivered, with a corrected form, or correct the form by amendment. The department may also request that the viatical or life settlement company or broker discontinue using the form, if, prior to receiving approval from the department, any form has been used, issued , or delivered.

(n) The department shall send written notification of any approval or disapproval of any form filed under this section.

(o) The department may request any additional information necessary for a comprehensive review of any form.

(p) The viatical or life settlement company or broker may make a written request for hearing to the department's Chief Clerk at the address specified in §3.1703(f) of this subchapter upon receiving notification under subsection (k) of this section of any disapproval of a form by the department.

(q) The commissioner may, after notice and opportunity for hearing, withdraw any previous approval of a form, if any form violates or does not comply with Insurance Code Article 3.50-6A, this subchapter, or any law of this state or the United States. The commissioner may require the viatical or life settlement company or broker to either replace the form previously used or delivered with a corrected form, or correct the form by amendment.

§3.1707. Advertising, Sales and Solicitation Materials; Filing Prior to Use ~~Required Filings for Informational Purposes~~.

~~[(a) Each viatical company shall file with the department a copy of the written informational material required by §3.1708 of this title (relating to the Required Informational Materials), on or before the date the brochure is disseminated to viators.]~~

(a) ~~[(b)]~~ Upon issuance of a certificate of registration, each ~~[Each]~~ viatical or life settlement company or broker shall file with the department all advertising or other solicitation materials used to market viatical or life settlements or the viatical or life settlement company's ~~[company]~~ or broker's services ~~[to viators or prospective viators]~~ in this state, on or before the date such materials are ~~[published or]~~ disseminated. ~~[Advertising submitted with the application for registration should be submitted to the address specified in §3.1706(e)(2) of this title (relating to Approval of Forms Relating to Viatical Settlements).]~~ Advertising ~~[Subsequent]~~ filings ~~[of advertising]~~ should be filed with ~~[sent directly to]~~ the department's Advertising Unit ~~[of the Consumer Protection Division, Texas Department of Insurance, Mail Code 111-2A,]~~ at the address specified in §3.1703(f) of this subchapter (relating to Application for Registration for Viatical or Life Settlement Companies or Brokers; Fees) ~~[P.O. Box 149104, Austin, Texas 78714-9104 or 333 Guadalupe, Austin, Texas 78701]~~.

~~[(c) If a viator represented by an attorney requests any substantive revision in a contract effecting a viatical settlement, the viatical settlement company must file the contract, as revised, with the department, redacting all information made confidential by §3.1714 of this title (relating to Confidentiality). Provided that this submission is accompanied by a written certification from the viator's stating that the viator has requested the substantive revision after consultation with the viator's attorney, the submission of the revised contract will be for informational purposes, rather than for prior approval.]~~

(b) ~~[(d)]~~ The filings required by this section are for informational purposes only. Viatical and life settlement companies or brokers may use or disseminate the materials referenced in ~~[subsection (a)-(c) of]~~ this section without the prior review ~~[approval]~~ of the department.

§3.1708. Required Disclosure [~~Informational Materials~~].

(a) With each application for a viatical or life settlement, the viatical or life settlement company or broker shall deliver to the viator or life settlor and owner [~~applicant~~] written disclosures required by this section [~~informational materials setting forth the company's full name and home office address~~].

(b) The written disclosures shall [~~informational materials must include the following statements~~]:

(1) prominently display the viatical or life settlement company's or broker's full name, home office address, and telephone number; and

(2) disclose the following information:

(A) [~~(1)~~] that individuals wishing to sell their policies[~~"Persons with catastrophic or life-threatening illnesses or conditions~~] may have alternatives to viatical or life settlements. These alternatives may include[~~, including~~] accelerated benefits offered by the issuer of the policy, loans secured by the policy, and surrender of the policy for cash value.[~~"~~]

(B) [~~(2)~~] that an individual [~~"A viator~~] may incur tax consequences by [~~from~~] entering into a viatical or life settlement. [~~Persons interested in entering into a viatical settlement should consult their tax advisor."~~]

(C) [~~(3)~~] that a [~~"A~~] viatical or life settlement may affect an individual's [~~a viator's~~] ability to receive supplemental social security income, public assistance and public medical services, including Medicaid. [~~Persons interested in entering into a viatical settlement should consult an attorney, financial advisor or social services agency regarding these potential consequences."~~]

(D) [~~(4)~~] that the[~~"The~~] proceeds of a viatical or life settlement [~~payable to the viator~~] may not be exempt from [~~the viator's~~] creditors, personal representatives, trustees in bankruptcy, and receivers in state or federal court. [~~Persons interested in entering into a viatical settlement should consult an attorney or financial advisor regarding these potential consequences."~~]

(E) that all confidential information solicited or obtained by a viatical or life settlement company or broker about a viator, life settlor, or owner, including the viator's, life settlor's, or owner's identity or the identity of family members, a spouse or significant other, if obtained in accordance with §3.1710(c)(2) of this subchapter (relating to Prohibited Practices Relating to Advertising and Solicitation; Applications and Contracts), is confidential, and shall not be disclosed in any form to any person, unless disclosure has been given by prior written consent from the viator, life settlor, or owner on a form which specifically identifies the person to whom the confidential information will be released, and the purpose for releasing the confidential information to that person.

[~~(c) The written informational materials must explain:~~]

(F) [~~(1)~~] how[~~How~~] viatical or life settlements operate[.] [~~;~~]

(G) [~~(2)~~] the owner's [~~The viator's~~] right to rescind a viatical or life settlement contract at any time prior to receipt of the settlement proceeds, but not later than the 15th day after the date [~~either that the viator~~] the owner receives the viatical or life settlement proceeds. If the viator or life settlor dies during the 15-day rescission period, the viatical or life settlement contract shall be deemed to have been rescinded. The viatical or life settlement company shall refund the death benefit to the owner or beneficiaries designated by the owner in the viatical or life settlement contract for this purpose, and the death benefit returned to such beneficiary or beneficiaries shall be subject to the deduction of all viatical or life settlement proceeds previously paid, and if applicable, any premiums paid by the viatical or life settlement company. [~~, or the proceeds are placed in escrow, as allowed by §3.1709 of this title (relating to Application and Contract Forms: Required Provisions and Prohibited Practices);~~]

(H) [~~(3)~~] the [~~The~~] viator's, life settlor's, or owner's right to know, upon request, the identity of any person who will receive or has received a commission or other form of compensation from the viatical or life settlement company or broker with respect to their [~~the~~] viatical or life settlement and the amount and terms of such compensation.[~~;~~]

(I) [~~(4)~~] the [~~The~~] limits and options regarding contacts for determination of health status set forth in §3.1709(c)(5) and (6) of this subchapter (relating to Application and Contract Forms: Required Provisions and Escrow/Trust Agreements). [~~§3.1709(b)(4) of this title (relating to Application and Contract Forms: Required Provisions and Prohibited Practices) and §3.1712 of this title (relating to Contacting the Viator for Health Status Inquiries: Limits and Prohibited Practices);~~]

[~~(5) Every viator's right to confidentiality under §3.1714 of this title (relating to Confidentiality);~~]

(J) [~~(6)~~] that [~~That~~] if the policy which [~~that~~] is the subject of a viatical or life settlement is a joint policy, [~~contains a provision for double or additional indemnity for accidental death,~~] or contains riders or other provisions insuring the lives of a spouse [~~spouses~~], dependents, [~~family members~~] or anyone else other than the viator or life settlor [~~person with the catastrophic or life-threatening illness~~], there may be a possible loss of coverage [~~the viatical settlement contract will affect those provisions or riders and may cause spouses, family members or others to lose the additional benefits afforded by those provisions or riders~~].

(K) that if the policy which is the subject of the viatical or life settlement contains a rider to, or a provision of, the policy providing an additional death benefit for accidental death, or a future increase in the death benefit, such death benefit remains payable by the insurance company to the beneficiary last named by the viator, life settlor, or owner, not including the viatical or life settlement company, or in the absence of a beneficiary, to the estate of the viator, life settlor, or owner.

(L) that entering into a viatical or life settlement contract will have an effect on payment of premiums and dispositions of proceeds, cash values, and dividends, and may cause other rights or benefits, including conversion rights and waiver of premium benefits that may exist under the policy, to be forfeited by the individual.

(M) that the individual may wish to contact an attorney, accountant, estate planner, financial planning advisor, their insurer, insurance agent, tax advisor, or social services agency regarding potential consequences resulting from entering into a viatical or life settlement.

(N) that the individual may wish to inquire if the viatical or life settlement broker is a captive broker, and explain that a captive broker does not actively market the viator's, life settlor's, or owner's policy to various viatical or life settlement companies to find the best competitive offer, but instead only refers viators, life settlors, or owners to the viatical or life settlement company with whom the viatical or life settlement broker is employed or contracted.

(O) that the viator, life settlor, or owner may file a complaint by contacting the Texas Department of Insurance, Consumer Protection Division, Mail Code 111-1A, P. O. Box 149104, Austin, Texas 78714-9104 or 333 Guadalupe, Austin, Texas 78701, or by calling the department's Consumer Help Line between 8 a.m. and 5 p.m., Central

Time, Monday-Friday at 1-800-252-3439; by faxing a complaint to the department at 1-512-475-1771; by completing a complaint on-line at www.tdi.state.tx.us; or by e-mailing a complaint to consumer.protection@tdi.state.tx.us; and

(3) comply with the plain language requirements prescribed in §3.602(b)(1)(A)-(C) of this title (relating to Plain Language Requirements), and shall contain the appropriate text required by this section, but shall not contain any material of an advertising nature, except for the viatical or life settlement company's or broker's logo-type.

(c) A viatical or life settlement company or broker may either develop and file for approval its own disclosure or utilize the applicable disclosure available from the department which may be obtained by making a request to the Life/Health Division at the address specified in §3.1703(f) of this subchapter (relating to Application for Certificate of Registration for Viatical or Life Settlement Companies or Brokers; Fees).

§3.1709. Application and Contract Forms: Required Provisions and Escrow/Trust Agreements[~~and Prohibited Practices~~].

(a) With each [~~All~~] application [~~forms used to effect~~] for a viatical or life settlement, the viatical or life settlement company or broker shall deliver to the viator or life settlor and owner, [~~settlements shall contain~~] the following information in English and in Spanish, which either must be displayed prominently and in bold print on the front page of the application, or on a supplement attached to the front of the application:

(1) In English: "Receipt of a (INSERT: viatical* or life,** as applicable) [~~viatical~~] settlement may affect your eligibility for public assistance programs such as medical assistance (Medicaid), Aid to Families with Dependent Children (AFDC), supplementary social security income (SSI), and drug assistance programs. The money you receive for your life insurance policy also may be taxable. Before completing a (INSERT: viatical or life, as applicable) settlement contract, you are urged to consult with an attorney, accountant, estate planner, financial planning advisor, your insurer or insurance agent,[~~a qualified~~] tax advisor, or a [~~and with~~] social service agency [~~agencies~~] concerning how [~~such~~] receipt of a payment will affect you, your family, and your spouse's eligibility for public assistance. For more information about (INSERT: viatical or life, as applicable) settlements generally, contact the Texas Department of Insurance[~~,~~] at 1-800-252-3439." (Insert either or both, as applicable: * Viatical settlement--A transaction whereby a written agreement is solicited, negotiated, offered, entered into, delivered, or issued for delivery in this state, under which a viatical settlement company acquires, through assignment, sale, or transfer of a policy insuring the life of an individual who has a catastrophic or life-threatening illness or condition, by paying the owner or certificate holder compensation or anything of value that is less than the net death benefit of the policy. ** Life settlement--A transaction whereby a written agreement is solicited, negotiated, offered, entered into, delivered, or issued for delivery in this state, under which a life settlement company acquires, through assignment, sale, or transfer of a policy insuring the life of an individual who does not have a catastrophic or life-threatening illness or condition, by paying the owner or certificate holder compensation or anything of value that is less than the net death benefit of the policy.)

(2) In Spanish: "El aceptar una liquidación tipo (INSERT: viáticos* or pago en vida**) podría afectar que usted pueda inscribirse en los programas de asistencia pública, tales como los de Asistencia Médica de Medicaid, Ayuda para Familias con Hijos Menores (AFDC), Ingreso Suplementario del Seguro Social (SSI) y otros programas de ayuda para la compra de medicamentos. Es posible que también tenga que pagar impuestos por el dinero que usted reciba por su seguro de vida. Antes de firmar cualquier acuerdo tipo (INSERT: viáticos or pago en vida) lo exhortamos que consulte con un abogado, contador, planeador de patrimonios, consejero económico, su aseguradora o agente de seguros, consejero (perito) en materia de impuestos o con (y con) una agencia (las agencias) de servicios sociales para que se informe cómo el recibo de dichos pagos podría afectar su capacidad, la de su familia y la de su cónyuge para recibir asistencia pública. Para más información en general respecto a los acuerdos tipo (INSERT: viáticos or pago en vida) llame al Departamento de Seguros de Texas al 1-800-252-3439." (Insert either or both, as applicable) *Pago Tipo Viáticos--Una transacción en la cual por medio de un contrato por escrito a cumplir en este estado se solicita, negocia, ofrece, compromete, establece o expide, que bajo dicho contrato una compañía de liquidación tipo viáticos adquiera, por medio de asignación, venta o transferencia, la póliza de seguro de vida de un individuo que padece de una enfermedad o padecimiento catastrófico o que amenaza la vida, al pagar al propietario o tenedor de la póliza una compensación o cualquier cosa de valor de menos cuantía que la suma neta del beneficio de muerte que estipula la póliza. Or **Pago en Vida--Una transacción en la cual por medio de un contrato por escrito a cumplir en este estado se solicita, negocia, ofrece, compromete, establece o expide, que bajo dicho contrato una compañía de liquidación tipo pago en vida adquiera, por medio de asignación, venta o transferencia, la póliza de seguro de vida de un individuo que no padece de una enfermedad o padecimiento catastrófico o que amenaza la vida, al pagar al propietario o tenedor de la póliza una compensación o cualquier cosa de valor de menos cuantía que la suma neta del beneficio de muerte que estipula la póliza. [~~Figure: 28 TAC §3.1709(a)(2)~~]

(b) All application and medical release forms signed by the viator, life settlor, or owner at the time of application shall contain the name, address, and phone number of the viatical or life settlement company or broker to whom the application is being made, and copies of the forms, including the Spanish/English disclosure, shall be given to the viator, life settlor, or owner at the time of application.

(c) [~~(b)~~] All contracts [~~forms of contract~~] used to effect viatical or life settlements shall contain the following:

(1) a provision that the viatical or life settlement contract together with the application, including any amendments and attached papers, if any, constitutes the entire viatical or life settlement contract between the parties to the contract, and no change to the viatical or life settlement contract shall be valid until approved by an executive officer of the viatical or life settlement company, and unless such approval be endorsed thereon or attached to the viatical or life settlement contract. The provision shall also state that no person, other than an executive officer of the company, has the authority to change the viatical or life settlement contract, or to waive any of its provisions, and that in the absence of fraud, all statements made by the viator or life settlor and owner shall be deemed representations and not warranties.

(2) [~~(1)~~] a provision that the owner[~~viator~~] may rescind the viatical or life settlement contract at any time, but not later than the 15th day after [~~either~~] the date that the owner [~~viator~~] receives the proceeds of the viatical or life settlement. If the viator or life settlor dies during the rescission period, the viatical or life settlement contract shall be deemed to have been rescinded, and the viatical or life settlement company shall refund the death benefit to the owner or beneficiaries designated in the viatical or life settlement contract for this purpose. A refund of the death benefit to a beneficiary or beneficiaries under this paragraph is subject to repayment of all viatical or life settlement proceeds, and if applicable, any premium paid by the viatical or life settlement company. [~~, or, at the option of the viatical settlement company,~~

the date the proceeds are placed in escrow as provided by paragraph (2)(B) of this subsection;]

(3) a provision that, at the option of the viatical or life settlement company, the proceeds may be placed into an escrow or trust account to effect payment to the owner.

(4) [(2)] a provision that, within three business days, upon receipt from the owner [viator] of documents to effect the transfer of the policy, the viatical or life settlement company may at its option either:

(A) make unconditional payment to the owner [viator immediately], either in a lump sum or in installment payments in a manner not prohibited by §3.1710(c)(7) of [subsection (c)(5) of] this subchapter (relating to Prohibited Practices Relating to Advertising and Solicitation; Applications, and Contracts) [section]; or

(B) place [pay] the proceeds of the settlement with a trustee or escrow agent, to be placed into [to] an escrow or trust account [managed by a trustee or escrow agent] in a financial institution [national or state bank] that is a member of the Federal Deposit Insurance Corporation (FDIC), where such proceeds shall remain until:

(i) the proceeds are disbursed to the owner within three business days, [viator] upon acknowledgment of the transfer of the policy by the issuer of the policy[, or the expiration of the rescission period without rescission by the viator , whichever occurs later];

(ii) the proceeds are transferred to purchase an instrument used to effect installment payments in a manner not prohibited by §3.1710(c)(7) [subsection (c)(5)] of this subchapter [section]; or

(iii) the proceeds and premium paid by the viatical or life settlement company are returned to the viatical or life settlement company by the escrow agent or trustee upon notice of the owner's [viator's] rescission , including rescission due to the death of the viator, life settlor, or owner within the rescission period. [;]

[(3) a provision that the forms used to effect the viatical settlement, together with the application, constitute the entire contract between the viatical settlement company and the viator;]

(5) [(4)] a provision that the viator or life settlor may designate any [adult] individual of legal age, in regular contact with the viator or life settlor, as the contact for all inquiries about the viator's or life settlor's health status upon written notice providing the name, address and telephone number of the individual. The provision shall include: [, and, if such designation is made, a viatical settlement company cannot make such an inquiry to the viator, unless the company is unable, after diligent effort, to contact the designee for more than 30 days. The viator or may change this designation at any time, upon written notice to the viatical settlement company;]

(A) the limitations on inquiry set forth in §3.1712 of this subchapter (relating to Contacting the Viator, Life Settlor, or Owner for Health Status Inquiries: Limits and Prohibited Practices); and

(B) a statement that the viator or life settlor may change this designation at any time upon written notice to the viatical or life settlement company.

(6) A provision that the viatical or life settlement company shall provide to the viator or life settlor and owner, the name, address, and telephone number of the viatical or life settlement company or broker that will contact the viator or life settlor or his or her designee as provided in §3.1712 of this subchapter, and shall notify the viator or life settlor and owner of any change in such information.

(7) [(5)] a provision disclosing that the viatical or life settlement company has the right to assign, [could] sell, or otherwise transfer the policy that is the subject of the viatical or life settlement to a person unknown to the viator, life settlor, or owner, without the viator's, life settlor's, or owner's consent, and if the viatical or life settlement company does assign, sell, or otherwise transfer said policy, the viatical or life settlement company will disclose to the viator, life settlor, or owner within 10 business days of the date of the assignment, sale, or transfer, the identity of the person or persons to whom the viatical or life settlement company has assigned, sold, or otherwise transferred said policy. [;]

[(6) if the viatical settlement company intends to sell or otherwise transfer the policy that is the subject of the viatical settlement to a particular person or persons, a provision disclosing the company's intent to sell or otherwise transfer the policy, and the identity of the person or persons to whom the initial company proposes to sell or otherwise transfer the policy;]

[(7) an acknowledgment page, which a prospective viator must sign before a notary, stating that the prospective viator acknowledges that he or she:]

[(A) has a life-threatening illness;]

[(B) has received and read the written informational materials required by §3.1708 of this title (relating to Required Informational Materials);]

[(C) has received and read all of the documents used to effect the viatical settlement;]

[(D) is entering into the viatical settlement knowingly and voluntarily;]

(8) a provision defining how any notice required or permitted under the contract shall be given and delivered.

(9) [(8)] a provision disclosing [full disclosure regarding] what effect the viatical or life settlement will have on payment of premiums and disposition of proceeds, cash values and dividends. [,]

(10) a provision disclosing that if the policy that is the subject of the viatical or life settlement is a joint policy, [contains a provision for double or additional indemnity for accidental death,] or contains riders or other provisions insuring the lives of a spouse [spouses], dependents, [family members] or anyone else other than the viator or life settlor, there may be a possible loss of coverage, and the viator or life settlor should contact their insurance company or their agent to determine if the coverage may be converted in order to avoid losing the coverage [person with the life-threatening illness].

(11) an acknowledgment form, which a viator or life settlor and owner shall sign before a notary, stating that:

(A) either the viator has a catastrophic or life-threatening illness, or the life settlor does not have a catastrophic or life-threatening illness;

(B) the written disclosures required by §3.1708 of this subchapter (relating to Required Disclosure) have been received and read;

(C) all of the documents used to effect the viatical or life settlement have been received and read; and

(D) the viatical or life settlement contract is being entered into knowingly and voluntarily.

(d) A viatical or life settlement company may develop and file its own acknowledgement form required by subsection (c)(11) of this section, or may utilize the acknowledgment form available from

the department, which may be obtained by making a request to the Life/Health Division at the address specified in §3.1703(f) of this subchapter (relating to Application for Certificate of Registration for Viatical or Life Settlement Companies or Brokers; Fees).

(e) If a viatical or life settlement company enters into a viatical or life settlement which allows the owner to retain an interest in the policy or the policy contains a provision, whether in the policy or attached by rider, providing an additional death benefit for accidental death or future increases in the death benefit, the viatical or life settlement contract or amendment shall contain a provision:

(1) that the viatical or life settlement company will effect the transfer of the amount of the net death benefit only to the extent or portion of the amount sold. Benefits in excess of the amount that is sold will be paid by the insurance company directly to the beneficiaries in accordance with the terms of the policy;

(2) that the additional death benefit for accidental death or future increases in the death benefit shall remain payable to the beneficiary last named by the viator, life settlor, or owner, not including the viatical or life settlement company or in the absence of a beneficiary, to the estate of the viator, life settlor, or owner;

(3) that the viatical or life settlement company will, upon acknowledgment of the perfection of the transfer, either:

(A) advise the owner, in writing, that the insurance company has confirmed the owner's remaining interest in the policy; or

(B) send the owner a copy of the document sent from the insurance company that acknowledges the owner's remaining interest in the policy;

(4) that defines the apportionment of premiums to be paid by the viatical or life settlement company and the owner. It is permissible for the viatical or life settlement contract, or amendment, to specify that all premiums will be paid by the viatical or life settlement company. The contract, or amendment, may also require the owner to reimburse the viatical or life settlement company for the premiums attributable to the remaining interest, including any premiums for the accidental death benefit or any increase in the death benefit subsequent to the viatical or life settlement contract.

(f) All viatical or life settlement contracts, in addition to meeting the other requirements of this section, shall contain:

(1) consistent terminology;

(2) a section defining key terms used in the viatical or life settlement contract;

(3) the name of the owner and insured;

(4) the number of the policy which serves as the basis for the viatical or life settlement contract;

(5) the name of the insurance company underwriting the policy;

(6) the amount of the net death benefit of the policy; and

(7) a signature line for the viatical or life settlement company's representative, and the owner and insured, as applicable.

(g) A viatical or life settlement company that places the proceeds of the viatical or life settlement into an escrow or trust account pursuant to subsection (c)(3) or (c)(4)(B) of this section, shall comply with the following:

(1) the viatical or life settlement company shall establish no more than one escrow or trust account;

(2) the name of the registered viatical or life settlement company shall be included within the name of the escrow or trust account;

(3) the escrow agent shall not be any person under common control with a viatical or life settlement company or broker;

(4) the escrow or trust agreement shall contain:

(A) the name of the owner and insured:

(B) the number of the policy which serves as the basis for the viatical or life settlement contract;

(C) the name of the insurance company underwriting the policy;

(D) the name of the viatical or life settlement company purchasing the policy;

(E) the name, address, and telephone number of the escrow agent or trustee;

(F) the amount of proceeds placed into the escrow or trust account;

(G) all terms and conditions of the escrow or trust agreement;

(H) the name and address of the financial institution where the funds to be paid to the owner will be deposited;

(I) a description of the purpose of the escrow or trust account;

(J) the circumstances that will trigger disbursement of the funds from the escrow or trust account;

(K) the name of the person to whom the funds will be disbursed;

(L) the time restrictions or limitations for accepting assignment of the policy regarding the insurance company's acceptance of the assignment or failure of the insurance company to acknowledge the assignment;

(M) if applicable, the process for required notices for communication if the viator or life settlor rescinds the viatical or life settlement contract pursuant to subsection (c)(2) of this section, or if the insurance company does not accept the policy assignment;

(N) the duties of the escrow agent or trustee;

(O) the designation of the escrow agent or trustee;

(P) the limits of liability for the escrow agent or trustee;

(Q) the process by which any dispute arising between the owner and the viatical or life settlement company and the escrow agent or trustee concerning the interpretation of the escrow or trust agreement is to be resolved; and

(R) a signature line for the viatical or life settlement company's representative, the owner and insured, and the escrow agent or trustee.

(h) The viatical or life settlement company or broker shall provide, to the viator or life settlor and owner, a copy of the viatical or life settlement contract and all materials used to effect the viatical or life settlement, including, but not limited to, the application, a copy of the escrow or trust agreement, and any consent forms or any other document that the viatical or life settlement company or broker, as applicable, required the viator or life settlor and owner, or his or her representative, to sign in order to effect the viatical or life settlement. The viatical or life settlement contract and all other materials used to effect

the viatical or life settlement shall be provided at no charge to the viator or life settlor and owner.

[(c) Prohibited practices relating to applications and contracts. A viatical settlement company or broker shall not:]

[(1) condition the consideration of an application on exclusive dealing between the viator and the viatical settlement company or broker.]

[(2) discriminate in the availability or terms of viatical settlements on the basis of race, color, national origin, creed, religion, occupation, geographic location, marital or family status, sexual orientation, age, gender, disability or partial disability (except when any such factor affects the life expectancy of the viator);]

[(3) discriminate between viators with dependents and those without dependents;]

[(4) enter into any viatical settlement that provides a payment to the viator that is unjust (In determining whether a payment is unjust, the commissioner may consider, among other factors, the life expectancy of the viator, the applicable rating of the insurance company that issued the subject policy by a rating service generally recognized by the insurance industry, regulators and consumer groups, and the prevailing discount rates in the viatical settlement market in Texas, or if insufficient data is available for Texas, the prevailing rates nationally or in other states that maintain such data.); or]

[(5) enter into a viatical settlement in which payments of proceeds are made in installments, unless the settlement is effected through an annuity purchased from an insurance company licensed by this state or any other state in the United States, or through an escrow or trust account which provides for installment refunds and which is established by a bank licensed by this state or any other state in the United States.]

§3.1710. [Advertising and Other Solicitation:] Prohibited Practices Relating to Advertising and Solicitation; Applications and Contracts.

(a) No viatical or life settlement company or broker shall advertise or in any other way solicit business in a manner that is untruthful or misleading by fact or implication. In considering whether or not the advertising or other solicitation is untruthful or misleading, the department shall [commissioner may] use the standards set forth in this subchapter, Insurance Code Article 21.21, [Insurance Code,] and Chapter 21, Subchapter B of this title (relating to Insurance Advertising, Certain Trade Practices, and Solicitation), or any other applicable law.

(b) No viatical or life settlement company or broker shall state or imply any advantage, right, or preference which, if granted or performed, would be a violation of any law of this state or the United States.

(c) No viatical or life settlement company or broker shall:

(1) condition the consideration of an application for a viatical or life settlement on the exclusive dealing between the viator or life settlor and owner and the viatical or life settlement company or broker;

(2) require any owner, viator, or life settlor to provide the identity of his or her parents, or any other information about his or her family members, including a spouse or significant other, as a prerequisite to considering an application or contract for a viatical or life settlement or for any other purpose, unless the owner, viator, or life settlor has designated a member of his or her family, a spouse, or a significant other as the contact person for health status information as provided in §3.1712 of this title (relating to Contacting the Viator, Life Settlor, or Owner for Health Status Inquiries; Limits and Prohibited Practices);

(3) discriminate in the availability or terms of viatical or life settlements on the basis of race, color, national origin, creed, religion, occupation, geographic location, marital or family status, sexual orientation, age, gender, disability or partial disability, unless it can be demonstrated that any such factor affects the life expectancy of the viator or life settlor;

(4) discriminate between viators or life settlors with dependents and those without dependents;

(5) enter into any viatical or life settlement contract without:

(A) obtaining the written consent of both the viator or life settlor and owner, if the two are separate individuals under the policy which is the subject of the viatical or life settlement; and

(B) making the disclosures required by §3.1708 of this subchapter (relating to Required Disclosure) to both the viator or life settlor and the owner;

(6) enter into any viatical or life settlement contract that provides a payment to the owner that is unjust. In determining whether a payment is unjust, the department may consider, among other factors, the life expectancy of the viator or life settlor, the applicable rating of the insurance company that insures the life of the viator or life settlor by a rating service generally recognized by the insurance industry, regulators and consumer groups, and the prevailing discount rates in the viatical or life settlement market in Texas, or if insufficient data is available for Texas, the prevailing rates nationally or in other states that maintain such data;

(7) enter into a viatical or life settlement contract in which payments of proceeds are made in installments, unless the settlement is effected through an annuity purchased from an insurance company licensed by this state or licensed by the state in which the annuity is purchased or through an escrow or trust account which provides for installment payments and which is established by a financial institution licensed by this state or any other state in the United States, and is also a member of the FDIC;

(8) enter into any viatical or life settlement in this state in which any form used to effect the settlement, including the escrow or trust agreement, contains a provision that either requires or limits a viator, life settlor, or owner to resolve a legal dispute with the viatical or life settlement company or broker in any state other than Texas, or makes any other state's laws as the law applicable to the form;

(9) enter into any viatical or life settlement in which any form used to effect the settlement, including the escrow or trust agreement, contains a provision that requires the owner, viator, or life settlor to pay for policy premiums that cover any period of time after the date in which the ownership of the policy is transferred, except as provided in §3.1709(e)(4) of this subchapter (relating to Application and Contract Forms: Required Provisions and Escrow/Trust Agreements);

(10) retain any portion of the proceeds from the viatical or life settlement contract;

(11) intentionally misstate the life expectancy of any viator or life settlor for the purpose of evading the tax laws of the United States, or for any other purpose; or

(12) require any viator, life settlor, or owner to give the viatical or life settlement broker, company, or any person, a power-of-attorney, or designate the broker, company, or any person as his or her attorney-in-fact.

(d) No viatical or life settlement company or broker shall purchase benefits of a policy or rider which provides for additional death

benefits for accidental death or future increases in the death benefit. Such additional death benefits shall remain payable to the beneficiary last named by the viator, life settlor, or owner, not including the viatical or life settlement company, or in the absence of a beneficiary, to the estate of the viator, life settlor, or owner.

§3.1711. Payment of Commissions or Other Forms of Compensation: Disclosure and Prohibited Practices.

(a) Upon request of the viator, life settlor, or owner [~~at or before the time a viatical settlement is executed~~], the viatical or life settlement company or broker, [~~viatical settlement broker,~~] or both, shall disclose in writing to the viator, life settlor, or owner:

(1) the identity of any person who will receive a commission or other form of compensation from the viatical or life settlement company or broker with respect to the viatical or life settlement; and

(2) the amount and terms of the compensation.

(b) A viatical or life settlement company or broker shall not pay or offer to pay any referral or finder's fee, commission, or other compensation to a viator's or life settlor's physician, attorney, accountant, social worker, case manager, individual acting under power-of-attorney, or other person providing medical, social, [~~legal or~~] financial planning or other counseling services to the viator, life settlor, or owner.

(c) Notwithstanding the manner in which the viatical or life settlement broker is compensated, a viatical or life settlement broker, except for a captive broker, is deemed to represent only the viator or life settlor and owner and owes a fiduciary duty to the viator or life settlor and owner to act according to the viator's or life settlor's and owner's instructions and in the best interest of the viator or life settlor and owner.

§3.1712. Contacting the Viator, Life Settlor, or Owner for Health Status Inquiries: Limits and Prohibited Practices.

(a) If a viator or life settlor makes a designation of an individual as provided in §3.1709(c)(5) of this subchapter (relating to Application and Contract Forms: Required Provisions and Escrow/Trust Agreements), a viatical or life settlement company or broker shall not contact the viator, life settlor, or owner for health status information about the viator or life settlor, unless the viatical or life settlement company or broker is unable, after diligent effort, to contact the designee for more than 30 calendar days, subject to the restrictions set forth in subsection (b) of this section. [~~No person shall contact a viator or the viator's designee as provided for in §3.1709(b)(4) of this title (relating to Application and Contract Forms: Required Provisions and Prohibited Practices)), for determining the viator's health status, unless that person is registered as a viatical settlement company or broker in this state.~~]

(b) Once a viator, life settlor, or owner has entered into a [~~viatical~~] settlement with a viatical or life settlement company, no viatical or life settlement company or broker shall contact the viator, life settlor, or owner, or the viator's or life settlor's designee, to determine the viator's or life settlor's health status more frequently than once every 30 days for viators or life settlors with a life expectancy of one year or less, and no more than once every three months for viators or life settlors with a life expectancy of more than one year, as determined at the time of viatical or life settlement contract. No person shall contact the viator, life settlor, owner, or designee for determining the health status of a viator or life settlor as provided in §3.1709(c)(5) and (6) of this subchapter, unless that person is registered as a viatical or life settlement company or broker in this state.

§3.1713. Assignment , Sale, or Transfer [~~or Resale~~] of Policies: Disclosure [~~and Prohibited Practices~~].

(a) Any [~~As to viatical settlements executed after the effective date of this subchapter, any~~] viatical or life settlement company that assigns, sells, or otherwise transfers its interest in any policy that is the subject of a viatical or life settlement without providing [~~making~~] the disclosures to the viator, life settlor, or owner as required by §3.1709(c)(7) [~~§3.1709(b)(5) or (6)~~] of this subchapter [~~title~~] (relating to Application and Contract Forms: Required Provisions and Escrow/Trust Agreements [~~Prohibited Practices~~]) is subject to discipline by the commissioner under §3.1716 of this subchapter [~~title~~] (relating to Denial, Suspension, or Revocation of Certificate of Registration; Enforcement).

(b) At the time a viatical or life settlement company assigns, sells, or otherwise transfers its interest in any policy that is the subject of a viatical or life settlement contract to any person not registered pursuant to this subchapter, the viatical or life settlement company [~~purchaser or transferee~~] must appoint, in writing, another [~~either the~~] viatical or life settlement company [~~that entered into the viatical settlement~~] or broker registered in this state, [~~or a broker who received commissions from the viatical settlement~~] to make all inquiries to the viator, life settlor, or owner, or the viator's or life settlor's designee, regarding the health status of the viator or life settlor or any other matters. A viatical or life settlement company that assigns, sells, or otherwise transfers such a policy to a non-registered viatical or life settlement company or broker and fails to [~~purchaser or transferee who does not~~] make such an appointment commits a violation of this section, and is subject to discipline by the commissioner under §3.1716 of this subchapter [~~title (relating to Enforcement)~~].

§3.1714. Confidentiality.

(a) All confidential [~~medical, financial or personal~~] information solicited or obtained by a viatical or life settlement company or broker about a viator, life settlor or owner, including the viator's, life settlor's, or owner's identity or the identity of family members, a spouse or a significant other, is confidential and shall not be disclosed in any form to any person, unless disclosure:

(1) is provided by prior written consent from the viator, life settlor, or owner on a form which specifically identifies the person to whom the confidential information will be released, and the purpose for releasing the confidential information to that person [~~is necessary to effect the viatical settlement between the viator and the viatical settlement company and the viator provides prior and knowing written consent to the disclosure or~~];

(2) is provided to the department or financing entity in the form of statistical data from which the identity of the viator or life settlor and owner cannot be ascertained; [~~traced, in response to the reporting requirements set forth in §3.1705 of this title (relating to Annual Reporting Requirements) and in Figures 3 and 4 contained in §3.1718 of this title (relating to Application and Reporting Forms); or~~]

(3) is provided to the department in response to a subpoena from the commissioner, pursuant to the enforcement powers made applicable by Insurance Code Article 3.50-6A, and [~~set forth in~~] §3.1716 of this subchapter [~~title~~] (relating to Denial, Suspension, or Revocation of Certificate of Registration; Enforcement), or in response to a written request for information made pursuant to Insurance Code §38.001; or [~~.~~]

(4) is provided to the department during the course of an examination by the department of the business and affairs of the viatical or life settlement company or broker, as provided in §3.1717 of this subchapter (relating to Examinations).

(b) All medical and financial information solicited or obtained by a viatical or life settlement company or broker about a viator, life

settlor, or owner must be obtained by written consent. The written consent form may not provide for the confidential release of information for a period greater than 12 months, and shall not be used to track the on-going health status of any viator or life settlor after the owner and the viatical or life settlement company have entered into the viatical or life settlement contract.

(c) A viatical or life settlement company or broker shall not release any viator's, life settlor's, or owner's confidential information to any person without first making a factual determination that:

(1) the releasing of any confidential information to that person is not in violation of any applicable provisions of the laws of this state, or of the United States, relating to the confidentiality of information;

(2) [~~(b)~~] all [~~All~~] persons to whom any [~~the~~] confidential information [~~referenced in subsection (a) of this section~~] is disclosed will [~~pursuant to the viator's consent shall~~] maintain the confidentiality of such information[~~,~~] and not disclose it to any other person in any form[~~,~~] without prior and knowing written consent of the viator or life settlor and owner; [~~.~~]

(3) all persons to whom any confidential information is released, have sufficient procedures implemented to prevent the accidental or unauthorized release of any viator's or life settlor's and owner's confidential information; and

(4) the viatical or life settlement company or broker is not violating any law of this state or the United States by engaging in business with persons to whom it is releasing the confidential information of any viator, life settlor, and owner.

(d) In any enforcement action taken by the department for a violation of this section, in accordance with §3.1716 of this subchapter, it shall be the viatical or life settlement company's or broker's duty to establish sufficient evidentiary proof that the factual determinations referenced in subsection (c) of this section were made by the company or broker.

(e) [~~(c)~~] Confidential [~~The confidentiality of~~] information obtained by the [~~department or the~~] commissioner pursuant to the subpoena powers set forth in §3.1716 of this subchapter [~~title (relating to Enforcement)~~], is protected by the confidentiality provisions of either Insurance Code Article 1.10D or §§36.151 - 36.159 [~~Article 1.19-1, Insurance Code,~~] depending on which provision [~~article~~] is used to subpoena the information.

(f) [~~(d)~~] All confidential[~~medical~~] information solicited or obtained by a viatical or life settlement company or broker about a viator, life settlor, or owner [~~further~~] shall be further subject to applicable provisions of the laws of this state[~~,~~] and of the United States[~~, relating to the confidentiality of medical information~~].

§3.1715. Prohibition Against [~~Operating as, or~~] Doing Business with[~~,~~] an Unregistered or Unlicensed Viatical or Life Settlement Company or Broker, Escrow Agent or Trustee.

[~~(a) No person shall act as a viatical settlement company or broker without first obtaining a certificate of registration from the Texas Department of Insurance, except as allowed under the grace period set forth in §3.1703(e) of this title (relating to Registration and Initial Fees).~~]

(a) [~~(b)~~] No [~~After expiration of the grace period set forth in §3.1703(e) of this title (relating to Registration and Initial Fees), no~~] viatical or life settlement company or broker registered pursuant to this subchapter shall participate in a viatical or life settlement, or pay or share commissions, with a person engaging in the business of viatical or life settlements who is required to be [~~company or broker not~~] registered pursuant to this subchapter, but who has not obtained such registration.

(b) A viatical or life settlement company or broker shall not place funds with any escrow agent or trustee wherein any portion of the funds will be forwarded to an insurance company, or used by the escrow agent or trustee, to maintain the premiums on a policy that is the subject of a viatical or life settlement, unless the escrow agent or trustee holds an insurance agent's license as required by Insurance Code Article 21.02 and Chapter 19 of this title (relating to Agents' Licensing).

(c) Any escrow agent or trustee who accepts funds from a viatical or life settlement company or broker or other person is required to obtain a license as an insurance agent under Insurance Code Article 21.02 and Chapter 19 of this title, if the escrow agent or trustee receives, collects, or transmits any premium of insurance.

§3.1716. Denial, Suspension, or Revocation of Certificate of Registration; Enforcement.

(a) Pursuant to Insurance Code Article 3.50-6A, if the commissioner determines, after notice and opportunity for hearing, that a viatical or life settlement company or broker, individually or through any officer, partner, member or key management personnel, employee, director, affiliate, subcontractor, shareholder or the registrant or applicant, escrow agent, or trustee has violated or fails to meet any provision of Insurance Code Article 3.50-6A, this subchapter, or any other insurance law of this state or another law made applicable to viatical or life settlement companies or brokers, the department may take any of the actions authorized by the insurance laws referenced in Insurance Code Article 3.50-6A, §3.

(b) A viatical or life settlement company or broker whose certificate of registration has been denied, suspended, or revoked under this section or pursuant to Insurance Code Article 3.50-6A shall not file another application for certificate of registration before the first anniversary of the effective date of the denial, suspension, or revocation or, if judicial review of the denial, suspension, or revocation is sought, the first anniversary of the date of the final court order or decree affirming the action. An application filed after that period shall be denied by the department unless the applicant shows good cause why the denial, suspension, or revocation of the previous certificate of registration should not bar the issuance of a new certificate of registration.

(c) Pursuant to Insurance Code Article 3.50-6A, §3, the department shall have all authority and powers in Insurance Code Article 1.10D against a person who violates any penal law while engaging in the business of viatical or life settlements or while attempting to defraud a viatical or life settlement company or broker.

(d) Pursuant to Insurance Code Article 3.50-6A, §3, in order to facilitate enforcement of Article 3.50-6A, other applicable laws and this subchapter, the department may utilize the provisions of Insurance Code Chapters 36 and 38 which apply to investigations of viatical or life settlement companies or brokers (whether registered by the department, applying for a certificate of registration or unlawfully doing business without a certificate of registration), or anyone else engaged in, or conducting transactions relating to the business of viatical or life settlements.

(e) The department may seek information made confidential by §3.1714 of this subchapter (relating to Confidentiality) through use of subpoenas issued pursuant to Insurance Code Article 3.50-6A, §3, Article 1.10D, Chapter 36, or through use of a written request for information made pursuant to Insurance Code §38.001. Confidential information obtained by the department shall remain confidential pursuant to the terms of either Insurance Code Chapter 38 or Article 1.10D, §5.

(f) Pursuant to Insurance Code Article 3.50-6A, §3, Insurance Code §§36.101, 36.205, and Chapter 40 apply to enforcement actions brought pursuant to this subchapter.

§3.1717. Examinations.

(a) The department may examine the business and affairs of any viatical or life settlement company or broker. The department may request any viatical or life settlement company or broker to produce any records, books, files, or other information reasonably necessary to ascertain whether or not the viatical or life settlement company or broker is acting or has acted in violation of the law or otherwise contrary to the interests of the public. The expenses incurred in conducting any examination shall be paid by the viatical or life settlement company or broker.

(b) For purposes of such examination, records of all transactions of viatical and life settlements shall be maintained by the viatical or life settlement company or broker and shall be available to the department for inspection during reasonable business hours. All viatical or life settlement companies and brokers doing business in this state shall maintain records of each viatical or life settlement in which it participates, until three years after the death of the viator or life settlor.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005298
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 463-6327

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28 TAC §§3.1704, 3.1706, 3.1716-3.1718

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

The Texas Department of Insurance proposes the repeal of §§3.1704, 3.1706, and 3.1716 - 3.1718; concerning viatical and life settlements. Contemporaneously with this proposed repeal, proposed amendments to §§3.1701 - 3.1703, 3.1705, and 3.1707 - 3.1715, and proposed new §§3.1704, 3.1706, 3.1716, and 3.1717 are published elsewhere in this issue of the *Texas Register*. This repeal is necessary so that proposed new §§3.1704, 3.1706, 3.1716, and 3.1717 may be adopted to implement the 1999 legislative amendments to Insurance Code Article 3.50-6A from the 76th Legislative Session, House Bill 792.

Ana M. Smith-Daley, Deputy Commissioner, Life/Health Division, has determined that for each year of the first five years the proposed repeal is in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the repeal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Smith-Daley has also determined that for each year of the first five years the repeal is in effect, the proposed repeal will benefit the public by allowing the department to propose amendments to §§3.1701 - 3.1703, 3.1705, and 3.1707 - 3.1715, and propose new §§3.1704, 3.1706, and 3.1716 - 3.1718, and in turn, those proposed amendments and additions to this subchapter will result in increased consumer protection for those persons entering into viatical or life settlement transactions; increased awareness by viatical or life settlement companies or brokers of the requirements and procedures to obtain a certificate of registration to do business as a viatical or life settlement company or broker; reduced administrative costs for companies and brokers who will only have to renew their certificates of registration every two years instead of annually as currently required; and a more efficient and expedited review process which streamlines the procedures and requirements for filing forms used in viatical or life settlement transactions. There is no anticipated economic cost to persons who are required to comply with the proposed repeal. There is no anticipated difference in cost of compliance between small, micro, and large businesses.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on September 11, 2000 to Lynda H. Nesenholtz, Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. An additional copy of the comment must be submitted to Diane Moellenberg, Chief Director, Regulatory Development, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. A request for a public hearing must be submitted separately to the Office of the Chief Clerk.

The repeal of §§3.1704, 3.1706, and 3.1716 - 3.1718 is proposed under the Insurance Code Article 3.50-6A, which provides that the commissioner shall adopt reasonable rules to implement this article as it relates to viatical and life settlements. Insurance Code §36.001 provides that the commissioner may adopt rules for the conduct and execution of the powers and duties of the department only as authorized by statute.

The following articles are affected by this proposal: Insurance Code Article 3.50-6A

§3.1704. Annual Fees.

§3.1706. Approval of Forms Relating to Viatical Settlements.

§3.1716. Enforcement.

§3.1717. Procedure for Approval or Other Determination by the Department and Commissioner.

§3.1718. Adoption by Department of Forms for Application and Reporting.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005297
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 39. PUBLIC NOTICE

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §39.15, concerning Public Notice Not Required for Certain Types of Applications; and §39.251 and §39.651, both concerning Application for Injection Well Permit.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

On September 29, 1999, the executive director received a petition for rulemaking from the Texas Chemical Council requesting changes to §39.251 that would amend the mailed notice requirement for new permits, major amendments, renewal applications, and public hearings to owners of mineral rights near permitted Class I underground injection wells. The petition proposed that the current notice requirement for mailed notice to mineral rights owners within the cone of influence be changed to require mailed notice only to those persons who own mineral rights which underlie the existing or proposed injection well facility and which underlie the tracts of land adjacent to the well facility. In addition to §39.251, staff identified two additional sections, §39.15 and §39.651, that would require conforming modification.

In response to this petition, the commission's staff held two stakeholder meetings to receive input regarding how to best amend §§39.15, 39.251, and 39.651. Representatives from industry, environmental organizations, and the commission's office of Public Interest Counsel were invited to participate. As a result of the input received during this process, the proposed rules will change not only the mailed notice requirements but also the published notice requirements for Class I underground injection wells. The proposed amendments do not apply to mailed or published notice requirements for Class III injection wells or for permitted Class V injection wells.

The existing rules for Class I underground injection wells require notice to be mailed to mineral rights owners who own mineral rights within the cone of influence of an injection well. The proposed rules will require notice applications for new permits, major amendments, renewal applications, and public hearings to mineral rights owners beneath the injection well site and beneath the adjacent properties near permitted Class I underground injection wells. The proposed rules clarify and make explicit the existing requirement that mailed notice be sent to owners of the property on which the injection well is located, if different from the applicant, as well as to owners of land adjacent to the property on which the injection well is located. The existing notice requirements for Class I underground injection control (UIC) permit applications do not specify the size of the notices or the location of the notices in the newspaper. The proposed provisions require that the notice be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and be located in the section of the newspaper containing state or local news items.

Chapter 39, Public Notice, provides the procedural requirements for issuance of public notice of environmental permitting actions pending before the commission. The proposed amendments alter the mailed and published notice requirements to mineral rights owners for Class I underground injection well permit applications and hearings. The current rules require the commission's chief clerk to mail notice of UIC permit applications and hearings to mineral rights owners within the cone of influence of the injection well. When the current rules were proposed on June 18, 1996, it was the first time that the cone of influence definition was used in the context of determining what mineral rights might be impaired by an injection well.

An injection well is used for the subsurface emplacement of fluids. The cone of influence is defined as the potentiometric surface area around the injection well within which increased injection zone pressures caused by injection of wastes would be sufficient to drive fluids into an underground source of drinking water (USDW) or freshwater aquifer. The Texas Water Code (TWC), §27.015 provides extensive procedures to assure that known oil or gas reserves are not endangered and that water supplies are not contaminated by the operation of an injection well.

Depending on the geology of the subsurface injection zone and the volume of waste to be injected, the cone of influence may extend several miles from the well bore. The commission now believes that the term was improperly applied and created too great of a financial burden on the agency and on the regulated community in cases where there are large cones of influence. It was not evident at the time of enactment of the existing rules that the provision had the potential to require that notice be mailed to thousands of individuals within the cone of influence of an injection well. The proposed rules are more effective in providing notice to the mineral interests most likely to be affected by an injection well; that is, mineral interests underlying or adjacent to the injection well facility.

There is no requirement to provide notice to mineral rights owners near the injection wells under federal law. However, there are state law requirements, TWC, §27.018 and §27.051, which provide notice to persons affected by underground injection disposal wells. This would include mineral rights owners if their mineral rights would be impaired. Notice by publication is a more efficient method of notifying thousands of potentially affected persons of a permit application.

Providing mailed notice to all mineral rights owners within the cone of influence has presented a financial burden for some applicants for the commission where a large cone of influence is associated with the injection well. The applicant must currently research the deed records for every land owner adjacent to the injection well facility and every mineral rights owner within the cone of influence of the injection well. The applicant must then provide the landowner and mineral rights owner lists to the agency for each new permit application, major amendment, permit renewal application, or public hearing. For injection well applicants with a large cone of influence associated with the injection well, applicants have reported costs ranging from $20,000 to $110,000 to research and identify mineral rights owners within the cone of influence of their injection wells. Applicants for UIC permits have reported finding up to 20,000 mineral rights owners requiring notification for a single injection well facility.

The commission's UIC permitting program and the chief clerk's office are also burdened when thousands of people are to receive mailed notice. The UIC permitting program must assure that the mailing lists are correctly formatted, that is, each name and address must be typed in a format that meets the United States Postal Service requirements for machine readability. Additionally, the chief clerk is required to process the mailings. The $50 notice fee received from the applicant is often grossly inadequate to cover the commission's expenses for processing and mailing the notice required under the existing rules.

For an injection well applicant where there is a small cone of influence associated with the injection well, the proposed rules may require the applicant to research and identify more mineral rights owners than required under the existing rules. In this case, the commission would have to process more notices than are currently required. The commission proposes the rule amendments

because they are a good compromise between the injection well applications involving large and small cones of influence, and are still protective of human health and safety and the environment. Overall, the new rules, as proposed, will still provide adequate notice to interested persons while reducing the administrative and financial burden on the regulated community and the agency.

The commission may not issue underground injection well permits unless the Railroad Commission of Texas (RRC) has determined that the well will not impair oil and gas interests. The TWC, §27.015, requires an applicant to obtain a letter from the RRC stating that drilling or using the disposal well and injecting industrial and municipal waste into the subsurface stratum will not endanger or injure any known oil or gas reservoir. The TNRCC does not declare an application to be technically complete until the RRC letter has been filed.

This rulemaking is not intended to decrease the opportunity for public participation. The proposed rules require more visible and accessible published notices. For hazardous waste facilities, the current rules require notice by radio broadcast as well. These methods of providing notice to very large numbers of people are considered to be more efficient and economical for the regulated community and for the commission. The proposed rules specify an enhanced newspaper publication of notice which requires the applicant to publish notice that is at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and in the section of the newspaper containing state or local news items. This enhanced publication requirement will significantly increase the visibility of the notice, thereby providing a better opportunity for public participation.

Under the Chapter 39 amendments adopted recently to implement House Bill 801, which was effective September 1, 1999, applicants are required to publish an additional notice earlier in the application process which was not previously required. Additionally, any person may ask to be added to the mailing list for a permit application. Any person may also request to be placed on a county-wide mailing list to receive notice of any permit application in a particular county.

SECTION BY SECTION DISCUSSION

Section 39.15, Public Notice Not Required for Certain Types of Applications, is proposed to be amended. These proposed amendments provide that for voluntary transfers of Class I UIC permits, the chief clerk shall mail notice to persons who own mineral rights underlying the existing or proposed injection well facility and underlying the tracts of land adjacent to the property on which the injection well facility is located, rather than to all mineral rights owners within the cone of influence. The proposed rules also clarify and make explicit the existing requirement that mailed notice be sent to owners of the property on which the injection well is located, if different from the applicant, as well as to owners of land adjacent to the property on which the injection well is located.

Section 39.251, Application for Injection Well Permit, is proposed to be amended. In §39.251(a), the word "well" is proposed to be substituted for "will" to correct a typographical error. Subsections (d), (e), and (g) concern notices regarding administratively complete applications, draft permits, and hearings. These proposed amendments provide that for Class I underground injection wells, the chief clerk shall mail notice to persons who own mineral rights underlying the existing or proposed injection well facility, and underlying the tracts of land adjacent to the property on which the injection well facility is or will be located, rather than to all mineral rights owners within the cone of influence. Additionally, the proposed rules clarify and make explicit the existing requirement that mailed notice be sent to owners of the property on which the injection well is located, if different from the applicant, as well as to owners of land adjacent to the property on which the injection well is located. Section 39.251(e) and (g) is also proposed to be amended to specify that the published notice be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and that the notice appear in the section of the newspaper containing state or local news items. The amended language includes appropriate grammatical changes. In addition, §39.251 is proposed to be amended to clarify existing requirements that published notices must be in a form approved by the executive director and that approval must be obtained prior to the publication.

Section 39.651, Application for Injection Well Permit, is proposed to be amended. Subsections (c), (d), and (f) concern notices regarding Receipt of Application and Intent to Obtain Permit, Application and Preliminary Decision, and notice of contested case hearing. These proposed amendments provide that for Class I underground Injection wells, the chief clerk shall mail notice to persons who own mineral rights underlying the existing or proposed injection well facility, and underlying the tracts of land adjacent to the property on which the injection well facility is or will be located, rather than to all mineral rights owners within the cone of influence. Additionally, the proposed rules clarify and make explicit the existing requirement that mailed notice be sent to owners of the property on which the injection well is located, if different from the applicant, as well as to owners of land adjacent to the property on which the injection well is located. New §39.651(c)(6) is proposed to be added, and §39.651(d)(1) and (f)(2) are proposed to be amended to specify that, in addition to existing notice requirements, for Class I wells, the published notice be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and that the notice appear in the section of the newspaper containing state or local news items. Subsection (f)(2)(A) is also proposed to be amended to specify that this subsection concerns facilities other than hazardous waste facilities. In addition, §39.651 is proposed to be amended to clarify existing requirements that published notices must be in a form approved by the executive director and that approval must be obtained prior to the publication.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Strategic Planning and Appropriations, has determined that for the first five-year period the proposed amendments are 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 amendments. The TNRCC may realize some administrative savings due to the reduced cost of not processing large mailings associated with notice requirements for Class I underground injection wells. However, these cost savings are not anticipated to be significant.

The purpose of the proposed amendments to Chapter 39, Public Notice, is to revise current requirements for mailed notice of Class I (deep disposal well) UIC permit applications, permits, and hearings. Under current rules, all persons who own mineral rights underlying the proposed or existing injection well facility and within the cone of influence must be notified by mail of permit applications, permits, and hearings. These proposed rules

would amend the current notice requirement which requires the agency to mail notice of permit applications, permits, or hearings, to mineral rights owners within the cone of influence of the injection well. These proposed rules would require mailed notice to those persons who own mineral rights which underlie the proposed or existing injection well facility and underlying the tracts of land adjacent to the well facility. The proposed amendments would also provide new published notice requirements.

An injection well is a well for the subsurface emplacement of fluids. The cone of influence is defined as the potentiometric surface area around the injection well within which increased injection zone pressures caused by injection of wastes would be sufficient to drive fluids into an USDW or freshwater aquifer. The TWC, §27.015, provides extensive procedures to assure that oil or gas reserves are not endangered and that water supplies are not contaminated. Depending on the geology of the subsurface injection zone and the volume of wastes to be injected, the cone of influence may extend several miles from the well bore.

For some injection well owners with large cones of influence, the proposed amendments will reduce the costs to research and identify all of the mineral rights owners within their cone of influence. The current requirement of providing mailed notice to all mineral rights owners within the cone of influence requires a substantial effort and financial burden for well owners whose wells have a large cone of influence. The current requirements may also present a burden to the chief clerk of the commission who must process these mailings. Some applicants have reported significant costs to research and identify mineral rights owners within the cone of influence of their injection wells; they also report finding up to 20,000 mineral rights owners requiring notification under the current rule.

The proposed amendments would also provide new published notice requirements for Class I underground injection wells. Published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and be located in the section of the newspaper containing state or local news items. The current published notice requirements for UIC permit applications do not specify the size of the notice or where it will be located in the newspaper.

PUBLIC BENEFIT AND COSTS

Mr. Horvath has also determined that for each year of the first five years the proposed amendments to Chapter 39 are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be a reduced regulatory burden, cost savings for injection well owners, and cost savings for the commission. However, there will be additional publication costs beyond the cost of providing notice as required by the current rule to all injection well owners of Class I wells regarding the new published notice requirements which require that the notice be at least 15 square inches and located in the state or local news section of the newspaper. These costs are not anticipated to be significant. There may also be cost savings to some injection well owners as some applicants have reported significant costs ($20,000 - $110,000) to research and identify mineral rights owners within the cone of influence of their injection wells; they also report finding up to 20,000 mineral rights owners requiring notification. Under the proposed mailed notice requirements for Class I underground injection control permits, major amendments, or renewals, owners of mineral rights with interests under the well facility or under adjacent tracts of land would be notified by mail.

The purpose of the proposed amendments to Chapter 39, Public Notice, is to revise current requirements for mailed and published notice requirements of Class I (deep disposal well) UIC permit applications, permits, and hearings. There are approximately 111 active Class I injection wells in Texas that will be affected by the proposed amendments. In addition, owners of mineral rights underlying the proposed or existing Class I injection well facility and adjacent tracts of land or owners of mineral rights within the cone of influence of a specific well will be affected by the proposed rules.

Specifically, the proposed amendments would revise mailed notice requirements for UIC permit applications, permits, and hearings to owners of mineral rights underlying the proposed or existing Class I injection well facility and adjacent tracts of land, rather than to all mineral rights owners within the injection well's cone of influence. It is recognized that some injection wells have large cones of influence while other injection wells have smaller cones of influence. While the proposed amendments will likely result in a significant reduction in notice requirements for wells with large cones of influence, they may also result in increasing notice requirements for well owners with small cones of influence. If the number of mineral rights owners adjacent to the well is larger than the number of mineral rights owners in the cone of influence, the proposed amendments will increase notice requirements. It is anticipated that the economic benefit of reducing notice requirements for wells with large cones of influence will be greater than the economic consequences of increasing notice requirements for wells with very small cones of influence. It is anticipated that additional costs for injection well owners with small cones of influence will not be significant.

The proposed amendments also revise the requirements for newspaper notice for Class I UIC permit applications by requiring that the notice be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and be located in the section of the newspaper containing state or local news items. The current notice requirements do not specify size or location in newspaper. A survey of newspapers indicated that a smaller city newspaper would charge approximately $210 for this type of notice and a larger city newspaper would charge approximately $3,000 for the same type of display notice.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

The number of small businesses or micro-businesses engaged in Class I injection well operations is unknown but is generally considered to be few because of the costs involved in building such a well. However, no significant additional costs are anticipated to any person, small business, or micro- business as a result of implementing the provisions of the proposed amendments to Chapter 39 of the rules. The proposed amendments revise notice requirements to mineral rights owners at or near injection wells. Specifically, the proposed amendments would revise mailed notice requirements for UIC permit applications, permits, and hearings to owners of mineral rights underlying the proposed or existing injection well facility and adjacent tracts of land, rather than to all mineral rights owners within the cone of influence. While the proposed amendments will likely result in a significant reduction in notice requirements for wells with large cones of influence, it may also result in increasing notice requirements for some well owners with very small cones of influence. If the number of mineral rights owners adjacent to the well is larger than the number of mineral rights owners in the cone of influence, the proposed amendments will increase notice requirements. It

is anticipated that the economic benefit of reducing notice requirements for wells with large cones of influence will be greater than the economic consequences of increasing notice requirements for wells with small cones of influence. It is anticipated that additional costs associated with the proposed notice requirements for injection well owners with small cones of influence will not be significant.

The proposed amendments also revise the requirements for newspaper notice by requiring for Class I UIC permit applications that the notice be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and be located in the section of the newspaper containing state or local news items. A survey of newspapers indicated that a smaller city newspaper would charge approximately $210 for this type of display notice and a larger city newspaper would charge approximately $3,000. The current notice requirements do not specify size or location for the published notice in a newspaper. Because existing regulatory requirements have been reduced for most injection well owners, the rulemaking may be considered to have potentially positive economic effects for small businesses and micro-businesses with injection wells that have large cones of influence. Conversely, additional costs associated with compliance with the proposed amendments for injection wells with small cones of influence are not anticipated to be significant.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

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. The proposed rules change the cost of providing notice, increasing the cost to some applicants and reducing the cost to others. The proposed amendments are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs in the state or a sector of the state. In addition, §2001.0225 applies only to a major environmental rule, the result of which is to exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law.

This rulemaking does not meet any of these four applicability requirements of Texas Government Code, §2001.0225(a)(1) - (4). There is a state law requirement to provide notice to persons affected by underground injection disposal wells. This would include mineral rights owners if their mineral rights would be impaired. The proposed amendments do not exceed a standard set by federal law nor exceed an express requirement of state law. There is no requirement to provide notice to mineral rights owners near the injection wells under federal law. There is a state law requirement to provide notice to persons affected by underground injection disposal wells. However, the proposed rules do not exceed this state requirement. In addition, the proposed amendments do not exceed a requirement of a delegation agreement nor are the rules proposed solely under the general powers of the agency, rather they implement TWC, §§27.018(b), 27.019, and 27.051.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these proposed rules pursuant to Texas Government Code, §2007.043. This action does not create a burden on private real property. The specific purpose of the proposed rules is to change mailed notice requirements that have proven to be burdensome and unworkable both to the commission and to the regulated community. The existing requirement to mail notice to mineral rights owners within the cone of influence of an injection well is not based on any federal requirement. However, state statute TWC, §27.018, requires affected persons to be notified and this could include mineral rights owners if their mineral rights would be impaired. The TWC, §27.051(a)(2), also requires that mineral rights not be impaired. The commission proposes to amend §§39.15, 39.251 and 39.651. This will modify the mailed and published notice requirements for UIC permit applications and mailed notice of hearings. The proposed provisions will require mailed notice to persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant, land owners adjacent to the property on which the existing or proposed injection well facility is or will be located, persons who own mineral rights underlying the existing or proposed injection well facility, and persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located.

The proposed notice amendments require that the published notice be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and be located in the section of the newspaper containing state or local news items. The existing published notice requirements for UIC applications do not specify the size and location of the notice, therefore, the proposed rules will likely result in more potentially affected persons receiving notice.

Promulgation and enforcement of these rules will not burden private real property because the proposed rules only involve changes to notice requirements. The proposed amendments change the notice requirements but the result is not less stringent because the proposed provisions sometimes increase and sometimes decrease the number of mineral rights owners who receive mailed notice. The existing requirement to mail notice to mineral rights owners within the cone of influence of an injection well is not based on any federal requirement. However, state statute requires mineral rights not be impaired by injection well operations. No other exemption in Private Real Property Rights Preservation Act under Texas Government Code, Chapter 2007, applies to this rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed rulemaking and found that the rules are not identified in Coastal Coordination Act, Texas Natural Resources Code, §33.2053(f). Therefore, the proposal is not subject to the Texas Coastal Management Program.

PUBLIC HEARING

A public hearing on this proposal will be held in Austin on September 6, 2000 at 10:00 a.m. at the TNRCC complex in Building F, Room 3202A, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted by mail to Angela Slupe, 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 September 11, 2000, and should reference Rule Log No. 1999-071-039-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 Devane Clarke at (512) 239-5604.

SUBCHAPTER A. APPLICABILITY AND GENERAL PROVISIONS

30 TAC §39.15

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §27.018(b), which requires the commission by rule to provide notice of the opportunity to request a public hearing on an injection well permit application which includes defining who is an "affected person;" §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.051, which requires the commission, when issuing an injection well permit, to find that no existing rights including, but not limited to, mineral rights be impaired.

The proposed amendment implements TWC, §§27.018(b), 27.019, and 27.051.

§39.15. Public Notice Not Required for Certain Types of Applications.

(a) (No change.)

(b) For the voluntary transfer of permits, no public notice shall be required, except that:

(1) (No change.)

(2) for notice of applications for the voluntary transfer of permits concerning underground injection wells (including injection wells for the disposal of hazardous waste), the chief clerk shall 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). The deadline to file public comment is ten days after mailing; and~~]

(3) for notice of applications for the voluntary transfer of permits concerning Class I underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility; and

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(4) [~~(3)~~] if the executive director determines that changes to the permit in addition to the transfer are necessary, other notice requirements may apply.

(c) The deadline to file public comment for the voluntary transfer of underground injection wells is ten days after mailing.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005277
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: September 11, 2000
For further information, please call: (512) 239-4712

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SUBCHAPTER E. PUBLIC NOTICE OF OTHER SPECIFIC APPLICATIONS

30 TAC §39.251

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §27.018(b), which requires the commission by rule to provide notice of the opportunity to request a public hearing on an injection well permit application which includes defining who is an "affected person;" §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.051, which requires the commission, when issuing an injection well permit, to find that no existing rights including, but not limited to, mineral rights be impaired.

The proposed amendment implements TWC, §§27.018(b), 27.019, and 27.051.

§39.251. Application for Injection Well Permit.

(a) Applicability. This section applies to applications for injection well [~~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) - (c) (No change.)

(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) For notice of administratively complete applications concerning Class I underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility; and

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located.

(3) [~~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) (No change.)

(2) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters) and the notice shall appear in the section of the newspaper containing state or local news items.

(3) [~~(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.

(4) For notice of draft permits concerning Class I underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility; and

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located.

(5) [~~(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).

(6) [~~(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) (No change.)

(g) Notice of hearing.

(1) (No change.)

(2) Newspaper notice.

(A) (No change.)

(B) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters) and the notice shall appear in the section of the newspaper containing state or local news items.

(C) [~~(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 notice shall appear in the section of the newspaper containing state or local news items. 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) For notice of hearings concerning Class I underground injection wells, the chief clerk shall also mail notice to:

(i) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(ii) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(iii) persons who own mineral rights underlying the existing or proposed injection well facility; and

(iv) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located.

(C) [~~(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) - (5) (No change.)

(h) All published notices required by this section shall be in a form approved by the executive director prior to publication.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005278
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: September 11, 2000
For further information, please call: (512) 239-4712

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SUBCHAPTER L. PUBLIC NOTICE OF INJECTION WELL AND OTHER SPECIFIC APPLICATIONS

30 TAC §39.651

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §27.018(b), which requires the commission by rule to provide notice of the opportunity to request a public hearing on an injection well permit application which includes defining who is an "affected person;" §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells; and §27.051, which requires the commission, when issuing an injection well permit, to find that no existing rights, including but not limited to, mineral rights be impaired.

The proposed amendment implements TWC, §§27.018(b), 27.019, and 27.051.

§39.651. Application for Injection Well Permit.

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

(c) Notice of Receipt of Application and Intent to Obtain Permit.

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

(3) After the executive director determines that the application is administratively complete, in addition to the requirements of §39.418 of this title, notice shall be given to [~~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) For notice of receipt of application and intent to obtain permit concerning Class I underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility; and

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located.

(5) [~~(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.

(6) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters) and the notice shall appear in the section of the newspaper containing state or local news items.

(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) (No change.)

(2) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters) and the notice shall appear in the section of the newspaper containing state or local news items.

(3) [~~(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.

(4) For notice of application and preliminary decision concerning Class I underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility; and

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located.

(5) [~~(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).

(6) [~~(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) (No change.)

(f) Notice of contested case hearing.

(1) (No change.)

(2) Newspaper Notice.

(A) If the application concerns a facility other than a hazardous waste facility, the [~~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) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters) and the notice shall appear in the section of the newspaper containing state or local news items.

(C) [~~(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 notice shall appear in the section of the newspaper containing state or local news items. 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) For notice of hearings concerning Class I underground injection wells, the chief clerk shall also mail notice to:

(i) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(ii) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(iii) persons who own mineral rights underlying the existing or proposed injection well facility; and

(iv) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located.

(C) [~~(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) - (5) (No change.)

(g) All published notices required by this section shall be in a form approved by the executive director prior to publication.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005279
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: September 11, 2000
For further information, please call: (512) 239-4712

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 20. EDWARDS AQUIFER AUTHORITY

CHAPTER 701. GENERAL PROVISIONS

31 TAC §§701.1, 701.3, 701.5

The Edwards Aquifer Authority ("Authority") proposes the adoption of new 31 TAC, §§701.1, 701.3, and 701.5, which will consist of general provisions relating to the Authority's rules.

Section 2001.0225 of the Texas Government Code requires an agency to perform, under certain circumstances, a regulatory analysis of "major environmental rules." The Authority has determined that none of the proposed rules are "major environmental rules" as that term defined by §2001.0225(g)(3) of the Texas Government Code. The basis for this determination is that the proposed rules do not have the specific intent to "protect the environment" or "reduce risks to human health from environmental exposure." The proposed rules set forth general provisions that will apply to all the rules issued by the Authority. They are informational in nature and have been written to provide basic parameters for all the rules of the Authority. The specific intent of these rules is to provide a basic understanding of the purpose and construction of the rules of the Authority. For this reason,

we find that none of the proposed rules are "major environmental rules" and that, therefore, no further analysis is required by §2001.0225 of the Texas Government Code.

Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act," ("TPRPRA") requires governmental entities, under certain circumstances, to prepare a takings impact assessment ("TIA") in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the proposal of these rules. First, the Authority has made a "categorical determination" that rules that provide general information only do not affect private real property. These proposed rules provide general information only. They simply state the purpose of the rules of the Authority, some general rules regarding construction of Authority rules, and provide the business and mailing addresses of the Authority. They have no direct affect on private real property and may not result in a taking. Second, the Authority's action in adopting these rules is an action that is reasonably taken to fulfill an obligation mandated by state law and is thus excluded from TPRPRA under §2007.003(b)(4) of the Texas Government Code. See Act §§ 1.08(a), 1.11(a), 1.11(b); TEXAS GOVERNMENT CODE ANNOTATED § 2001.004(1) (Vernon Pamp. 2000). It was held, in *Edwards Aquifer Authority v. Bragg,* ___ S.W.3d. ___, No. 04-99-00059-CV, 2000 WL 35582 (Tex. App. San Antonio 2000, no history), that the Act expressly mandates the adoption of substantive and procedural permitting rules and that such actions are therefore excepted from the TPRPRA. Third, it is the position of the Authority that all valid actions of the Authority are excluded from the TPRPRA under §2007.003(b)(11)(C) of the Texas Government Code as actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the proposal of these rules.

Proposed §701.1 states the general purpose of the Authority's rules. This section provides that the purpose of the Authority's rules is to implement the Act and other laws applicable to the Authority and to set forth the administrative procedures to be followed in Authority proceedings.

Proposed §701.3 relates to the construction of the Authority's rules. This section provides that unless otherwise expressly provided, the past, present, and future tense shall each include the other; the masculine, feminine and neutral gender shall each include the other; and the singular and plural number shall each include the other.

Proposed §701.5 states the business office and mailing address of the Authority.

Gregory M. Ellis, General Manager of the Authority, is responsible for approving the Fiscal Note that was prepared for these proposed rules. Mr. Ellis has determined that for each year of the first five years that the proposed rules will be in effect, there will be no: (1) additional costs; (2) reduction in costs; (3) loss in revenues; or (4) increase in revenues, to state or local governments expected as a result of enforcing or administering the proposed rules. The basis for this determination is that the adoption of these proposed rules will have no implications for regulation or compliance obligations on public or private actions that might result in an impact on costs or revenues.

Mr. Ellis is responsible for approving the Public Benefit and Cost Note that was prepared for these proposed rules. Mr. Ellis has determined that for each year of the first five years that the proposed rules will be in effect, the public benefits expected as a result of adoption of the proposed rules will be to provide the public with a basic understanding of the purpose and construction of the rules of the Authority and with the Authority's business and mailing address. Mr. Ellis has determined that for each year of the first five years that the proposed rules will be in effect, there are no probable economic costs to persons required to comply with the proposed rules. The basis for this determination is that the adoption of these rules is a prerequisite to proposal and adoption of other rules by the authority. These proposed rules do not impose compliance obligations on any person or otherwise regulate the use of water resources and therefore do not impose economic costs.

Section 2001.022 of the Texas Government Code requires agencies to request that the Texas Workforce Commission prepare a Local Employment Impact Statement in connection with certain proposed rules. The Authority has determined that there is no need to request the preparation of a Local Employment Impact Statement with respect to these proposed rules. In making this determination, the Authority assumes that an "effect" on employment and local economies (as that word is used in §2001.022(b) of the Texas Government Code) means a gain or loss of employment or a change in the costs and/or revenues to a person, business or governmental agency sufficient to cause a material change in their economic status that would be attributable to a proposed rule, if adopted. The basis for the determination that there is no need to request the preparation of a Local Employment Impact Statement is that the proposed rules have no implications for regulatory or compliance obligations that might result in an effect on local employment or local economies. The rules have no effect other than to convey general information to the public. By themselves, they do not regulate water resources nor establish compliance requirements. There is nothing in the proposed rules that could possibly impact local employment or economies.

Interested persons may submit written comments on the proposed rules. Comments must be submitted in writing to Brenda Davis, Docket Clerk, Edwards Aquifer Authority, P.O. Box 15830, 1615 N. St. Mary's St., San Antonio, Texas 78212-9030, within 30 days of the publication of this notice in the *Texas Register*. The written comments should be filed on 8 1/2 x 11 inch paper and be typed or legibly written. Written comments must indicate whether the comments are generally directed at all of the proposed rules, or whether they are directed at specific proposed rules. If directed at specific proposed rules, the number of the proposed rule must be identified and followed by the comments thereon.

The Authority has scheduled the following public hearings on this proposed rule: Wednesday, August 9, 2000, 6:00 p.m., Conference Center Edwards Aquifer Authority, 1615 N. St. Mary's San Antonio, Texas 78215, (210) 222-2204; Tuesday, August 15, 2000, 6:00 p.m., New Braunfels Civic Center, 380 S. Seguin Avenue New Braunfels, Texas 78130, (830) 625-2385; Thursday, August 17, 2000, 6:00 p.m., St. Paul's Lutheran Church, 1303 Avenue M Hondo, Texas 78861,(830) 426-3222; Tuesday, August 22, 2000, 6:00 p.m., Sgt. Willie DeLeon Civic Center, 300 E. Main Street Uvalde, Texas 78801, (830) 278-9922; Thursday, August 24, 2000, 6:00 p.m., San Marcos Activity Center, 501 E. Hopkins San Marcos, Texas 78666, (512) 393-8280.

The new sections are proposed pursuant to §§1.08(a), 1.11(a) and (h) of the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634 ("Act"); and §2001.004(1) of the Texas Administrative Procedure Act (TEXAS GOVERNMENT CODE ANNOTATED §§ 2001.001-.902 (Vernon 2000)) ("APA").

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under Article 1 of the Act, including rules governing procedures of the board and the authority." This section directs the Board to adopt rules as necessary to implement the various substantive programs set forth in the Act related to the Edwards Aquifer, including, in particular, administrative procedures to be used before the Board and the Authority.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. Pursuant to this section, the Authority is required to comply with the APA in connection with its rulemaking, even though the Authority is not a state agency and would therefore otherwise not generally be subject to APA requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures."

The statutes, articles, or sections of the Act or any other code that are affected by the proposed rule are §§1.08(a), 1.11(a) and (h) of the Act, and §2001.004(1) of the APA. The sections of Chapter 31, Texas Administrative Code, that are to be affected are §§701.1, 701.3, and 701.5.

§701.1. Purpose of Rules.

The purpose of the rules of the Authority is to implement the Act and other laws applicable to the Authority and to set forth the administrative procedures to be followed in Authority proceedings.

§701.3. Construction of Rules.

Unless otherwise expressly provided for in these rules, the past, present, and future tense shall each include the other; the masculine, feminine and neutral gender shall each include the other; and the singular and plural number shall each include the other.

§701.5. Business Office and Mailing Address of the Authority.

The business offices and mailing address of the authority are located at 1615 North St. Mary's, San Antonio, Texas 78215.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005244
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Earliest possible date of adoption: September 10, 2000
For further information, please call: (210) 222-2204

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CHAPTER 702. GENERAL DEFINITIONS

31 TAC §702.1

The Edwards Aquifer Authority ("Authority") proposes the adoption of new 31 TAC, §702.1, which will consist of general definitions that apply to all of the Authority's rules.

Proposed §702.1 would set forth general definitions that will apply to all the rules issued by the Authority. This rule has been written to provide uniform definitions for words and phrases that are expected to be used consistently throughout the Authority's other rules. Collectively, every definition contained in proposed §702.1 falls into one of the following five categories: (1) those defined in the Act and not modified by §702.1; (2) those defined in the Act and modified by §702.1 to clarify the definition in light of other sections of the Act, interpretation of the Act by the Authority, or definitions or provisions found in chapter 36, TEXAS WATER CODE; (3) new definitions constructed directly from language used in the Act; (4) new definitions for factually accurate elaboration of a short-form word; and (5) new definitions for conventional or self-evident procedural terms. The definitions are not intended to create substantive meanings separate and apart from what is otherwise intended by the Act. The definitions are designed to provide useful "short-hand" to reduce the amount of cumbersome regulatory language necessary on other Authority rules. Additionally, a purpose of the definitions is to benefit any interested person's understanding of Authority actions by providing direction to the sections in the Act which effectively define a given term.

Definitions for the following terms in 31 TAC Chapter 702.1 are derived in their entirety from, and conform completely to definitions in §1.03 of the Act: Aquifer; Augmentation; Authority; Beneficial use; Board; Commission; Conservation; Diversion; Domestic or livestock use; Industrial use; Irrigation use; Livestock; Municipal use; Order; Person; Pollution; Recharge; Reuse; Well; Well J-17; Well J-27; and Withdrawal.

Definitions for the following terms are derived from, and conform to definitions in §1.03 of the Act, and other sections, but have been modified to clarify the definition in light of other sections of the Act, interpretation of the Act by the Authority, or definitions or provisions found in chapter 36, TEXAS WATER CODE:

Underground water (defined in §36.001(5) of the Texas Water Code).

Definitions for the following new terms simply consist of a reference to language contained in the Act, where such language introduces or makes self-evident a term that is associated with potential future actions by the Authority:

Additional regular permit (term established through the effect of §1.18(a) of the Act);Aquifer management fees (term established through the effect of §1.29(b) and §1.29(e) of the Act); Aquifer recharge storage permit (term established through effect of §1.08(a), §1.11(f), §1.14(d), §1.44, and §1.45 of the Act);

Declarant (term made self-evident through the effect of §1.16(a) of the Act); Declaration of historical use (term established through the effect of §1.16(a) of the Act; Declaration (term established through the effect of §1.16(a) of the Act); Emergency permit (term established through the effect of §1.20(a) of the Act); Exempt well (term established through the effect of §1.33); Existing well (term established through the effect of §1.14(e) of the Act); Groundwater (defined in §35.002(5) of the Texas Water Code); Groundwater withdrawal permit (term made self-evident through the effect of §1.15(b) of the Act); Historical period (term established through the effect of §1.16(a) of the Act); Initial regular permit (term established through the effect of §1.16(d) of the Act); Interruptible (term established through the effect of §1.14(f) and §1.19 of the Act); Medina Pool (term established pursuant to §1.14(f) of the Act); Monitor well permit (term established thought the effect of §1.15(b) of the Act); New well (term established through the effect of §1.14(e) of the Act); Non-exempt well (term established through the effect of §1.31(a) of the Act); Recharge recovery permit (term established through the effect of §1.08(a), §1.11(f), §1.14(d), §1.15(a) and (b), §1.44 and §1.45 of the Act); Registrant (term established through the effect of §1.33(b) of the Act); Registration (term established through the effect of §1.33(b) of the Act); San Antonio Pool (term established through the effect of §1.14(f) and 1.19(b) of the Act); Surface water (defined in §11.021 of the Texas Water Code); Term permit (term established through the effect of §1.19(a) of the Act); Uvalde Pool (term established through the effect of §1.14(f) and 1.19(c) of the Act); Water supply facility (term established through the effect of §1.11(f) of the Act); Well construction permit (term established through the effect of §1.15(b) of the Act).

Definitions for the following terms simply provide factually accurate elaboration of a short-form word for convenience: Act; APA; Authority officers; Docket clerk; General Counsel; General Manager; and SOAH.

Definitions for the following new terms in are conventional terms of a procedural nature that will apply to procedural matters pending before the Authority: Applicant; Application; Judge; Party; Permit; Permittee; Petitioner; Pleadings; and Protestant.

Section 2001.0225 of the Texas Government Code requires an agency to perform, under certain circumstances, a regulatory analysis of "major environmental rules." The Authority has determined that this proposed rule in not a "major environmental rule" as that term defined by §2001.0225(g)(3) of the Texas Government Code. The basis for this determination is that the proposed rules do not have the specific intent to "protect the environment" or "reduce risks to human health from environmental exposure." The proposed rule would set forth general definitions that will apply to all the rules issued by the Authority. These rules have been written to provide uniform definitions for words and phrases that are expected to be used consistently throughout the Authority's other rules. Some of these definitions are identical to the definitions that appear in the Act Other definitions provide useful "short-hand" to reduce the amount of cumbersome regulatory language necessary in other Authority rules. The specific intent of these definitions is thus to allow for a more efficient understanding and operation of other rules of the Authority. For this reason, we find that the proposed rule is not a "major environmental rule" and that, therefore, no further analysis is required by §2001.0225 of the Texas Government Code.

Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act," ("TPRPRA") requires governmental entities, under certain circumstances, to prepare a takings impact assessment ("TIA") in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the proposal of this rule. First, the Authority's action in adopting this rule is an action that is reasonably taken to fulfill an obligation mandated by state law and is thus excluded from the TPRPRA under §2007.003(b)(4) of the Texas Government Code. See Act §§1.03, 1.08(a), 1.11(a), and 1.11(f); TEX. WATER CODE ANN. §36.001(5). It was held, in *Edwards Aquifer Authority v. Bragg,* ___ S.W.3d. ___, No. 04-99-00059-CV, 2000 WL 35582 (Tex. App. San Antonio 2000, no history), that the Edwards Aquifer Act expressly mandates the adoption of substantive and procedural permitting rules and that such actions are therefore excepted from TPRPRA. Third, it is the position of the Authority that all valid actions of the Authority are excluded from the TPRPRA under Section 2007.003(b)(11)(C) of the Texas Government Code as actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the proposal of this rule.

Gregory M. Ellis, General Manager of the Authority, is responsible for approving the Fiscal Note that was prepared for this proposed rule. Mr. Ellis has determined that for each year of the first five years that the proposed rule will be in effect, there will be no: (1) additional costs; (2) reduction in costs; (3) loss in revenues; or (4) increase in revenues, to state or local governments expected as a result of enforcing or administering the proposed rules. The basis for this determination is that the adoption of the proposed rule will have no implications for regulation or compliance obligations on public or private actions that might result in an impact on costs or revenues.

Mr. Ellis is responsible for approving the Public Benefit and Cost Note that was prepared for this proposed rule. Mr. Ellis has determined that for each year of the first five years that the proposed rule will be in effect, the public benefits expected as a result of adoption of the proposed rule will be to provide uniform definitions that will be used throughout the Authority's rulemaking and to allow for a more efficient understanding and operation of other rules of the Authority. Mr. Ellis has determined that for each year of the first five years that the proposed rule will be in effect, there are no probable economic costs to persons required to comply with the proposed rule. The basis for this determination is that the adoption of this rule is a prerequisite to proposal and adoption of other rules by the authority. The proposed rule does not impose compliance obligations on any person or otherwise regulate the use of water resources and therefore does not impose economic costs.

Section 2001.022 of the Texas Government Code requires agencies to request that the Texas Workforce Commission prepare a Local Employment Impact Statement in connection with certain proposed rules. The Authority has determined that there is no need to request the preparation of a Local Employment Impact Statement with respect to this proposed rule. In making this determination, the Authority assumes that an "effect" on employment and local economies (as that word is used in §2001.022(b) of the Texas Government Code) means a gain or loss of employment or a change in the costs and/or revenues to a person, business or governmental agency sufficient to cause a material change in their economic status that would be attributable to a proposed rule, if adopted. The basis for the determination that

there is no need to request the preparation of a Local Employment Impact Statement is that the proposed rule has no implications for regulatory or compliance obligations that might result in an effect on local employment or local economies. The rule has no effect other than to provide definitions to be used throughout the Authority's other rules. By themselves, they do not regulate water resources nor establish compliance requirements. There is nothing in the proposed rule that could possibly impact local employment or economies.

Interested persons may submit written comments on the proposed rule. Comments must be submitted in writing to Brenda Davis, Docket Clerk, Edwards Aquifer Authority, P.O. Box 15830, 1615 N. St. Mary's St., San Antonio, Texas 78212-9030, within 30 days of the publication of this notice in the *Texas Register*. The written comments should be filed on 8 1/2 x 11 inch paper and be typed or legibly written. Written comments must indicate whether the comments are generally directed at all of the proposed rules, or whether they are directed at specific proposed rules. If directed at specific proposed rules, the number of the proposed rule must be identified and followed by the comments thereon.

The Authority has scheduled the following public hearings on this proposed rule: Wednesday, August 9, 2000, 6:00 p.m., Conference Center Edwards Aquifer Authority, 1615 N. St. Mary's San Antonio, Texas 78215, (210) 222-2204; Tuesday, August 15, 2000, 6:00 p.m., New Braunfels Civic Center, 380 S. Seguin Avenue New Braunfels, Texas 78130, (830) 625-2385; Thursday, August 17, 2000, 6:00 p.m., St. Paul's Lutheran Church, 1303 Avenue M Hondo, Texas 78861, (830) 426-3222; Tuesday, August 22, 2000, 6:00 p.m., Sgt. Willie DeLeon Civic Center, 300 E. Main Street Uvalde, Texas 78801, (830) 278-9922; Thursday, August 24, 2000, 6:00 p.m., San Marcos Activity Center, 501 E. Hopkins San Marcos, Texas 78666, (512) 393-8280.

The new section is proposed pursuant to §§1.03, 1.08(a), 1.11(a), (d)(5), (f) and (h), 1.14(d)-(f), 1.15(a)-(c), 1.16(a), (c), and (d), 1.17(a), 1.18(a) and (b), 1.19(a)-(c), 1.20(a), 1.29(b) and (e), 1.31(a), 1.33(a)-(c), 1.44, and 1.45 of the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634 ("Act"); §§11.021(a) and 36.001(5) of the Texas Water Code (TEXAS WATER CODE ANNOTATED §§11.021(a); and 36.002(5) (Vernon 2000)); and §2001.004(1), of the Texas Government Code (TEXAS GOVERNMENT CODE ANNOTATED, §§2001.004(a) (Vernon 2000)).

Section 1.03 of the Act sets forth definitions of various words and phrases used throughout the Act that the Legislature provided in passing the Act. Many of the definitions in this proposed rule are taken directly from this provision.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under Article 1 of the Act, including rules governing procedures of the board and the authority." This section directs the Board to adopt rules as necessary to implement the various substantive programs set forth in the Act related to the Edwards Aquifer.

Section 1.11(d)(5) of the Act provides that the Board may hire an executive director to manage the Authority. In the proposed definitions the executive director is proposed to be referred to a the general manager.

Section 1.11(f) of the Act empowers the Authority to contract with a person who uses water from the aquifer to construct, operate, own, finance, and maintain water supply facilities. That section defines the term "water supply facility" as including "a darn, reservoir, treatment facility, transmission facility, or recharge project."

Section 1.ll(h) of the Act provides that the Authority is, among other things, "subject to the Administrative Procedures Act, TEXAS GOVERNMENT CODE ANNOTATED §§2001.001-2001.902 (Vernon 2000).

Section 1.14(d) of the Act provides the grounds for and the procedure by which the Authority may increase of quantity of groundwater available for permitting and modify the effect of §1.14(b) and (c) of the Act which creates maximum quantities of groundwater that may be permitted for certain periods of time. Among the groundwater available is conservation, augmentation, and supplemental recharge.

Section 1.14(e) of the Act provides for a prohibition on withdrawals of groundwater from the Edwards Aquifer (Aquifer) from post-June 1, 1993 new wells, as well as, provisions for interruptible withdrawals from such wells if the amount of groundwater available for permitting is increased pursuant to §1.14(d) of the Act.

Section 1.14(f) of the Act authorizes the Authority to allow uninterruptible withdrawals from the Aquifer when certain index wells for the San Antonio and Uvalde Pools are at certain levels identified in the section.

Section 1.15(a) of the Act provides broad authority to the Authority to manage (1) withdrawals from the Aquifer, and (2) points of withdrawals pursuant to the Act.

Section 1.15(b) of the Act prohibits withdrawals from the Aquifer except pursuant to a prior issued groundwater withdrawal permit. An exception to this permit requirement is recognized for withdrawals made based on interim authorization status under §1.17 of the Act, and exempt wells under §1.33 of the Act.

Section 1.15(c) of the Act authorizes the Authority to issue regular, term and emergency groundwater withdrawal permits .

Section 1.16(a) of the Act provides for existing users to file declarations of historical use (otherwise known as applications for initial regular permits) for withdrawals made during the statutorily established historical period.

Section 1.16(c) of the Act provides that owners of exempt wells are not required to file declarations of historical use in order to continue to make lawful withdrawals from their exempt wells.

Section 1.16(d) of the Act provides some of the elements that, if proven by convincing evidence, would require the Board to grant an application for an initial regular permit.

Section 1.17(a) of the Act authorizing persons owning wells meeting certain criteria to continue to make withdrawals from the well even though they have not been issued an initial regular permit.

Section 1.18(a) of the Act authorizes the Authority to issue additional regular permits if there remains water available for permitting after the issuance of all initial regular permits. The section also provides that groundwater withdrawals pursuant to additional regular permits are subject to maximum permitted groundwater withdrawal amounts set out in §1.14(b) and (c) of the Act.

Section 1.18(b) of the Act prohibits the Authority from considering or taking action on an application for an additional regular permit until the Authority has taken final action on all pending applications for initial regular permits.

Section 1.19(a) of the Act authorizes the Authority to issue term permits for groundwater withdrawals from the Aquifer for up to 10 years.

Section 1.19(b) of the Act provides for the minimum index well level for the San Antonio Pool below which term permit withdrawals would be automatically interrupted.

Section 1.19(c) of the Act provides for the minimum index well level for the Uvalde Pool below which term permit withdrawals would be automatically interrupted.

Section 1.20(a) of the Act authorizes the Authority to issue emergency permits for groundwater withdrawals from the Aquifer not to exceed 30 days to prevent severe, imminent threats to the public health or safety.

Section 1.29(b) of the Act directs the Authority to assess an aquifer management fee on aquifer use to finance its administrative and programmatic expenses authorized under the Act.

Section 1.29(e) of the Act provides that in developing its fees, the Authority may charge different fee rates on a per acre-foot basis for different types of uses as long as they are equitable between types of uses. This section also creates a fee differential between agricultural users and non-agricultural users for aquifer management fees whereby the agricultural fee may not exceed 20% of the aquifer management fees assessed against non-agricultural users. In addition, this section creates a distinction between agricultural and non-agricultural users when calculating aquifer use under §1.29(b) of the Act by providing that aquifer use for agricultural users is the actual volume of groundwater withdrawn, while for non-agricultural users it is the face value authorized to be withdrawn in an initial regular permit.

Section 1.31(a) of the Act provides that owners of non-exempt wells are required to install meters on wells, or, if the meter requirement is waived, apply alternative measuring methods to calculate the volume of groundwater withdrawals from the Aquifer.

Section 1.33(a) of the Act provides that wells qualifying for exempt status are not required to install a meter on the well. This subsection also provides some of the criteria for a well to quality for exempt well status.

Section 1.33(b) of the Act provides that exempt wells must be registered with the Authority.

Section 1.33(c) of the Act provides additional criteria for a well to quality for exempt well status.

Section 1.44 of the Act provides the terms and conditions under which a political subdivision of the states may enter in to an interlocal contract with the Authority for an aquifer recharge, storage and recovery project.

Section 1.45 of the Act authorizes the Authority to build or operate recharge dams and provides certain terms and conditions for the operation of such facilities as well as eligible source water for the recharge project.

Section 11.021(a) of the Texas Water Code provides the basic definition of state water to which the prior appropriation doctrine applies and over which jurisdiction is vested in the Texas Natural Resource Conservation Commission. Section 1.08(b) of the Act provides that the Authority does not have the authority to regulate surface water. The Authority interprets the jurisdictional prohibition in §1.08(b) to apply to surface water which is proposed to be defined as state water is defined in §11.021(a).

Section 36.002(5) of the Texas Water Code defines the term "groundwater" as "water percolating below the surface of the earth." Under §1.08(a) of the Act, Chapter 36 of the Texas Water Code (which replaced Chapter 52 (see Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 933, §2, 6, 1995 Texas General Laws 4673), is applicable to the Authority to the extent that it does not conflict with the Act.

Because the Authority is "subject to" the APA due to the operation of §1.11(h) of the Act, §1.004(1) of the Texas Government Code provides that the Authority is required to adopt rules of practice stating the nature and requirement of all available formal and informal procedures. This would necessarily include definitions relevant to the rules of practice or procedural rules.

The statutes, articles, or sections of the Act or any other code that are affected by the proposed rule are §§1.08(a), 1.11(a), (d)(5), (f) and (h), 1.14(d)-(f), 1.15(a)-(c), 1.16(a), (c), and (d), 1.17(a), 1.18(a) and (b), 1.19(a)-(c), 1.20(a), 1.29(b) and (e), 1.31(a), 1.33(a)-(c), 1.44, and 1.45 of the Act; §§11.021(a) and 36.001(5) of the Texas Water Code, and §1.004(1), of the Texas Government Code. The section of Chapter 31, Texas Administrative Code, that is to be affected is §702.1.

§702.1. General Definitions.

(a) In its rules, the Authority employs two types of definitions. The first type are general definitions that apply to all rules of the Authority. The second type are specific definitions that apply only to the chapters in this title in which they are located. The specific definitions applying only to terms within a particular chapter are set out in that chapter.

(b) The following words and terms, when used in any rule of the Authority, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Act-The Edwards Aquifer Authority Act, Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2353, as amended.

(2) Additional regular permit-A groundwater withdrawal permit issued by the Authority pursuant to the Act, §1.18(a).

(3) APA-The Administrative Procedures Act, Chapter 2001, Government Code.

(4) Applicant-A person who files an application with the Authority.

(5) Application-A form document required by the Authority to initiate the process of obtaining the issuance of a permit, registration, exemption, license or any other Authority approval. A declaration of historical use is an application for an initial regular permit.

(6) Aquifer-The Edwards Aquifer, which is that portion of an arcuate belt of porous, water-bearing, predominately carbonate rocks known as the Edwards and Associated Limestone in the Balcones Fault Zone extending from west to east to northeast from the hydrologic division near Brackettville in Kinney County that separates underground flow toward the Comal Springs and San Marcos Springs from underground flow to the Rio Grande Basin, through Uvalde, Medina, Atascosa, Bexar, Guadalupe and Comal counties, and in Hays County south of the hydrologic division near Kyle that separates flow toward the San Marcos River from flow to the Colorado River Basin.

(7) Aquifer management fees-The fee authorized to be assessed by the Authority based:

(A) on aquifer use under the Act, §1.29(b) and (e); or

(B) taxes in lieu of user fees to be paid by groundwater users in a groundwater conservation district governed by Chapter 36, Water Code, pursuant to a contract between the Authority and the water district under the Act, §1.29(b).

(8) Aquifer recharge and storage permit-A permit issued by the Authority for the recharge of the aquifer.

(9) Augmentation-An act or process to increase the amount of water available for use or springflow.

(10) Authority-The Edwards Aquifer Authority.

(11) Authority offices-The Authority's principal offices identified in §701.5 of this title (relating to Business Office and Mailing Address of the Authority).

(12) Beneficial use-The use of the amount of water that is economically necessary for a purpose authorized by law when reasonable intelligence and reasonable diligence are used in applying the water to that purpose.

(13) Board-The board of directors of the Authority.

(14) Commission-The Texas Natural Resource Conservation Commission.

(15) Conservation-Any measure that would sustain or enhance water supply.

(16) Declarant-An existing user who files a declaration of historical use.

(17) Declaration of historical use (or declaration)-The form document required by the Authority to be filed pursuant to the Act, § 1.16(a). A declaration is an application for an initial regular permit.

(18) Diversion-The removal of state water from a watercourse or impoundment.

(19) Docket clerk-The docket clerk of the Authority as designated by the general manager.

(20) Domestic or livestock use-Use of water for:

(A) drinking, washing, or culinary purposes;

(B) irrigation of a family garden or orchard the produce of which is for household consumption only, or

(C) watering of animals.

(21) Emergency permit-A groundwater withdrawal permit issued by the Authority pursuant to the Act, §1.20(a).

(22) Exempt well-A well that produces 25,000 gallons of water a day or less for domestic or livestock use that is not within or serving a subdivision requiring platting.

(23) Existing well-A well drilled before June 1, 1993.

(24) General counsel-The general counsel of the authority hired by the board.

(25) General manager-The executive director hired by the board to be the chief administrator of the Authority.

(26) Groundwater-Water percolating below the surface of the earth.

(27) Groundwater withdrawal permit-A permit issued by the authority pursuant to §1.15(b) of the Act authorizing the withdrawal of groundwater from the aquifer.

(28) Historical period-The period from June 1, 1972, through May 31, 1993, inclusive.

(29) Industrial use-The use of water for, or in connection with, commercial or industrial activities, including manufacturing, bottling; brewing; food processing; scientific research and technology; recycling; production of concrete, asphalt, and cement; commercial uses of water for tourism, entertainment, and hotel or motel lodging; generation of power other than hydroelectric; and other business activities.

(30) Initial regular permit-A groundwater withdrawal permit issued by the Authority pursuant to the Act, §1.16(d).

(31) Irrigation use-The use of water for the irrigation of pastures and commercial crops, including orchards.

(32) Interruptible-When referring to a groundwater withdrawal permit, the conditioning of the right to withdraw groundwater from the aquifer that makes the right subject to complete cessation, temporary curtailment, or reduction of the amount of groundwater that may be withdrawn from the aquifer based upon the measurement of a water level at an index well, or as otherwise determined by the board.

(33) Judge-A SOAH administrative law judge.

(34) Livestock-Animals, beasts or poultry collected or raised for pleasure, recreational use, or commercial use.

(35) Monitoring well permit-A permit issued by the Authority pursuant to §1.15(b) of the Act for the measuring of the water quality of the aquifer or water level of the aquifer.

(36) Municipal use-The use of water within or outside of a municipality and its environs whether supplied by a person, privately owned utility, political subdivision, or other entity, including the use of treated effluent for certain purposes specified as follows. The term includes:

(A) the use of water for domestic use, the watering of lawns and family gardens, fighting fires, sprinkling streets, flushing sewers and drains, water parks and parkways, and recreation, including public and private swimming pools;

(B) the use of water in industrial and commercial enterprises supplied by a municipal distribution system without special construction to meet its demands; and

(C) the application of treated effluent on land under a permit issued under Chapter 26, Water Code, if:

(i) the primary purpose of the application is the treatment or necessary disposal of the effluent;

(ii) the application site is a park, parkway, golf course, or other landscaped area within the authority's boundaries; or

(iii) the effluent applied to the site is generated within an area for which the commission has adopted a rule that prohibits the discharge of the effluent.

(37) New well-A well drilled on or after June 1, 1993.

(38) Non-exempt well-Any well, the groundwater withdrawals from which, are required to be authorized by interim authorization status or a groundwater withdrawal permit.

(39) Order-Any written directive of the board carrying out the powers and duties of the Authority under Article 1 of the Act.

(40) Party-Each person admitted as a party in a contested case hearing.

(41) Permit-The written document issued by the Authority approving an application for a permit.

(42) Permittee-A person to whom the Authority has issued a permit.

(43) Person-An individual, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association and any other legal entity.

(44) Petitioner--A person who files a petition with the authority.

(45) Pleadings-Any document filed by parties in a contested case hearing.

(46) Pollution-The alteration or contamination of the physical, thermal, chemical, or biological quality of any water in the state, or the contamination of any water in the state, that renders the water harmful , detrimental, or injurious to humans, animal life, vegetation, property, or public health, safety, or welfare or that impairs the usefulness of the public enjoyment of the water for any lawful or reasonable purpose.

(47) Protestant-Any person opposing, in whole or in part, an application.

(48) Recharge-Increasing the supply of water to the aquifer by naturally occurring channels or artificial means.

(49) Recharge recovery permit-A permit issued by the Authority pursuant to §1.15(b) for withdrawal of groundwater stored in the aquifer pursuant to an aquifer recharge and storage permit.

(50) Registrant-A person who files a registration with the Authority.

(51) Registration-The document required to be filed pursuant to the Act, §1.33(b) or as may otherwise be required by the rules of the Authority.

(52) Reuse-Authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before the water is discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.

(53) San Antonio Pool-That part of the aquifer underlying the boundaries of the Authority, other than Uvalde County.

(54) SOAH-The State Office of Administrative Hearings.

(55) Surface Water-Has the meaning of "state water" as defined by §11.021, Water Code.

(56) Term permit-A groundwater withdrawal permit issued by the Authority pursuant to the Act, §1.19(a).

(57) Underground water-Has the meaning of "groundwater" as defined by §36.001(5), Water Code, as incorporated in subsection (26) of this section.

(58) Uvalde Pool-That part of the Aquifer underlying the boundaries of the Authority and Uvalde County.

(59) Water supply facility-Any infrastructure designed for the supply of raw or potable water for any beneficial use, including a dam, reservoir, treatment facility, transmission facility, or recharge project.

(60) Well-A bored, drilled, or driven shaft or an artificial opening, in the ground made by digging, jetting, or some other method where the depth of the shaft or opening is greater than its largest surface dimension, but does not include a surface pit, surface excavation, or natural depression.

(61) Well construction permit-A permit issued by the Authority pursuant to §1.15(b) of the Act for the construction or modification of wells or other works designed for the withdrawal of water from the aquifer.

(62) Well J-17-State well number AY-68-37-203 located in Bexar County.

(63) Well J-27-State well number YP-69-50-302 located in Uvalde County.

(64) Withdrawal-An act or a failure to act that results in taking water from the aquifer by or through man-made facilities, including pumping, withdrawing or diverting groundwater.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005245
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Earliest possible date of adoption: September 10, 2000
For further information, please call: (210) 222-2204

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CHAPTER 705. JURISDICTION OF THE EDWARDS AQUIFER AUTHORITY

31 TAC §705.1, §705.3

The Edwards Aquifer Authority ("Authority") proposes the adoption of new 31 TAC, §705.1, and §705.3, which will consist of rules relating to the jurisdiction of the Authority.

Proposed §705.1 relates to the jurisdiction of the Authority over groundwater. It specifies that the Authority's jurisdiction applies only to groundwater within the aquifer and to groundwater withdrawn from the aquifer.

Proposed §705.3 relates to the jurisdiction of the Authority over surface water. It specifies that the Authority's jurisdiction does not extend to surface water.

Section 2001.0225 of the Texas Government Code requires an agency to perform, under certain circumstances, a regulatory analysis of "major environmental rules." The Authority has determined that none of the proposed rules are "major environmental rules" as that term defined by §2001.0225(g)(3) of the Texas

Government Code. The basis for this determination is that the proposed rules do not have the specific intent to "protect the environment" or "reduce risks to human health from environmental exposure." The proposed rules merely state the Authority's understanding concerning its jurisdiction. Their specific intent is to state and clarify the extent of the Authority's power. These rules do not contain any environmental or human health standards that impose requirements on the regulated community. For these reasons, we find that none of the proposed rules are "major environmental rules" and that, therefore, no further analysis is required by §2001.0225 of the Texas Government Code.

Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act," ("TPRPRA") requires governmental entities, under certain circumstances, to prepare a takings impact assessment ("TIA") in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the proposal of these rules. First, the Authority has made a "categorical determination" that rules that provide general information only do not affect private real property. These proposed rules provide general information only; that is, they provide general statements concerning the nature of Authority's jurisdiction. Second, the Authority's action in adopting these rules is an action that is reasonably taken to fulfill an obligation mandated by state law and is thus excluded from TPRPRA §2007.003(b)(4) of the Texas Government Code. See Act § 1.08(a), 1.08(b), 1.11(a). It was held, in *Edwards Aquifer Authority v. Bragg,* ___ S.W.3d. ___, No. 04-99-00059-CV, 2000 WL 35582 (Tex. App. San Antonio 2000, no history), that the Act expressly mandates the adoption of substantive and procedural permitting rules and that such actions are therefore excepted from TPRPRA. Third, it is the position of the Authority that all valid actions of the Authority are excluded from TPRPRA under §2007.003(b)(11)(C) of the Texas Government Code as actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the proposal of these rules.

Gregory M. Ellis, General Manager of the Authority, is responsible for approving the Fiscal Note that was prepared for these proposed rules. Mr. Ellis has determined that for each year of the first five years that the proposed rules will be in effect, there will be no: (1) additional costs; (2) reduction in costs; (3) loss in revenues; or (4) increase in revenues, to state or local governments expected as a result of enforcing or administering these proposed rules. The basis for this determination is that the adoption of these proposed rules will have no direct fiscal impact on any unit of state or local government. Moreover, these proposed rules will have no implications for regulation and compliance.

Mr. Ellis is also responsible for approving the Public Benefit and Cost Note that was prepared for these proposed rules. Mr. Ellis has determined that for each year of the first five years that the proposed rules will be in effect, the public benefits expected as a result of adoption of the proposed rules will be to provide the public with a concise statement of the jurisdiction of the Authority. Mr. Ellis has determined that for each year of the first five years that the proposed rules will be in effect, there are no probable economic costs to persons required to comply with the proposed rules. The basis for this determination is that the adoption of these rules is a prerequisite to proposal and adoption of other rules by the authority. By themselves, they create no substantive requirements. Moreover, these proposed rules do not impose compliance obligations on any person or otherwise regulate the use of water resources and therefore do not impose economic costs.

Section 2001.022 of the Texas Government Code requires agencies to request that the Texas Workforce Commission prepare a Local Employment Impact Statement in connection with certain proposed rules. The Authority has determined that there is no need to request the preparation of a Local Employment Impact Statement with respect to these proposed rules. In making this determination, the Authority assumes that an "effect" on employment and local economies (as that word is used in §2001.022(b) of the Texas Government Code) means a gain or loss of employment or a change in the costs and/or revenues to a person, business or governmental agency sufficient to cause a material change in their economic status that would be attributable to a proposed rule, if adopted. The basis for the determination that there is no need to request the preparation of a Local Employment Impact Statement is that the proposed rules have no implications for regulatory or compliance obligations that might result in an effect on local employment or local economies. The rules have no effect other than to state the jurisdiction of the Authority. By themselves, they do not regulate water resources nor establish compliance requirements. There is nothing in the proposed rules that could possibly impact local employment or economies.

Interested persons may submit written comments on the proposed rules. Comments must be submitted in writing to Brenda Davis, Docket Clerk, Edwards Aquifer Authority, P.O. Box 15830, 1615 N. St. Mary's St., San Antonio, Texas 78212-9030, within 30 days of the publication of this notice in the *Texas Register*. The written comments should be filed on 8 1/2 x 11 inch paper and be typed or legibly written. Written comments must indicate whether the comments are generally directed at all of the proposed rules, or whether they are directed at specific proposed rules. If directed at specific proposed rules, the number of the proposed rule must be identified and followed by the comments thereon.

The Authority has scheduled the following public hearings on this proposed rule: Wednesday, August 9, 2000, 6:00 p.m., Conference Center Edwards Aquifer Authority, 1615 N. St. Mary's San Antonio, Texas 78215, (210) 222-2204; Tuesday, August 15, 2000, 6:00 p.m., New Braunfels Civic Center, 380 S. Seguin Avenue New Braunfels, Texas 78130, (830) 625-2385; Thursday, August 17, 2000, 6:00 p.m., St. Paul's Lutheran Church, 1303 Avenue M Hondo, Texas 78861,(830) 426-3222; Tuesday, August 22, 2000, 6:00 p.m., Sgt. Willie DeLeon Civic Center, 300 E. Main Street Uvalde, Texas 78801, (830) 278-9922; Thursday, August 24, 2000, 6:00 p.m., San Marcos Activity Center, 501 E. Hopkins San Marcos, Texas 78666, (512) 393-8280.

The new sections are proposed pursuant to §§1.08(a), 1.08(b) and 1.11(a) of the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634 ("Act").

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad

and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer.

Section 1.08(b) of the Act provides that the Authority's "powers regarding underground water apply only to underground water within or withdrawn from the aquifer." The term "aquifer" is defined by §1.03(1) of the Act as "the Edwards Aquifer, which is that portion of an arcuate belt of porous, water-bearing, predominately carbonate rocks known as the Edwards and Associated Limestones in the Balcones Fault Zone extending from west to east to northeast from the hydrologic division near Brackettville in Kinney County that separates underground flow toward the Comal Springs and San Marcos Springs from underground flow to the Rio Grande Basin, through Uvalde, Medina, Atascosa, Bexar, Guadalupe, and Comal counties, and in Hays County south of the hydrologic division near Kyle that separates flow toward the San Marcos River from flow to the Colorado River Basin." Section 1.08(b) also states that "this subsection is not intended to allow the authority to regulate surface water."

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under Article 1 of the Act, including rules governing procedures of the board and the authority." This section directs the Board to adopt rules as necessary to implement the various substantive programs set forth in the Act.

The statutes, articles, or sections of the Act or any other code that are affected by the proposed rule are §§1.08(a), 1.08(b), and 1.11(a) of the Act.

§705.1. Groundwater.

The power of the Authority regarding groundwater applies only to:

(1) groundwater within the aquifer; or

(2) groundwater withdrawn from the aquifer.

§705.3. Surface Water.

The power of the Authority does not extend to regulation of surface water.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005246
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Earliest possible date of adoption: September 10, 2000
For further information, please call: (210) 222-2204

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CHAPTER 707. PROCEDURE BEFORE THE AUTHORITY

The Edwards Aquifer Authority ("Authority") proposes the adoption of §§707.1, 707.101-707.106, 707.201-707.208, 707.301-707.315, 707.401-707.417, 707.422, 707.424, 707.426, 707.428, 707.501-707.519, 707.601-707.626, to be codified at Title 31, Texas Administrative Code.

Proposed §707.1 provides uniform definitions for certain terms to be used throughout Chapter 707, Title 31, TAC. The purpose of this rule is to reduce the amount of cumbersome regulatory language and thus streamline the rules in Chapter 707.

Proposed §707.101 states the purpose of the rules to be codified at Chapter 707, Title 31, TAC. This section explains that Chapter 707 provides the procedures to be followed in Authority proceedings.

Proposed §707.102 provides general rules regarding the computation of time when a period of time is prescribed or allowed under the Authority's rules or by applicable statute.

Proposed §707.103 sets forth general rules to be followed by persons when filing documents with the Authority. It requires that all such documents be submitted to the docket clerk of the Authority, that any docket or application number appear on the first page, and that such documents be filed by mail or by hand delivery. It also states the circumstances under which documents may be filed by facsimile.

Proposed §707.104 sets forth general rules to be followed by persons when serving documents under Chapter 707. It requires service either in person, by courier, United States mail, or facsimile. Proposed §707.014 includes general rules concerning when service by mail and by facsimile shall be considered complete and includes additional rules regarding service by facsimile. It also provides for an extra three days when a person has a right or is required to do some act within a prescribed period after a document is served on that person by mail or facsimile. It also a certificate of service requirement.

Proposed §707.105 states requirements for applicants, registrants and permittees regarding changes to addresses or telephone numbers.

Proposed §707.106 sets forth general requirements regarding the use of forms provided by the general manager.

Proposed §707.201 relates to meetings of the Board of Directors of the Authority. It states requirements regarding the frequency, scheduling, notice and conduct of such meetings.

Proposed §707.202 relates to the conduct and decorum at Board meetings, and provides some general rules regarding the conduct of persons at such meetings. It also pertains to instances in which persons attending Board meetings have special requests.

Proposed §707.203 pertains to deadlines to file comments on matters set for discussion at a Board meeting and it states some general rules regarding such deadlines.

Proposed §707.204 pertains to the continuance of matters set for discussion at a Board meeting and it states some general rules regarding such continuances.

Proposed §707.205 pertains to the signing of orders or resolutions showing actions taken at Board meetings. It specifies that any such orders or resolutions may be signed by the chair or by any Board member if he or she did not vote against the action taken.

Proposed §707.206 relates to audio recording of Board meetings. It specifies that the assistant to the secretary of the Board shall make audio recordings of meetings of the Board that are open to the public under the Texas Open Meetings Act. It also states that audio recordings will be made of closed sessions, except that no recordings will be made of private consultations with an attorney.

Proposed §707.207 concerns minutes taken in meetings of the Board and states some requirements concerning such minutes.

Proposed §707.208 pertains to instances in which an evidentiary hearing is held before the Board. It specifies that in such cases, the procedures of subchapter G of Chapter 707, title 31, TAC, shall apply.

Proposed §707.301 states that Subchapter D of Chapter 707, Title 31, TAC, applies to any application or registration filed with the Authority.

Proposed §707.302 states the basic requirement that any person who wishes to obtain a permit, authorization, or other approval from the Authority must submit a written application to the Authority on a form provided by the general manager.

Proposed §707.303 relates to who the Authority considers to be the proper applicant, registrant, or declarant in situations where a well has one owner or where there is more than one owner. It also specifies that where a well has more than one owner, the owners shall select one among them to act for and represent the others in the filing the application, registration or declaration.

Proposed §707.304 states the general rule that any person seeking to withdraw groundwater from the Edwards Aquifer must file an application for a groundwater withdrawal permit with the Authority. It also makes clear that no such application must be filed , if the well is exempted from the permit requirement by §§ 1.16(c) and 1.33 of the Edwards Aquifer Authority Act and §711.20 of Title 31, TAC.

Proposed §707.305 pertains to the requirement to file an application for a well construction permit and provides that a person seeking to perform one of the activities mentioned in §711.12(2)-(5) of Title 31, TAC, must file such an application.

Proposed §707.306 pertains to the requirement to register a well and provides that an owner of an existing well or an exempt well must register the well. It also states that well registrations must be filed no later than 180 days from the effective date of the Chapter 707 rules.

Proposed §707.307 concerns the effect of registrations filed before the effective date of the Chapter 707 rules. It provides that owners of wells that were registered with the Authority prior to the effective date of this subchapter D, Chapter 707, Title 31, TAC, need not file another well registration.

Proposed §707.308 pertains to the requirement to file an application for exempt well status. It states that an owner of an existing or proposed well that the owner believes is exempt from the requirements to obtain a permit, and who wishes to withdraw groundwater from that well, must file such an application. It also provides that an owner of a permitted well who wishes to convert that well to one with exempt well status must file such an application.

Proposed §707.309 pertains to the requirement to file an application for a permit to install or modify a meter. It states that a person seeking to install a new meter or modify an existing meter must file such an application with the Authority. It also provides that a person seeking to employ an alternative measuring method or modify an existing alternative measuring method must file such an application.

Proposed §707.310 pertains to the requirement to register a meter. It states that an owner of an existing well equipped with a meter or alternative measuring method must register the meter or alternative measuring method. It also requires that meter registrations be filed with the Authority no later than 180 days from the effective date of the Chapter 707 rules.

Proposed §707.311 concerns the requirement to file a declaration of historical use. It states that for each well from which groundwater from the aquifer has been withdrawn and placed to beneficial use during the historical period, a declaration of historical use must have been filed by December 30, 1996. It also states that an owner of a well that is exempt from the requirement to obtain a groundwater withdrawal permit is not under a requirement to file a declaration of historical use.

Proposed §707.312 pertains to declarations of historical use received before the effective date of Chapter 707 and provides that such declarations need not be resubmitted.

Proposed §707.313 pertains to the requirement to file an application for a monitoring well permit and provides that a person seeking to perform one of the activities mentioned in §711.12(3) of Title 31, TAC, must file such an application.

Proposed §707.314 pertains to the requirement to file an application for an aquifer recharge and storage permit and provides that a person seeking to perform one of the activities mentioned in §711.12(7) of Title 31, TAC, must file such an application.

Proposed §707.315 pertains to the requirement to file an application for a recharge recovery permit and provides that any person seeking to perform one of the activities mentioned in §711.12(8) of Title 31, TAC, must file such an application.

Proposed §707.401 provides general requirements concerning the contents of and requirements for all applications and registrations filed with the Authority. It requires that all applications and registrations be typewritten or printed legibly in ink. It also states that each application and registration shall include: the full name, post office address, and telephone number of applicant or registrant; the signature of the applicant or registrant; and an attestation. The section also states additional requirements pertaining to the name and signature of the applicant or registrant, depending upon the type of entity.

Proposed §707.402 states that applicants and registrants are encouraged to confer with the Authority staff on any questions concerning the preparation of an application or registration.

Proposed §707.403 pertains to application fees to be charged by the Authority and requires that a non-refundable application fee of $25 accompany all applications other than an application for an agricultural conservation loan. It also requires that a non-refundable application fee of $250 accompany an application for an agricultural conservation loan.

Proposed §707.404 concerns registration fees to be charged by the Authority and requires that a $10 registration fee accompany all registrations filed with the Authority.

Proposed §707.405 concerns applications for initial regular permits. It lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents are: the name and address of the well owner; the source of groundwater supply; the amount and purpose of withdrawal and use; the rate of withdrawal; the method of withdrawal; and a declaration of historical use. This section also specifies the required contents of a declaration of historical use.

Proposed §707.406 concerns applications for additional regular permits. It lists the required contents for such applications (that are in addition to the information specified in §707.401). Those

required contents are: the name and address of the well owner; the source of groundwater supply; the proposed amount of withdrawal; the proposed purpose of use; the proposed maximum rate of withdrawal; the proposed method of withdrawal; the proposed place of use; a legal description of the location of each well; a map showing the location of each well; a water conservation plan; a water reuse plan; a description of the meter to be used; a list of all other permits applied for or issued by the Authority to the applicant; and any other information as may be required by the general manager.

Proposed §707.407 concerns applications for term permits. It lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents are: the name and address of the well owner; the source of groundwater supply; the proposed amount of withdrawal; the proposed purpose of use; the proposed maximum rate of withdrawal; the proposed method of withdrawal; the proposed place of use; a legal description of the location of each well; a map showing the location of each well; a water conservation plan; a water reuse plan; a description of the meter; a list of all other permits applied for or issued by the Authority to the applicant; and any other information as may be required by the general manager.

Proposed §707.408 concerns applications for emergency permits. It lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents are: the name and address of the well owner; the source of groundwater supply; the proposed amount of withdrawal; the proposed purpose of use; the proposed maximum rate of withdrawal; the proposed method of withdrawal; the proposed place of use; a reasonably clear description of the location of each well; a list of all other permits applied for or issued by the Authority to the applicant; the basis for the issuance of an emergency permit; and any other information as may be required by the general manager.

Proposed §707.409 concerns applications to renew emergency permits. It states that such an application must contain the information specified in §707.408. It also states that such an application must be filed before the existing emergency permit has expired.

Proposed §707.410 concerns well registrations. It lists the required contents for such registrations (that are in addition to the information specified in §707.401). Those required contents are: the name and address of the well owner; a legal description of the location of the well; a map showing the location of the well, the three nearest wells within a quarter mile of the well, and any possible sources of contamination; the purpose of use; the amount of withdrawal; the maximum rate of withdrawal; the depth of the well; the size of the pump and pumping method; the date of construction; a list of all other permits applied for or issued by the Authority to the applicant; and any other information as may be required by the general manager.

Proposed §707.411 concerns applications for well construction permits. It lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents are: the name and address of the owner of the proposed well; a legal description of the location of the proposed well; a map showing the location of the proposed well, the three nearest wells within a quarter mile of the proposed well, and any possible sources of contamination; the proposed purpose of use; the amount proposed to be withdrawn; the proposed maximum rate of withdrawal; the proposed depth of the well; the size of the pump and pumping method; the approximate date that construction will begin; the identity of the well drilling contractor; a list of all other permits applied for or issued by the Authority to the applicant; the claimed legal basis under which groundwater will be withdrawn; and any other information as may be required by the general manager.

Proposed §707.412 concerns meter registrations. It lists the required contents for such registrations (that are in addition to the information specified in §707.401). Those required contents are: the name and address of the well owner; a legal description of the location of the well on which the meter is located; a map showing the location of the well; whether or not the well is an exempt well or a permitted well; the purpose of use of the water withdrawn from the well; a description of the meter; the date that the meter was installed; and any other information as may be required by the general manager. In addition, the rule lists the specific elements to be included in the description of the meter.

Proposed §707.413 concerns applications for permits to install or modify a meter to perform one of the activities mentioned in §711.12(a)(6) of Title 31, TAC. It lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents are: the name and address of the owner of the well on which the meter is proposed to be installed; a legal description of the location of the well; a map showing the location of the well; whether or not the well is an exempt well or a permitted well; the purpose of use of the water withdrawn from the well; a description of the meter; and any other information as may be required by the general manager. In addition, the rule lists the specific elements to be included in the description of the meter.

Proposed §707.414 concerns applications to transfer interim authorization status and to amend an application for an initial regular permit. It lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents are: the names and addresses of the person who seeks to transfer his or her interim status and of the person to whom that status is proposed to be transferred; legal descriptions of the locations of the two wells; the purpose of use for the well that has current interim authorization status and the proposed purpose of use for the well to which the transfer is proposed; the amount of groundwater proposed to be withdrawn at the well to which the transfer is proposed; the place of use of the water withdrawn from the well under interim status and the proposed place of use for the water withdrawn from the well to which the transfer is proposed; the period of time for which the transfer is proposed; a copy of the transfer agreement; the price per acre-foot; and any other information as may be required by the general manager.

Proposed §707.415 concerns applications to transfer and amend a permit. It lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents are: the names and addresses of the person who seeks to transfer his or her permitted rights and person to whom those rights are proposed to be transferred; legal descriptions of the locations of the two wells; the purpose of use for the currently permitted well and the proposed purpose of use for the well to which the transfer is proposed; the amount of groundwater proposed to be withdrawn at the well to which the transfer is proposed; the place of use of the water withdrawn from the permitted well and the proposed place of use for the water withdrawn from the well to which the transfer is proposed; the period of time for which the transfer is proposed; a copy of the transfer

agreement; the price per acre-foot; and any other information as may be required by the general manager.

Proposed §707.416 concerns applications for exempt well status. It lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents are: the name and address of the owner of the well (or proposed well); a legal description of the location of the well; a map showing the location of each well; the purpose of use; the maximum amount of withdrawal per day; the maximum rate of withdrawal; the depth of the well; the size of the pump and pumping method; the approximate date of well construction; a list of all other permits applied for or issued by the Authority to the applicant; a statement as to whether the well is within a subdivision requiring platting; a statement as to whether the well serves a subdivision requiring platting; and any other information as may be required by the general manager.

Proposed §707.417 pertains to applications for well monitoring permits to perform one of the activities mentioned in §711.12(a)(3) of Title 31, TAC. It lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents are: the name and address of the well owner; a legal description of the location of the well; a map showing the location of the well; a statement of the purpose of the monitoring well; a description of the method to be used to measure water depth or quality; the amount of water to be withdrawn per annum; the depth of the well; and any other information as may be required by the general manager.

Proposed §707.422 pertains to applications for agricultural conservation loans. It lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents are: the name and address of the well owner; the tax identification or social security number of the applicant; a description of the intended use of the loan proceeds; a description of any item to be purchased; a legal description of the real property to be affected; any Authority permit application number; credit references; any invoice of items to be purchased with loan proceeds; if, for refinancing, a statement of the date that the equipment was purchased; a statement the applicant's consent and compliance meeting certain requirements; certain specified financial records; documents verifying the organization, existence and authority of the applicant; and any other information that may be required by the general manager.

Proposed §707.424 pertains to applications for declarations of abandonment of a groundwater withdrawal permit. It lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents are: the name and address of the well owner; a description of the facts demonstrating non-use; a description of facts showing an intent to abandon; and any other information that may be required by the general manager.

Proposed §707.426 pertains to applications to cancel a groundwater withdrawal permit. It lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents are: the name and address of the well owner; a description of the facts demonstrating non-use; and any other information that may be required by the general manager.

Proposed §707.428 pertains to applications to convert base irrigation groundwater. It lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents are: the name and address of the well owner; and, if the application is based in physical impossibility, a description of all facts demonstrating physical impossibility. If the application is based on conservation, a list of other required contents is required.

Proposed §707.501 concerns the Authority's initial action on applications and registrations and provides that all applications and registrations shall be stamped or marked "Received" by the docket clerk with the date of receipt clearly indicated.

Proposed §707.502 concerns the Authority's initial review of applications and registrations for administrative completeness. It provides that such review shall generally be conducted within 45 business days of the receipt of the application or registration and payment of applicable fees. For applications for emergency permits, such review shall be conducted within ten business days. It also states the basic criteria that shall be used in conducting such a review. The proposed rule also provides that upon completion of this review, the general manager shall notify the applicant and forward the registration or application to the docket clerk with a request that it be filed.

Proposed §707.503 concerns the general manager's return of applications and registrations that are deemed to be not administratively complete. It provides procedures to be followed by the general manager in such circumstances and provides procedures to be followed to allow an applicant to correct deficiencies.

Proposed §707.504 concerns the technical review of applications by the Authority. It provides procedures to be followed by Authority staff in conducting such review. In particular, it generally directs Authority staff to complete such review within 90 business days of the determination that an application is administratively complete. It also provides procedural requirements regarding the providing of additional material that may be necessary for technical review. It also provides that the general manager or his designee may enter public or private property for the purpose of inspecting, investigating or verifying conditions or information submitted in connection with an application or a registration.

Proposed §707.505 governs changes to applications and registrations. It provides procedures governing when and how nonsubstantive and substantive changes may be made to applications and registrations.

Proposed §707.506 pertains to extensions of time to process applications. It provides procedures to be followed where Authority staff determines that technical review of an application cannot be completed within the normal time period.

Proposed §707.507 applies to all applications for groundwater withdrawal permits and provides procedures regarding the proposed permit and technical summary to be prepared by the general manager, including the providing of notice to the applicant. It directs the general manager to prepare a proposed permit unless the general manager recommends to deny the application. It provides procedures regarding the filing of a proposed permit with the docket clerk and its presentation to the Board. The section also provides procedures applicable where the general manager recommends to deny an application. It also provides procedures regarding the technical summary and lists the appropriate contents of the technical summary. If the application is for an initial regular permit, the proposed rule specifies that the general manager shall issue the proposed permit or denial and technical summary within 90 days of the effective date of these rules.

Proposed §707.508 applies to all applications other than applications for groundwater withdrawal permits and provides procedures regarding the proposed approval and technical summary to be prepared by the general manager, including the providing of notice to the applicant. It directs the general manager to prepare a proposed permit unless the general manager recommends to deny the application. It provides procedures regarding the filing of a proposed approval with the docket clerk and its presentation to the Board. This section also provides procedures applicable where the general manager recommends to deny an approval. It also provides procedures regarding the technical summary and lists the contents of the technical summary.

Proposed §707.509 concerns the referral to docket clerk of a proposed permit, approval, authorization or denial, and technical summary. It provides that when administrative and technical review is complete, the completed appropriate documents shall be forwarded to the docket clerk for presentation to the Authority for action and publication, if appropriate.

Proposed §707.510 concerns the publication of a notice of the proposed permit and technical summary in the Texas Register and in local newspapers. It applies to applications for initial regular permits, additional regular permits, term permits, aquifer recharge and storage permits, and recharge recovery permits. It also applies to applications to transfer interim authorization status and amend application for initial regular permit where the location of the point of withdrawal to which the transfer is proposed is East of Cibolo Creek and applications to transfer and amend permit where the location of the point of withdrawal to which the transfer is proposed is East of Cibolo Creek. This section provides procedures for the publication of a proposed permit, approval, authorization or denial, and technical summary in the Texas Register and in local newspapers. It requires that such notice be published no later than 30 days following the referral of the proposed permit, approval, authorization or denial to the docket clerk. It also states the required contents of such notice.

Proposed §707.511 concerns the supplementation of an application required by a change in any of the Authority's rules. It provides that if any pending application is affected by a change in rules before final action on the application is taken, the applicant shall have a right to submit information as necessary to comply with such change.

Proposed §707.512 governs the withdrawal of an application by an applicant and provides procedures pertaining to the withdrawal of an application both with and without prejudice.

Proposed §707.513 governs action by the Board on applications where there is no right to a contested case hearing. It applies to an application for an agricultural conservation loan and for a variance from the comprehensive management plan. It also applies to a decision of the Board regarding loss of exempt well status. It also applies to the denial (but not the granting) of applications: for a new well construction permit, for exempt well status, for a permit to install or modify meter or alternative measuring method, to transfer interim authorization status and amend application for initial regular permit where the location of the point of withdrawal to which the transfer is proposed to occur is West of Cibolo Creek, to transfer and amend permit where the location of the point of withdrawal to which the transfer is proposed to occur is West of Cibolo Creek, for operation of monitoring well, for conservation plan approval, and for reuse plan approval. It provides procedures for: the scheduling of a Board meeting following technical review and the referral of the proposed permit, approval, authorization or denial to the docket clerk; notice of such a Board meeting; the consolidation or severance of matters by the Board; oral presentations before the Board; public comment; and Board action.

Proposed §707.514 governs action by the Board on applications where there is a right to a contested case hearing but none were requested or requests were withdrawn. It applies to applications for initial regular permits, additional regular permits, term permits, aquifer recharge and storage permits, and recharge recovery permits, where, after the time for the filing of a hearing request has passed, no timely hearing request has been received, all timely hearing requests have been withdrawn, or the judge has remanded the application because of settlement. It also applies to applications to transfer interim authorization status and amend application for initial regular permit where the location of the point of withdrawal to which the transfer is proposed is East of Cibolo Creek and to applications to transfer and amend permit where the location of the point of withdrawal to which the transfer is proposed is East of Cibolo Creek, where, after the time for the filing of a hearing request has passed, no timely hearing request has been received, all timely hearing requests have been withdrawn, or the judge has remanded the application because of settlement. It provides procedures for: the scheduling of a Board meeting following technical review and the referral of the proposed permit, approval, authorization or denial to the docket clerk; notice of such a Board meeting; the consolidation or severance of matters by the Board; oral presentations before the Board; public comment; and Board action.

Proposed §707.515 concerns actions on applications by the general manager. Its purpose is to delegate authority to the general manager to take action on behalf of the Board for certain listed actions. Under this section, the general manager may, under certain circumstances, grant: applications for new well construction permits; applications for exempt well status; applications for permit to install or modify meter or alternative measuring method; applications to transfer interim authorization status and amend application for initial regular permit where the location of the point of withdrawal to which the transfer is proposed to occur is West of Cibolo Creek; applications to transfer and amend permit where the location of the point of withdrawal to which the transfer is proposed to occur is West of Cibolo Creek; applications for operation of a monitoring well; applications for conservation plan approval; and applications for reuse plan approval. It also provides procedures applicable in such instances.

Proposed §707.516 concerns corrections to permits by the general manager. It provides procedures regarding when and how the general manager may make non-substantive corrections to permits.

Proposed §707.517 provides special procedures regarding the loss of exempt well status. It covers situations were the Authority receives information from a person other than the well owner indicating that the well no longer qualifies as an exempt well. It provides for notice and an opportunity for the well owner to provide information demonstrating why exempt well status should not be cancelled.

Proposed §707.518 provides special procedures regarding applications for emergency permits. It provides that where the general manager finds that the issuance of an emergency permit is warranted, the general manager shall issue that permit for a term not exceeding 30 days. This section provides for notice to the applicant and public comment and directs the general manager to submit the permit to the Board following public comment for ratification, recission, granting, renewal or modification.

Proposed §707.519 establishes a moratorium on the processing of applications for additional regular permits until a final determination has been made on all applications for initial regular permits.

Proposed §707.601 defines the applicability of subchapter G, which concerns contested case hearings on Authority applications. Under this section, contested case hearings may be requested and granted in connection with applications for initial regular permits, additional regular permits, term permits, aquifer recharge and storage permits, and recharge recovery permits. Contested case hearings may also be requested and granted in connection with applications to transfer interim authorization status and amend application for initial regular permit where the location of the point of withdrawal to which the transfer is proposed is east of Cibolo Creek and applications to transfer and amend permit where the location of the point of withdrawal to which the transfer is proposed is east of Cibolo Creek.

Proposed §707.602 states the persons that are entitled to request a contested case hearing. Those persons are the applicant for that permit or approval, an applicant for another groundwater withdrawal permit issued by the Authority, and any permittee holding a groundwater withdrawal permit issued by the Authority.

Proposed §707.603 concerns the required form and contents of a request for a contested case hearing. It provides that a request for a contested case hearing must be in writing and be filed by United States mail, facsimile, or hand-delivery with the docket clerk within the time specified in §707.604 of these rules.

Proposed §707.604 concerns the time for the filing of a request for a contested case hearing. It provides that, unless a different time limit is specified in the notice of the proposed permit and technical summary, a hearing request must be filed with the docket clerk within 30 days of the date of publication of that notice in the Texas Register.

Proposed §707.605 provides the procedures applicable to the processing of a request for a contested case hearing by the Authority. It states that hearing requests not filed within the time period specified in §707.604 shall not be processed and shall be returned by the docket clerk to the person filing the request. This section directs the docket clerk to provide notice to the applicant, general manager and any persons making a timely hearing request at least 20 days prior to the first meeting at which the Board considers the request. It also provides that persons may submit written responses to the hearing request no later than 20 days before a Board meeting at which the board will evaluate the hearing request. It also provides for the opportunity to file replies to those responses.

Proposed §707.606 governs action by the Board on a request for a contested case hearing. It specifies that the determination of whether a hearing request should be granted is not, in itself, a contested case subject to the APA. It provides procedures applicable to the Board's consideration of the hearing request and states that the board may: (1) determine that the hearing request does not meet the requirements of this subchapter and deny the hearing request; (2) determine that the hearing request does not meet the requirements of this subchapter, deny the hearing request, and refer the application to a public meeting to develop public comment before acting on the application; or (3) determine that a hearing request meets the requirements of this subchapter and direct the docket clerk to refer the application to SOAH for a contested case hearing. It also provides that a request for a contested case hearing shall be granted if the request: (A) is supported by competent evidence; (B) is submitted by a person entitled to request under § 707.602 of these rules; (C) complies with the requirements set forth in §707.603 of these rules; and (D) is timely filed with the docket clerk.

Proposed §707.607 concerns the service of documents filed in a contested case. It specifies that a person filing the document must serve a copy on all parties to the contested case including the general manager at or before the time that the request is filed. It also requires the inclusion of a certificate of service.

In proposed §707.608, the Board delegates the authority to conduct contested case hearings to SOAH. It also specifies that as supplemented by subchapter G of Chapter 707, the applicable rules of practice and procedure of SOAH govern any contested case hearing of the Authority conducted by SOAH.

Proposed §707.609 provides procedures to be followed when the Board refers a contested case to SOAH. It specifies that the Authority shall provide to the judge a list of issues to be addressed. It also states the Board may identify additional issues to be addressed, or may limit issues or areas to be addressed, at any time.

Proposed §707.610 concerns the designation of parties at contested case hearings. It specifies that the general manager is a party in all contested case hearings. It also states that the applicant is a party in a contested case hearing on its application as is the person who requested the contested case hearing. In addition, this section allows an applicant for an initial regular permit who files a notice of party status pursuant to §707.626 to be a party in all contested case hearings for which notice is given.

Proposed §707.611 concerns the burden of proof at contested case hearings and provides that the burden of proof is on the applicant to establish by convincing evidence that he is entitled to an application for a groundwater withdrawal permit.

Proposed §707.612 concerns subpoenas at contested case hearings. It provides procedures concerning such subpoenas and specifies that requests for such subpoenas shall be in writing and directed to the Authority.

Proposed §707.613 concerns remands of contested case hearings to the Board. It provides that at the request of the applicant, a judge may remand an application to the Board if all timely hearing requests have been withdrawn or denied or, if parties have been named, all parties to a contested case reach a settlement so that no facts or issues remain controverted. It also states procedures regarding such a remand.

Proposed §707.614 concerns certified questions in contested case hearings. It provides that a judge may certify a question to the Authority at any time during a contested case hearing. It lists types of issues that are appropriate for certification. It also provides procedures to be followed where a question is certified.

Proposed §707.615 concerns proposals for decision in contested case hearings. It specifies a proposal for decision submitted to the Authority by a judge shall, where appropriate, include any recommended changes to the permit originally proposed by the general manager.

Proposed §707.616 allows a party to waive the right to review and comment upon the judge's proposal for decision. It requires such waiver to be either in writing or stated on the record at the hearing.

Proposed §707.617 concerns pleadings following the submittal of a proposal for decision. It provides that exceptions or briefs may be filed within 20 days after the date of the judge's submittal of the proposal for decision. It also specifies that replies to such exceptions or briefs, if any, must be filed within 30 days after the date of the judge's submittal of the proposal for decision.

Proposed §707.618 governs the scheduling of a meeting of the Board in connection with a proposal for decision. It provides procedure applicable to such scheduling, including notice to parties of the date of the meeting and deadlines for the filings of exceptions and replies. It allows the Board to consolidate related matters or sever issues in a proceeding under certain circumstances.

Proposed §707.619 concerns oral presentations to the Board regarding contested case. It provides that any party to the contested case hearing may make an oral presentation at the Board meeting in which the proposal for decision in that case is presented to the Board. It limits such presentations to 15 minutes each, excluding time for answering questions, unless the chair or the general counsel establishes other limitations.

Proposed §707.620 concerns the reopening of the record in connection with a contested case hearing. It states that the Board may order the judge to reopen the record for further proceedings on specific issues and provides procedure applicable to such an order.

Proposed §707.621 concerns the decision rendered by the Board in connection with a contested case hearing. It specifies that the Board shall render its decision upon the expiration of 30 days or later following service of the judge's proposal for decision, unless the parties have waived review. This section also specifies the Board's decision will be rendered no more than 90 days after the date the proposal for decision is presented to the Board, unless the Board determines that there is good cause for continuing the proceeding. It also provides that the decision, if adverse to any party, shall include findings of fact and conclusions of law separately stated.

Proposed §707.622 concerns motion for rehearing on decisions in contested case hearings. It provides that only a party to the contested case may file a motion for rehearing. It also specifies that a motion for rehearing is a prerequisite to appeal. The rule also provides procedures applicable to the filing of, response to, and the ruling on such a motion for rehearing.

Proposed §707.623 declares that in the absence of a timely motion for rehearing, a decision or order of the board is final on the expiration of the period for filing a motion for rehearing. It also provides that if a party files a motion for rehearing, a decision or order of the board is final and appealable on the date of the order overruling the motion for rehearing or on the date the motion is overruled by operation of law.

Proposed §707.624 concerns that right to appeal a final decision in a decision in a contested case hearing. It provides that a person who was a party to a contested case before the Authority and is affected by a final decision or order of the Authority in that case may file a petition for judicial review within 30 days after the decision or order is final and appealable. It provides that procedures for appealing an order of the Board in contested cases are governed by provisions of the APA governing judicial review of contested case decisions. For the purposes of such an appeal, this section also defines the items to be included in the record in a contested case.

Proposed §707.625 concerns the payment of costs for preparing the record on appeal. It provides that a party who appeals a final decision in a contested case shall pay all costs of preparation of the record and that such a charge is considered to be a court cost and may be assessed by the court in accordance with the Texas Rules of Civil Procedure.

Proposed §707.626 relates to notice of party status. This section states that any applicant for an initial regular permit may obtain party status in any or all contested cases by filing the requisite notice. The section provides that the notice must be in writing and filed with the docket clerk within the time provided by §707.604. In addition, the section lists the information that must be contained in the notice.

Section 2001.0225 of the Texas Government Code requires an agency to perform, under certain circumstances, a regulatory analysis of "major environmental rules." The Authority has determined that none of the proposed rules are "major environmental rules" as that term defined by §1.0225(g)(3) of the Texas Government Code. The basis for this determination is that the proposed rules do not have the specific intent to "protect the environment" or "reduce risks to human health from environmental exposure." The proposed rules would establish procedures to be followed in Authority proceedings. Specifically, these proposed rules would set forth procedures: (1) regarding the computation of time and the filing of documents; (2) governing meetings before the Board; (3) pertaining to the filing of applications and registrations with the Authority; (4) to be followed by the Authority with respect to the processing and review of such applications and registrations; and (5) regarding contested case hearings on applications. The specific intent of these procedural rules is to allow the Authority to efficiently implement its powers and duties. For this reason, we find that these proposed rules do not have a specific intent to "protect the environment" or "reduce risks to human health from environmental exposure." Accordingly, we find that none of the proposed rules are "major environmental rules" and that, therefore, no further analysis is required by §2001.0225 of the Texas Government Code.

Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act," requires governmental entities, under certain circumstances, to prepare a takings impact assessment ("TIA") in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the proposal of these rules. First, the Authority has made a "categorical determination" that rules of practice and procedure do not affect private real property. These proposed rules establish and describe the procedures to be followed in Authority proceedings and before the Board of Directors of the Authority. More specifically, these provisions would set forth procedures: (1) regarding the computation of time and the filing of documents; (2) governing meetings before the board; (3) pertaining to the filing of applications and registrations with the Authority; (4) to be followed by the Authority in connection with the processing and review of such applications and registrations; and (5) regarding contested case hearings on applications. As such, they have no direct affect on private real property and may not result in a taking. Second, the Authority's action in adopting these rules is an action that is reasonably taken to fulfill an obligation mandated by state law and is thus excluded from the Texas Private Real Property Rights Preservation Act under §2007.003(b)(4) of the Texas Government Code. See Act §§ 1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b).

1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), and 1.34; Texas Government Code Annotated § 2001.004(1). It was held, in *Edwards Aquifer Authority v. Bragg,* ___ S.W.2d. ___, No. 04-99-00059-CV, 2000 WL 35582 (Tex. App. San Antonio 2000, no history), that the Edwards Aquifer Act expressly mandates the adoption of substantive and procedural permitting rules and that such actions are therefore excepted from the Texas Private Real Property Rights Preservation Act. The holding of in that case controls here. Third, it is the position of the Authority that all valid actions of the Authority are excluded from the Texas Private Real Property Rights Preservation Act under §2007.003(b)(11)(C) of the Texas Government Code as actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the proposal of these rules.

Gregory M. Ellis, General Manager of the Authority, is responsible for approving the fiscal note that was prepared in connection with these proposed rules.

A Programmatic Assessment of the Authority's proposed rules, which addresses the combined effects of Chapter 707 (relating to procedure before the Authority), 709 (relating to fees) and 711 (relating to groundwater withdrawal permits) has been prepared on behalf of the Authority. The information presented below pertains particularly to the proposed Chapter 707 rules and, by itself, satisfies the requirements stated in §2001.024(a)(4) of the Texas Government Code with respect to those rules. Some of the information presented below is derived from the Programmatic Assessment. Persons interested in viewing the Programmatic Assessment may arrange to do so by contacting the Authority at the telephone number shown below.

The proposed Chapter 707 rules, by themselves and in conjunction with the proposed Chapters 709 and 711 rules, will have fiscal impacts on local governments including the Authority. These rules will affect the budgets of municipalities and other local governments within the Authority's boundaries and those that rely on the Edwards Aquifer for water supplies. Cities close to, but outside, the Authority's boundaries may experience secondary effects from changes in economic activity within the boundaries caused by these rules.

The proposed Chapter 707 rules are not expected to have forseeable material implications relating to the costs or revenues of state government. This conclusion is based on the fact that no state agency is an applicant or is expected to be an applicant for a groundwater withdrawal permit.

This Chapter, together with the proposed Chapters 709 and 711 rules, generate the administrative costs associated with the Authority's permit program. These rules therefore determine, in part, the Authority's annual expense budget, estimated to average approximately $9,500,000 per year for each of the first five years that the rule is in effect. This sum includes the Authority's costs involved in processing applications and in conducting contested case hearings, which are discussed in more detail below.

Although Chapter 707 taken as a whole will have fiscal impacts, the enforcement or administration of many of the individual sections and subchapters within Chapter 707 will have no forseeable implications relating to costs or revenues of state or local governments during the first five years that the rules will be in effect. In particular, subchapter A sets forth definitions to be used throughout the rest of the Chapter. Subchapter B states the purpose of Chapter 707 and provides general rules regarding the computation of time and the filing and service of documents. These two subchapters will have no foreseeable material implications relating to costs or revenues of state or local governments. Subchapter C establishes general rules regarding the conduct of meeting of the Board of Directors of the Authority. Its purpose is to facilitate the efficient conduct of meetings. Since the Board is required to conduct its business through open meetings regardless of these rules, these rules do not have foreseeable material implications relating to costs or revenues of state or local governments. Moreover, the costs of holding board meetings are considered as part of the Authority's overall costs of operations, which are discussed in the fiscal note for Chapter 709.

Subchapter D states the requirements to file various applications and registrations with the Authority. Subchapter E sets forth the required contents of various applications and registrations to be filed with the Authority. The Authority will incur costs in to produce, copy and distribute forms that comply with the provisions of subchapters D and E. The Authority expects roughly $1600 in such costs over the next five years. Local governments, including those that function as water utilities, will spend a certain amount of money and personnel time in complying with these rules by completing forms. Table 707-A, which is included in the Public Benefits and Costs Note for this chapter, provides an estimate of the administrative burdens expected to be incurred by those persons who will be completing registrations and applications. These burdens are not expected to differ significantly for local governments as compared to other persons required to comply.

Subchapter F sets forth the procedures to be used by the Authority when processing and taking actions on various applications and registrations filed with the Authority. The Authority will incur costs in processing and approving (or denying) these applications and registrations. Such costs are almost exclusively a function of staff time and are equivalent to roughly $1,180,000 over the next five years. Since the Authority expects to process most Initial Regular Permits soon after the effective date of these rules and expects that more well registrations will be filed in those first few years, the Authority expects that a greater percentage of these costs will be concentrated in the first two years after the effective date of these rules.

Subchapter G establishes procedures to be used by the Authority in connection with contested case hearings. Contested case hearings may be requested and granted in connection with certain types of permit applications. Although the costs associated with a contested case hearing are expected to vary widely depending on complexity of the application and the underlying facts, the Authority has estimated that the total costs of a typical contested case will be around $26,000. Of this amount, the Authority has estimated that the applicant will incur roughly 1/2 (or about $13,000), while the party asserting the contest will incur roughly 1/4 of those costs (or about $6,500). (The remaining estimated 1/4 will be incurred by the Authority.) The lower percentage for parties bringing the contest reflects the assumption that, generally speaking, parties bringing contests will bring many contests and will achieve economies of scale compared to applicants who will generally be involved only in their own individual cases. Local governments are expected to be involved in contested cases as both the applicant and as the party contesting the application and their costs are not expected to differ significantly from other, non-governmental parties.

Based on the assumption that 250 contested case hearings will be held, the Authority estimates that its costs over the next five years to participate in contested case hearings will be roughly $1.625 million. Uncertainty about the pace of the contested case hearings process makes it difficult to estimate the timing of these costs, other than to say that most are expected to occur in the first two years the rules are in effect.

The total cost of obtaining a permit (including the costs associated with participating in a contested case hearings) to each of the 35 municipal utilities potentially affected by these proposed rules will vary considerably. The cost to the City of San Antonio to obtain the SAWS permit may be as much as $2,000,000. The next two largest governmental utilities, Bexar Metropolitan Water District and New Braunfels Utilities, may each incur costs in the $100,000 to $500,000 range. The two next largest, Uvalde and Alamo Heights, may each incur costs in the range of $50,000 to $100,000. Smaller municipal or other governmental utilities may each incur costs of $50,000 or less.

There are no estimated reductions in costs to state and local governments expected as a result of enforcing or administering the Chapter 707 rules over the course of the first five years that those rules will be in effect. There is no estimated loss or increase in revenue to state and local governments as a result of enforcing or administering the Chapter 707 rules over the course of the first five years that those rules will be in effect.

Gregory M. Ellis, General Manager of the Authority, is responsible for approving the public benefits and costs note that was prepared in connection with these proposed rules.

As noted in the Fiscal Note set forth above, a Programmatic Assessment of the Authority's proposed rules, which addresses the combined effects of Chapter 707 (relating to procedure before the Authority), Chapter 709 (relating to fees) and Chapter 711 (relating to groundwater withdrawal permits) has been prepared on behalf of the Authority. The information presented below pertains particularly to the proposed Chapter 707 rules and, by itself, satisfies the requirements stated in §2001.024(a)(5) of the Texas Government Code with respect to those rules. Some of the information presented below is derived from the Programmatic Assessment. Persons interested in viewing the Programmatic Assessment may arrange to do so by contacting the Authority at the telephone number shown below.

The proposed Chapter 707 rules, by themselves and in conjunction with the proposed Chapters 709 and 711 rules, will produce public benefits and result in economic costs for those persons (including business and governmental entities) that are required to comply with Chapter 707.

Subchapter A sets forth uniform definitions of terms to be used throughout the rest of Chapter 707. The adoption of this subchapter is expected to benefit the public over the course of the first five years that this rule is in effect by clarifying the meaning of certain terms used in Chapter 707, providing useful "short-hand" to reduce the amount of cumbersome regulatory language, and to generally allow for a more efficient understanding and operation Chapter 707.

Subchapter B states the purpose of Chapter 707 and provides general rules regarding the computation of time and the filing and service of documents under this Chapter. The adoption of this subchapter is expected to benefit the public over the course of the first five years that this rule is in effect by clearly stating the requirements related to filing and service that the public must follow in doing business with the Authority.

Subchapter C establishes general rules regarding the conduct of meeting of the Board of Directors of the Authority. The purpose of subchapter C is to facilitate the more efficient conduct of meetings. The adoption of this subchapter is expected to benefit the public over the course of the first five years that this rule is in effect by helping create an environment at Board meetings that is conducive to decision-making and to orderly public input. In addition, these rules help impart predictability and transparency to the decision-making process.

Subchapter D sets forth requirements for persons to file various applications and registration with the Authority to conduct certain activities related to the withdrawal of water from the Aquifer. The adoption of this subchapter is expected to benefit the public over the course of the first five years that this rule is in effect by making it clear which activities require a permit or registration.

Subchapter E states with particularity, the required contents for various applications and registrations to be filed with the Authority. The adoption of this subchapter is expected to benefit the public over the course of the first five years that this rule is in effect by putting the regulated community on notice as to the Authority's information requirements.

Subchapter F establishes and defines the procedures to be used by the Authority when processing and taking actions on various applications and registrations filed with the Authority. The adoption of this subchapter is expected to benefit the public over the course of the first five years that this rule is in effect by providing well-defined procedures and time frames regarding the processing of applications and registrations. These procedures are intended to help ensure that permit decisions are reached through an unbiased method. They also work to ensure that the Authority's decisions are legally and technically sound and well-explained to the public. Some of the provisions in this subchapter also help to promote administrative efficiency.

Subchapter G establishes procedures to be used by the Authority in connection with contested case hearings. The adoption of this subchapter is expected to benefit the public over the course of the first five years that this rule is in effect by establishing an efficient mechanism by which certain persons may challenge the claims to permitted withdrawal rights of other persons and for those rights to be determined in a quasi-judicial setting. To the extent that this process results in legitimate denials of applications or reductions in permitted amount from that which had been applied for, users of the aquifer receive a benefit by reduced costs of "buying down" water rights that exceed the cap on total permitted withdrawals.

As a whole, Chapter 707 is expected to result in economic costs to persons required to comply with Chapter 707. However, many individual sections and subchapters within Chapter 707, by themselves, will not result in economic costs. In particular, subchapter A (which sets forth the definitions to be used throughout the rest of Chapter 707) and Subchapter B (which states the purpose of Chapter 707 and provides general rules regarding the computation of time and the filing and service of documents under this Chapter) will not result in economic costs on persons required to comply with Chapter 707. The basis for this conclusion is that these subchapters will have no implications for regulation or compliance obligations on persons required to comply with the rule. Also, subchapter C will not result in economic costs. Subchapter C establishes general rules regarding the conduct of meeting of the Board of Directors of the Authority. The purpose of subchapter C is to facilitate the more efficient conduct of meetings. Since the Board is required

to hold meetings regardless of the substance of subchapter C, subchapter C will not result in economic costs on persons required to comply with Chapter 707.

Subchapter D states the requirements to file various applications and registrations with the Authority. Subchapter E sets forth the required contents of those applications and registrations. These subchapters impose administrative burdens on applicants and permittees. Although particular application and registration forms are not incorporated into these rules, the rules are sufficiently specific to make the forms presently used by the Authority representative of other forms that might be subsequently employed. The total administrative burdens associated with completing and filing applications will vary from one or two person-days per year for a small user to several person-months for the largest user. Forms required to be filed, and an estimate of the time and expenses for an average user to complete them, are detailed below in Table 707-A.

Figure: 31 TAC Part 20, Chapter 707, Preamble

Subchapter F concerns the procedures to be used by the Authority in processing and taking actions on various applications and registrations filed with the Authority. As such, it generally imposes requirements on the Authority and is not expected to impose material economic costs on applicants and registrants.

Subchapter G sets forth the procedures to be used for contested case hearings. Where a contested case is requested and granted, significant economic costs will be expended by the applicant as well as the party bringing the contest. Such costs will likely include costs for attorneys and experts. The costs involved in contested case hearings may have an even more serious effect on small users for whom such costs may be significant relative to the value of their permit.

As noted in the fiscal note set forth above, the costs associated with participation in contested case hearings are expected to vary widely. The Authority has nevertheless estimated the cost of a typical contested case hearing to be around $26,000. Of this amount, the Authority has estimated that the applicant will incur roughly 1/2 of those costs (or around $13,000) while the party asserting the contest will incur roughly 1/4 of those costs (or about $6,500). Uncertainty about the pace of the contested case hearings process makes it difficult to estimate the timing of these costs, other than to say that most are expected to occur in the first two years the rules are in effect.

Section 2001.022 of the Texas Government Code requires agencies to request that the Texas Workforce Commission prepare a Local Employment Impact Statement in connection with certain proposed rules. Under the appropriate circumstances, the Commission is then to prepare, within 25 days, an impact statement which includes a description of the probable effects of the rule on employment in each geographic area affected by the rules for each year of the first five years that the rules will be in effect. On April 21, 2000, after having determined that the proposed Chapter 707 rules may affect a local economy, the Authority submitted to the Commission a copy of the proposed Chapter 707 rules and other supporting and initial information, including information that the Commission requires on a form prescribed by the Commission. On April 28, 2000, the Authority provided to the Commission certain supplemental information relating to these rules.

In a letter to Gregory M. Ellis, dated May 19, 2000, the Commission stated, in regard to these proposed rules as follows: After reviewing the information provided to our Department, there is no apparent basis to refute the proposed employment impacts outlined in the information submitted on behalf of the Authority. Our data will not confirm nor deny the potential lost jobs nor the newly created jobs based upon the impact of these proposed rules.

This letter does not constitute a Local Employment Impact Statement because it does not meet the criteria identified in §2001.022(a) of the Texas Government Code. Because the Commission did not prepare and deliver to the Authority a Local Employment Impact Statement within 25 days after the date on which the Commission received the proposed rules, the proposed rules are presumed not to affect local employment pursuant to §2001.022(e) of the Texas Government Code. Accordingly, there is no Local Employment Impact Statement required by §2001.024(a)(6) of the APA to be included in this Notice of Proposed Rule.

Interested persons may submit written comments on the proposed rules. Comments must be submitted in writing to Brenda Davis, Docket Clerk, Edwards Aquifer Authority, P.O. Box 15830, 1615 N. St. Mary's St., San Antonio, Texas 78212-9030, within 30 days of the publication of this notice in the *Texas Register*. The written comments should be filed on 8 1/2 x 11 inch paper and be typed or legibly written. Written comments must indicate whether the comments are generally directed at all of the proposed rules, or whether they are directed at specific proposed rules. If directed at specific proposed rules, the number of the proposed rule must be identified and followed by the comments thereon.

The Authority has scheduled the following public hearings on this proposed rule: Wednesday, August 9, 2000, 6:00 p.m., Conference Center Edwards Aquifer Authority, 1615 N. St. Mary's San Antonio, Texas 78215, (210) 222-2204; Tuesday, August 15, 2000, 6:00 p.m., New Braunfels Civic Center, 380 S. Seguin Avenue New Braunfels, Texas 78130, (830) 625-2385; Thursday, August 17, 2000, 6:00 p.m., St. Paul's Lutheran Church, 1303 Avenue M Hondo, Texas 78861,(830) 426-3222; Tuesday, August 22, 2000, 6:00 p.m., Sgt. Willie DeLeon Civic Center, 300 E. Main Street Uvalde, Texas 78801, (830) 278-9922; Thursday, August 24, 2000, 6:00 p.m., San Marcos Activity Center, 501 E. Hopkins San Marcos, Texas 78666, (512) 393-8280.

The new sections are proposed pursuant to §§1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), and 1.34(c) of the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634 ("Act"); and §2001.004(1) of the Texas Administrative Procedure Act (TEXAS GOVERNMENT CODE ANNOTATED §§ 2001.001-.902 (Vernon 2000)) ("APA").

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the

recharge of, and prevent the waste or pollution of water in, the aquifer.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under Article 1 of the Act, including rule governing procedures of the board and the authority." This section requires the Board to adopt rules as necessary to implement the various substantive programs set forth in the Act related to the Edwards Aquifer, including, in particular, administrative procedures to be used before the board and the Authority.

Section 1.11(b) of the Act requires the Authority to "ensure compliance with permitting, metering, and reporting requirements and shall regulate permits." This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to establish procedures related to the filing and processing of various applications and registrations with and by the Authority.

Section 1.11(d)(1) of the Act empowers the Authority to issue and administer grants, loans, or other financial assistance to water users for water conservation and water reuse. Section 1.24(c) of the Act allows the Authority to issue grants or make loans to finance the purchase or installation of equipment or facilities for water conservation. These sections, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, empower the Authority to establish procedures related to the filing and processing of applications for agricultural conservation loans with and by the Authority.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. Pursuant to this section, the Authority is required to comply with the APA in connection with its rulemaking, even though the Authority is not a state agency and would therefore otherwise not generally be subject to APA requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures."

Section 1.15(a) of the Act directs the Authority to manage withdrawals from the aquifer and manage all withdrawal points from the aquifer as provided by this Act. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that would allow the Authority to fulfill these mandates.

Section 1.15(b) of the Act states that "except as provided by §§ 1.17 and 1.33 of this article, a person may not withdraw water from the aquifer or begin construction of a well or other works designed for the withdrawal of water from the aquifer without obtaining a permit from the authority." This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will implement this limitation.

Section 1.15(c) of the Act allows the Authority to issue regular permits, term permits, and emergency permits. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, empowers the Authority to establish procedures related to the filing and processing of applications for initial and additional regular permits, term permits and emergency permits.

Section 1.16(a) of the Act allows an existing user to apply for an initial regular permit by filing a declaration of historical use. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules governing the filing and processing of such applications or declarations.

Section 1.16(b) of the Act sets forth certain requirements concerning an existing user's declaration of historical use and an applicant's payment of application fees required by the Board. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will implement these requirements.

Section 1.16(c) of the Act provides that an owner of a well from which the water will be used exclusively for domestic use or watering livestock and that is exempt under §1.33 of the Act is not required to file a declaration of historical use. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will implement this exemption.

Section 1.16(d) of the Act requires the Board to grant an initial regular permit to an existing user who: (1) files a declaration and pays fees as required by this section; and (2) establishes by convincing evidence beneficial use of underground water from the aquifer. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to fulfill this mandate.

Section 1.17(a) of the Act provides that a person who, on the effective date of this article, owns a producing well that withdraws water from the aquifer may continue to withdraw and beneficially use water without waste until final action on permits by the Authority, if: (1) the well is in compliance with all statutes and rules relating to well construction, approval, location, spacing, and operation; and (2) by March 1, 1994, the person files a declaration of historical use on a form as required by the Authority. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to determine who may continue to withdraw water under such authority.

Section 1.17(b) of the Act specifies that use under "interim authorization" may not exceed on an annual basis the historical, maximum, beneficial use of water without waste during any one calendar year as evidenced by the person's declaration of historical use, unless otherwise determined by the Authority. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to implement this condition.

Section 1.18 of the Act allows the Authority, in certain circumstances, to issue additional regular permits. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, empowers the Authority to establish procedures related to the filing and processing of applications for such permits.

Section 1.19 of the Act allows the Authority to issue term permits and places certain limitations and conditions on the right to withdraw water under such a permit. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to issue term permits and to implement the limitations and conditions stated in §1.19.

Section 1.20 of the Act allows the Authority to issue emergency permits under certain circumstances and subject to certain conditions. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt

procedural rules that will allow the Authority to issue emergency permits when appropriate and to implement the conditions stated in §1.20.

Section 1.29(f) of the Act requires the Authority to impose a permit application fee of not more than $25. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to fulfill this mandate.

Section 1.29(g) of the Act empowers the Authority to impose a registration application fee of not more than $10. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, allows the Authority to adopt procedural rules that will allow the Authority to collect such a fee.

Section 1.33(a) of the Act provides that a well that produces 25,000 gallons of water a day or less for domestic or livestock use is exempt from metering requirements. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to determine who may qualify for such an exemption.

Section 1.33(b) of the Act requires that exempt wells be registered with the Authority or with an underground water conservation district in which the well is located. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to implement this requirement.

Section 1.34(a) of the Act provides that a place of use for Edwards Aquifer groundwater may not be outside the boundaries of the Authority. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to implement these requirements.

Section 1.34(c) of the Act provides that a holder of a permit for irrigation use may not lease more than 50 percent of the irrigation rights initially permitted and that the user's remaining irrigation water rights must be used in accordance with the original permit and must pass with transfer of the irrigated land. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to implement these requirements.

SUBCHAPTER A. DEFINITIONS

31 TAC §707.1

The articles or sections of the Act or any other code that are affected by the proposed rule are: §§ 1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), 1.34(a), and 1.34(c) of the Act, and §2001.004(1) of the APA. The sections of Chapter 31, Texas Administrative Code, that are to be affected are §§707.1, 707.101, 707.102, 707.103, 707.104, 707.105, 707.106, 707.201, 707.202, 707.203, 707.204, 707.205, 707.206, 707.207, 707.208, 707.301, 707.302, 707.303, 707.304, 707.305, 707.306, 707.307, 707.308, 707.309, 707.310, 707.311, 707.312, 707.313, 707.314, 707.315, 707.401, 707.402, 707.403, 707.404, 707.405, 707.406, 707.407, 707.408, 707.409, 707.410, 707.411, 707.412, 707.413, 707.414, 707.415, 707.416, 707.417, 707.422, 707.424, 707.426, 707.428, 707.501, 707.502, 707.503, 707.504, 707.505, 707.506, 707.507, 707.508, 707.509, 707.510, 707.511, 707.512, 707.513, 707.514, 707.515, 707.516, 707.517, 707.518, 707.519, 707.601, 707.602, 707.603, 707.604, 707.605, 707.606, 707.607, 707.608, 707.609, 707.610, 707.611, 707.612, 707.613, 707.614, 707.615, 707.616, 707.617, 707.618, 707.619, 707.620, 707.621, 707.622, 707.623, 707.624, 707.625, and 707.626.

§707.1. Definitions.

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

(1) Chair - the chair of the board, as elected by the board pursuant to the Bylaws of the Authority.

(2) Contested case hearing - a proceeding governed by the APA 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.

(3) Director - a member of the board elected or appointed pursuant to the Act.

(4) Secretary - the secretary of the board, as elected by the board pursuant to the Bylaws of the Authority.

(5) Treasurer - the treasurer of the board, as elected by the board pursuant to the Bylaws of the Authority.

(6) Vice chair - the vice chair of the board, as elected by the board pursuant to the Bylaws of the Authority.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005247
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Earliest possible date of adoption: September 10, 2000
For further information, please call: (210) 222-2204

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SUBCHAPTER B. GENERAL PROVISIONS

31 TAC §§707.101 - 707.106

The articles or sections of the Act or any other code that are affected by the proposed rule are: §§ 1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), 1.34(a), and 1.34(c) of the Act, and §2001.004(1) of the APA. The sections of Chapter 31, Texas Administrative Code, that are to be affected are §§707.1, 707.101, 707.102, 707.103, 707.104, 707.105, 707.106, 707.201, 707.202, 707.203, 707.204, 707.205, 707.206, 707.207, 707.208, 707.301, 707.302, 707.303, 707.304, 707.305, 707.306, 707.307, 707.308, 707.309, 707.310, 707.311, 707.312, 707.313, 707.314, 707.315, 707.401, 707.402, 707.403, 707.404, 707.405, 707.406, 707.407, 707.408, 707.409, 707.410, 707.411, 707.412, 707.413, 707.414, 707.415, 707.416, 707.417, 707.422, 707.424, 707.426, 707.428, 707.501, 707.502, 707.503, 707.504, 707.505, 707.506, 707.507, 707.508, 707.509, 707.510, 707.511, 707.512, 707.513, 707.514, 707.515, 707.516, 707.517, 707.518, 707.519, 707.601, 707.602, 707.603, 707.604, 707.605, 707.606, 707.607, 707.608, 707.609, 707.610, 707.611, 707.612, 707.613, 707.614, 707.615,

707.616, 707.617, 707.618, 707.619, 707.620, 707.621, 707.622, 707.623, 707.624, 707.625, and 707.626.

§707.101. Purpose.

The purpose of this chapter is to provide the procedures to be followed in Authority proceedings. Included in this chapter are general and specific procedures for the filing and processing of registrations and applications for permits and other types of approvals and authorizations to be issued or granted by the Authority. These procedures are intended to allow the Authority to efficiently implement its powers and duties under its enabling legislation. These rules should be interpreted to simplify procedure, avoid delay, save expense, and facilitate the administration and enforcement of the Authority's enabling legislation.

§707.102. Computation of Time.

In computing any period of time prescribed or allowed under the Authority's rules or orders or by any applicable statute, the period shall begin on the day after the act, event, or default in question, and shall conclude on the last day of that designated period, unless it is a Saturday, Sunday, or legal holiday on which the Authority is closed, in which event the period runs until the end of the next day that is neither a Saturday, Sunday, nor a legal holiday on which the Authority is closed.

§707.103. Document Filing Procedures.

(a) Except for the documents required to be filed with a judge under Subchapter G of this Chapter (relating to Procedures for Contested Case Hearings on Applications), all documents required to be filed with the Authority shall be submitted to the docket clerk. Requests for contested case hearings shall be filed with the docket clerk.

(b) If a docket or application number has been assigned to a matter, that number should appear on the first page of any document filed in that matter.

(c) Documents shall be filed by mail or hand delivery. Documents containing 20 or fewer pages may also be filed by facsimile. If a person files a document by facsimile, he or she must file with the docket clerk the appropriate number of copies by mail or hand-delivery within three days.

(d) Unless specified otherwise in this Chapter, the original and one copy of all documents shall be filed.

(e) The time of receipt by the Authority shall be evidenced by the date stamp affixed to the document by the docket clerk, or as evidenced by the date stamp affixed to the document or envelope by the Authority mail room, whichever is earlier.

(f) The docket clerk shall accept all documents submitted. The docket clerk's acceptance is not a determination that a document meets filing deadlines or any other requirement.

(g) If the requirements of this section are not followed, the Authority may choose not to consider the documents. In the absence of a waiver under subsection (h) of this section, the Authority may choose not to consider documents filed within two days of a board meeting.

(h) The Authority may waive one or more of the requirements of this section or impose additional filing requirements.

(i) The filing of documents in a contested case proceeding once that case has been referred to SOAH and prior to the time that the judge submits a proposal for decision to the Authority shall be governed by the applicable SOAH rules (Title 1, Texas Administrative Code, Chapter 155).

(j) This section does not apply to offers of evidence during a hearing.

§707.104. Service of Documents.

(a) All documents filed and served under these rules, except as otherwise expressly provided, may be served by delivering a copy to the person to be served, or the person's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier-receipted delivery or by United States mail, to the person's last known address, or by facsimile to the recipient's current telecopier number, or by such other manner as the Authority in its discretion may direct.

(b) Service by mail shall be complete upon deposit of the document, enclosed in a postage-paid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by facsimile after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Service by facsimile must be followed by serving an extra copy in person, by mail or by carrier-receipted delivery within one day.

(c) Whenever a person has the right or is required to do some act within a prescribed period after the service of a document upon the person and the document is served by mail or by facsimile, three days shall be added to the prescribed period. This subsection does not apply when documents are filed for consideration at a board meeting.

(d) The person or the person's attorney of record shall certify compliance with this rule in writing over signature and on the filed document. A certificate by a person or the person's attorney of record, or the return of an officer, or the affidavit of any person showing service of a document, shall be prima facie evidence of the fact of service.

(e) Nothing herein shall preclude any person from offering proof that the notice or instrument was not received or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the Authority may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules.

(f) In contested case hearings referred to SOAH, copies of all documents filed with the judge shall be served on the general manager no later than the day of filing.

§707.105. Change of Address or Telephone Number.

Applicants, registrants, and permittees shall give written notice to the Authority of any change of mailing address, telephone number and facsimile number within 30 days of such change. Such written notice shall be submitted to the docket clerk.

§707.106. Use of Forms.

The general manager will furnish, without charge, forms and instructions for the preparation of any application, declaration or registration to be filed with the Authority. The use of such forms is mandatory. Supplements may be attached if there is insufficient space on the form. If supplements are used, the data and information entered thereon shall be separated into sections that are numbered to correspond with the numbers on the printed form.

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

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Gregory M. Ellis
General Manager
Edwards Aquifer Authority
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SUBCHAPTER C. MEETINGS OF THE BOARD

31 TAC §§707.201 - 707.208

The articles or sections of the Act or any other code that are affected by the proposed rule are: §§ 1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), 1.34(a), and 1.34(c) of the Act, and §2001.004(1) of the APA. The sections of Chapter 31, Texas Administrative Code, that are to be affected are §§707.1, 707.101, 707.102, 707.103, 707.104, 707.105, 707.106, 707.201, 707.202, 707.203, 707.204, 707.205, 707.206, 707.207, 707.208, 707.301, 707.302, 707.303, 707.304, 707.305, 707.306, 707.307, 707.308, 707.309, 707.310, 707.311, 707.312, 707.313, 707.314, 707.315, 707.401, 707.402, 707.403, 707.404, 707.405, 707.406, 707.407, 707.408, 707.409, 707.410, 707.411, 707.412, 707.413, 707.414, 707.415, 707.416, 707.417, 707.422, 707.424, 707.426, 707.428, 707.501, 707.502, 707.503, 707.504, 707.505, 707.506, 707.507, 707.508, 707.509, 707.510, 707.511, 707.512, 707.513, 707.514, 707.515, 707.516, 707.517, 707.518, 707.519, 707.601, 707.602, 707.603, 707.604, 707.605, 707.606, 707.607, 707.608, 707.609, 707.610, 707.611, 707.612, 707.613, 707.614, 707.615, 707.616, 707.617, 707.618, 707.619, 707.620, 707.621, 707.622, 707.623, 707.624, 707.625, and 707.626.

§707.201. Meetings.

(a) The board shall meet as necessary for the conduct of business at times and places necessary for the performance of the Authority's duties. Meetings shall be scheduled in accordance with the Bylaws of the Authority. The Authority is subject to the Open Meetings Act, including any existing or future exceptions that may be provided by law.

(b) Meetings of the board shall be presided over by the chair, or in the chair's absence, the vice chair, or in the absence of both the chair and the vice chair, the secretary, or in the absence of all three, the treasurer. In the absence of all four such officers, the voting directors present shall elect a temporary chair for that meeting.

(c) Business may be considered in accordance with Robert's Rules of Order or other standard rules of procedure as may be adopted by the directors from time to time. Directors may also, to the extent permitted by applicable laws, suspend by a majority vote any such rules.

(d) Non-voting directors may participate in and comment on any matter before the board in the same manner as a voting director. A non-voting director may not vote on any matter before the board.

(e) Members of the South Central Texas Water Advisory Committee (SCTWAC) may participate in board meetings to represent downstream water supply concerns and assist in solutions to those concerns. SCTWAC members may request the chair to permit them to address the board on such matters. SCTWAC members may not vote on matters before the board.

(f) The Parliamentarian shall decide issues of parliamentary procedure, but may be overruled by majority vote of the board. The Parliamentarian is a director appointed to that position by the chair pursuant to the Bylaws of the Authority.

§707.202. Conduct and Decorum at Meetings of the Board.

(a) Persons who attend or participate in a meeting should act in a manner that is respectful of the conduct of public business and conducive to orderly and polite discourse.

(b) All persons shall comply with the chair's directions concerning the offer of public comment, conduct and decorum. Before the meeting, any person who wishes to speak shall complete a public participation form and deliver it to the general manager or his or her representative at the meeting.

(c) Persons who have special requests concerning a presentation during a meeting shall make advance arrangements with the assistant to the secretary. A special request includes:

(1) the presentation of audio or video recordings;

(2) the need to move furniture, appliances, or easels;

(3) alternative language interpreters; or

(4) auxiliary aids or services, such as interpreters for persons who are hearing impaired, readers, large print, or braille. The assistant to the secretary shall consult with the general counsel on such requests.

§707.203. Deadline to File Comments on Matter Set for a Meeting.

The board or the general counsel may set deadlines for the public to file written comments on matters set for a meeting of the board. The general counsel, either by agreement of the interested persons and any judge assigned to the matter, or on the general counsel's own motion, may extend a filing deadline.

§707.204. Continuance of Matter Set for a Meeting.

(a) The chair may continue a matter scheduled for a meeting of the board from time to time and from place to place.

(b) Motions for continuance shall be in writing or stated on the record. The general counsel, either by agreement of the parties and any judge assigned to the matter, or on the general counsel's own motion, may reschedule the presentation of a matter at a board meeting.

(c) If the time and place for the meeting to reconvene are not announced at the meeting, the docket clerk shall send notice of the rescheduled meeting date to the parties no later than ten days before the rescheduled meeting. The parties may agree to waive this notice requirement.

§707.205. Signing of Orders or Resolutions Showing Action Taken at Meetings of the Board.

The chair or any director may sign written orders or resolutions to show actions taken at a meeting of the board if he or she did not vote against the actions reflected in the orders or resolutions.

§707.206. Audio Recording of Meetings of the Board.

(a) The assistant to the secretary shall make audio recordings of meetings of the board which are open to the public pursuant to the Open Meetings Act. These recordings shall be kept in the Authority's records.

(b) Audio recordings shall also be made of closed sessions properly held in accordance with the requirements of the Open Meetings Act, except that no recordings of a private consultation with an attorney under the § 551.071 of the Open Meetings Act shall be made. Audio recordings of closed sessions are available for public disclosure only as required by Open Meetings Act.

§707.207. Minutes.
Actions taken in meetings will be incorporated in written minutes taken by the secretary or assistant to the secretary and signed by the secretary or the chair. A copy of the minutes will be sent with the agenda and submitted for approval to the board at their next meeting.

§707.208. Evidentiary Hearing Held by Board.
When an evidentiary hearing is held before the board, the procedures of Subchapter G of this Chapter (relating to Procedures for Contested Case Hearings on Applications) shall apply. The chair or a director designated by the chair shall preside over the hearing.

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

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SUBCHAPTER D. REQUIREMENTS TO FILE APPLICATIONS AND REGISTRATIONS

31 TAC §§707.301 - 707.315

The articles or sections of the Act or any other code that are affected by the proposed rule are: §§ 1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), 1.34(a), and 1.34(c) of the Act, and §2001.004(1) of the APA. The sections of Chapter 31, Texas Administrative Code, that are to be affected are §§707.1, 707.101, 707.102, 707.103, 707.104, 707.105, 707.106, 707.201, 707.202, 707.203, 707.204, 707.205, 707.206, 707.207, 707.208, 707.301, 707.302, 707.303, 707.304, 707.305, 707.306, 707.307, 707.308, 707.309, 707.310, 707.311, 707.312, 707.313, 707.314, 707.315, 707.401, 707.402, 707.403, 707.404, 707.405, 707.406, 707.407, 707.408, 707.409, 707.410, 707.411, 707.412, 707.413, 707.414, 707.415, 707.416, 707.417, 707.422, 707.424, 707.426, 707.428, 707.501, 707.502, 707.503, 707.504, 707.505, 707.506, 707.507, 707.508, 707.509, 707.510, 707.511, 707.512, 707.513, 707.514, 707.515, 707.516, 707.517, 707.518, 707.519, 707.601, 707.602, 707.603, 707.604, 707.605, 707.606, 707.607, 707.608, 707.609, 707.610, 707.611, 707.612, 707.613, 707.614, 707.615, 707.616, 707.617, 707.618, 707.619, 707.620, 707.621, 707.622, 707.623, 707.624, 707.625, and 707.626.

§707.301. Applicability.
This subchapter applies to any application or registration filed with the Authority.

§707.302. Initiation of Proceedings.
Any person who wishes to obtain a permit, authorization, or other approval from the Authority shall submit a written application to the Authority on a form provided by the general manager.

§707.303. Proper Applicant, Registrant, or Declarant.
If a well or a proposed well has one owner, that owner shall file the application, registration or declaration. If there is more than one owner, a joint application, registration, or declaration shall be filed by those owners. In such an instance, the owners shall select one among them to act for and represent the others in the filing the application, registration or declaration. Written documentation of such a selection satisfactory to the Authority shall be filed with the application, registration or declaration.

§707.304. Requirement to File an Application for a Groundwater Withdrawal Permit.

Any person seeking to withdraw groundwater from the aquifer, unless exempted from the permit requirement by §§1.16(c) and 1.33 of the Act and §711.20 of this title (relating to Groundwater Withdrawal Permits), must file with the Authority an application for a groundwater withdrawal permit.

§707.305. Requirement to File an Application for a Well Construction Permit.

Any person seeking to perform one of the activities set forth in §711.12(2) or (4) of this title (relating to Activities Requiring a Permit) must file an application for a well construction permit with the Authority.

§707.306. Requirement to Register Well.

An owner of an existing well or an exempt well must register the well with the Authority by filing a well registration form provided by the general manager. Well registrations must be filed no later than 180 days from the effective date of these rules.

§707.307. Effect of Registrations Filed Before Effective Date of These Rules.

Owners of wells that were registered with the Authority prior to the effective date of this subchapter through the filing of forms previously prescribed by the Authority need not file another well registration.

§707.308. Requirement to File Application for Exempt Well Status.

(a) An owner of an existing or proposed well that the owner believes is exempt from the requirements to obtain a permit under §§1.16(c) and 1.33 of the Act and §711.20 of this title (relating to Groundwater Withdrawal Permits) and who wishes to withdraw groundwater from that well must file an application for exempt well status.

(b) If the owner of a permitted well desires to convert that well to one with exempt well status, the owner must file with the Authority an application for exempt well status.

§707.309. Requirement to File Application for Permit to Install or Modify Meter.

Any person seeking to install a new meter or modify an existing meter must file with the Authority an application for a permit to install or modify a meter. Any person seeking to employ an alternative measuring method or modify an existing alternative measuring method must file with the Authority an application for a permit to install or modify a meter as well. For the purpose of this chapter, the term "modify" in connection with a meter means to make any physical change to the meter.

§707.310. Requirement to Register Meter.

An owner of an existing well equipped with a meter or alternative measuring method must register the meter or alternative measuring method with the Authority by filing with the Authority a meter registration form provided by the general manager. Meter registrations must be filed with the Authority no later than 180 days from the effective date of these rules. This requirement does not apply to any meter owned by the Authority. The Authority need not register any of its own meters.

§707.311. Requirement to File Declaration of Historical Use.

A declaration of historical use (application for an initial regular permit) must have been filed with the Authority pursuant to §1.16(a) of the Act by December 30, 1996, for each well from which groundwater from the aquifer has been withdrawn and placed to beneficial use during the historical period. An owner of an well exempt from the requirement to obtain a groundwater withdrawal permit under §§1.16(c) and 1.33 of the Act and §711.20 of this title (relating to Groundwater Withdrawal Permits) is not under a requirement to file a declaration of historical use.

§707.312. Declarations Received Before Effective Date of These Rules.

Declarations of historical use received by the Authority before the effective date of this subchapter need not be resubmitted.

§707.313. Requirement to File an Application for a Monitoring Well Permit.

Any person seeking to perform one of the activities set forth in §711.12(3) of this title (relating to Activities Requiring a Permit) must file an application for a monitoring well permit with the Authority.

§707.314. Requirement to File an Application for an Aquifer Recharge and Storage Permit.

Any person seeking to perform one of the activities set forth in §711.12(6) of this title (relating to Activities Requiring a Permit) must file an application for an aquifer recharge and storage permit with the Authority.

§707.315. Requirement to File an Application for a Recharge Recovery Permit.

Any person seeking to perform one of the activities set forth in §711.12(7) of this title (relating to Activities Requiring a Permit) must file an application for a recharge recovery permit with the Authority.

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

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SUBCHAPTER E. REQUIREMENTS FOR APPLICATIONS AND REGISTRATIONS

31 TAC §§707.401 - 707.417, 707.422, 707.424, 707.426, 707.428

The articles or sections of the Act or any other code that are affected by the proposed rule are: §§ 1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), 1.34(a), and 1.34(c) of the Act, and §2001.004(1) of the APA. The sections of Chapter 31, Texas Administrative Code, that are to be affected are §§707.1, 707.101, 707.102, 707.103, 707.104, 707.105, 707.106, 707.201, 707.202, 707.203, 707.204, 707.205, 707.206, 707.207, 707.208, 707.301, 707.302, 707.303, 707.304, 707.305, 707.306, 707.307, 707.308, 707.309, 707.310, 707.311, 707.312, 707.313, 707.314, 707.315, 707.401, 707.402, 707.403, 707.404, 707.405, 707.406, 707.407, 707.408, 707.409, 707.410, 707.411, 707.412, 707.413, 707.414, 707.415, 707.416, 707.417, 707.422, 707.424, 707.426, 707.428, 707.501, 707.502, 707.503, 707.504, 707.505, 707.506, 707.507, 707.508, 707.509, 707.510, 707.511, 707.512, 707.513, 707.514, 707.515, 707.516, 707.517, 707.518, 707.519, 707.601, 707.602, 707.603, 707.604, 707.605, 707.606, 707.607, 707.608, 707.609, 707.610, 707.611, 707.612, 707.613, 707.614, 707.615, 707.616, 707.617, 707.618, 707.619, 707.620, 707.621, 707.622, 707.623, 707.624, 707.625, and 707.626.

§707.401. Contents of and Requirements for All Applications and Registrations.

All applications and registrations filed with the Authority shall be typewritten or printed legibly in ink and shall include:

(1) The full name, post office address, and telephone number of applicant or registrant. If the applicant or registrant is a partnership, the applicant or registrant shall designate the name of the partnership followed by the words "a partnership." If the applicant or registrant is acting as trustee for another, the applicant or registrant shall designate the trustee's name followed by the word "trustee." If one other than the named applicant or registrant executes the application or registration, the person executing the application shall provide their name, position, post office address and telephone number.

(2) Signature of Applicant or Registrant. The application or registration shall be signed as follows:

(A) If the applicant or registrant is an individual, the application or registration shall be signed by the applicant, registrant or a duly appointed agent. An agent shall provide written evidence of his or her authority to represent the applicant or registrant. If the applicant or registrant is an individual doing business under an assumed name, the applicant or registrant shall attach to the application or registration an assumed name certificate from the county clerk of the county in which the principal place of business is located.

(B) Joint applications and registrations. A joint application or registration shall be signed by each applicant or registrant or each applicant's or registrant's duly authorized agent with written evidence of such agency submitted with the application or registration. If a well or proposed well is owned by both husband and wife, each person shall sign the application or registration. Joint applicants or registrants shall select one among them to act for and represent the others in pursuing the application or registration with the Authority with written evidence of such representation to be submitted with the application or registration.

(C) If the application or registration is by a partnership, the application or registration shall be signed by one of the general partners. If the applicant or registrant is a partnership doing business under an assumed name, the applicant or registrant shall attach to the application or registration an assumed name certificate from the county clerk of the county in which the principal place of business is located.

(D) If the applicant or registrant is an estate or guardianship, the application or registration shall be signed by the duly appointed guardian or representative of the estate and a current copy of the letters testamentary issued by the court shall be attached to the application or registration.

(E) If the applicant or registrant is a corporation, public district, county, municipality or other corporate entity, the application or registration shall be signed by a duly authorized official. Written evidence in the form of bylaws, charters, or resolutions specifying the

authority of the official to take such action shall be submitted along with the application or registration. A corporation may file a corporate affidavit as evidence of the official's authority to sign.

(F) If the applicant or registrant is acting as trustee for another, the applicant or registrant shall sign as trustee and in the application or registration shall disclose the nature of the trust agreement and give the name and current address of each trust beneficiary.

(3) Attestation. Each applicant or registrant shall subscribe and swear to the application or registration before any person entitled to administer oaths who shall also sign his or her name and affix his or her seal of office to the application or registration.

§707.402. Conference with Authority Staff.

Applicants and registrants are encouraged to confer with the Authority staff on any questions concerning the preparation of an application or registration.

§707.403. Application Fee.

For all applications other than for an agricultural conservation loan, a non-refundable application fee of $25 must accompany that application in order for it to be considered by the Authority. An application for an agricultural conservation loan must be accompanied by a non-refundable application fee of $250. Authority staff is prohibited from processing any application unless the proper fee is tendered.

§707.404. Registration Fee.

A registration fee of $10 must accompany any registration for it to be filed by the Authority. Authority staff is prohibited from filing any registration unless the proper fee is tendered.

§707.405. Applications for Initial Regular Permits/Declarations of Historical Use.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application for an initial regular permit shall contain the following:

(1) Name and Address of Owner. The full name, post office address and telephone number of the well owner, if different from that of the applicant.

(2) Source of Supply. The applicant shall clearly state whether the Edwards Aquifer is the source of groundwater from the well.

(3) Amount and Purpose of Withdrawal and Use. The total amount of groundwater proposed to be withdrawn and beneficially used shall be stated in definite terms, that is, a definite number of acre-feet annually. The purpose of each use shall also be stated in definite terms. If the groundwater is to be used for more than one purpose, the specific amount to be used for each purpose shall be clearly stated. If the amount to be used is less than the amount to be withdrawn, both the amount to be withdrawn and the amount to be used shall be specified.

(4) Rate of Withdrawal. The proposed maximum rate of withdrawal in gallons per minute or cubic feet per second shall be stated.

(5) Method of Withdrawal. The method to be used to withdraw groundwater shall be described.

(6) Declaration of Historical Use. A declaration of historical use containing:

(A) the total amount of water from the aquifer that the applicant or his contract user, prior user or former existing user withdrew and beneficially used without waste during each calendar year of the historical period;

(B) the maximum number of acres irrigated during any one calendar year of the historical period;

(C) the purpose(s) for which the groundwater was used during each year of the historical period;

(D) the amount of groundwater the applicant claims as the maximum beneficial use of water without waste during any one calendar year of the historical period;

(E) the number and location of each well owned by the applicant and for which the applicant claims groundwater from the aquifer was withdrawn and placed to beneficial use during the historical period and the amount of water withdrawn from each well during each year of the historical period;

(F) the place of use of groundwater withdrawn from each well;

(G) if the groundwater was withdrawn from the well or placed to a beneficial use by a contract user, prior user or former existing user, then the name, address and telephone number of each contract user, prior user or former existing user the year of withdrawals, purpose of use, place of use and amount of withdrawals, including copies of the legal documents establishing the legal right of the contract user to withdraw and/or place groundwater from the aquifer to beneficial use;

(H) any facts upon which the applicant requests equitable adjustment on the grounds that the applicant's historic use was affected by a requirement of or participation in a federal program;

(I) if the groundwater is to be sold on a wholesale or bulk basis, whether metered or un-metered, transported or transferred, a description of how the groundwater will be sold, transported or transferred, the name, address and telephone number of every person to whom the water will be delivered, the location to which the groundwater will be delivered, and the purpose for which the groundwater will be used, including copies of the legal documents establishing the right for the groundwater to be sold, transported or transferred;

(J) a separate Well Information Sheet prescribed by the general manager or a registration form from a groundwater district or other entity with the same data as the Well Information Sheet for each well accompanied by a photograph of the well taken approximately 100 feet from the well head; and

(K) any other information that the general manager may require.

§707.406. Applications for Additional Regular Permits.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application for an additional regular permit shall contain the following:

(1) Name and Address of Owner. The full name, post office address and telephone number of the well owner, if different from that of the applicant.

(2) Source of Supply. The applicant shall clearly state whether the Edwards Aquifer is the source from which the withdrawal of groundwater is proposed and identify the aquifer pool that will serve as the source of the groundwater.

(3) Amount of Withdrawal. The total amount of groundwater proposed to be withdrawn and beneficially used on an annual and monthly basis, stated in number of acre-feet.

(4) Purpose of Use. The proposed purpose of use stated in definite terms. If the groundwater is to be used for more than one purpose, the approximate amount to be used for each purpose shall be

clearly stated. If the amount to be used is less than the amount to be withdrawn, both the amount to be withdrawn and the amount to be used shall be specified. If the purpose of use is irrigation, documentation of the number of acres to be irrigated must be included as well.

(5) Rate of Withdrawal. The maximum rate of withdrawal that the well is capable of, in gallons per minute or cubic feet per second, shall be stated.

(6) Method of Withdrawal. The method of withdrawal to be used shall be described; (i.e., portable pump, stationary pump or artesian flow).

(7) Place of Use. The proposed place of use of groundwater to be withdrawn from each well.

(8) Location of Points of Withdrawal. A legal description of the location of any wells, including: the county; section, block and survey; labor and league; number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority.

(9) Map. A map showing the location of each well.

(10) Water Conservation Plan. A description of proposed water conservation measures to be implemented.

(11) Water Reuse Plan. A description of proposed water reuse measures to be implemented.

(12) Meter. A description of the meter or other device installed on the well to be used for measuring the amount of groundwater withdrawn from the aquifer.

(13) Other Permits. A complete list of all other permits applied for or issued by the Authority to the applicant.

(14) Any other information as may be required by the general manager.

§707.407. Applications for Term Permits.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application for a term permit shall contain the following:

(1) Name and Address of Owner. The full name, post office address and telephone number of the well owner, if different from that of the applicant.

(2) Source of Supply. The applicant shall clearly state whether the Edwards Aquifer is the source from which the withdrawal of groundwater is proposed and identify the aquifer pool that will serve as the source of the groundwater.

(3) Amount of Withdrawal. The total amount of groundwater proposed to be withdrawn from the aquifer and beneficially used on an annual and monthly basis and over the entire term of the permit, stated in number of acre-feet.

(4) Purpose of Use. The proposed purpose of use stated in definite terms. If the groundwater is to be used for more than one purpose, the approximate amount to be used for each purpose shall be clearly stated. If the amount to be used is less than the amount to be withdrawn, both the amount to be withdrawn and the amount to be used shall be specified. If the purpose of use is irrigation, documentation of the number of acres to be irrigated must be included as well.

(5) Rate of Withdrawal. The maximum rate of withdrawal that the well is capable of, in gallons per minute or cubic feet per second, shall be stated.

(6) Method of Withdrawal. The method of withdrawal to be used shall be described (i.e., portable pump, stationary pump or artesian flow).

(7) Place of Use. The proposed place of use of groundwater to be withdrawn from each well.

(8) Location of Points of Withdrawal. A legal description of the location of any wells, including: the county; section, block and survey; labor and league; number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority.

(9) Map. A map showing the location of each well.

(10) Water Conservation Plan. A description of proposed water conservation measures to be implemented.

(11) Water Reuse Plan. A description of proposed water reuse measures, if applicable, to be implemented.

(12) Meter. A description of the meter or other device installed on the well to be used for measuring the amount of groundwater withdrawn from the aquifer.

(13) Other Permits. A complete list of all other permits applied for or issued by the Authority to the applicant.

(14) Proposed Term. A statement of the proposed period of time for which the term permit is requested.

(15) Any other information as may be required by the general manager.

§707.408. Applications for Emergency Permits.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application for an emergency permit shall contain the following:

(1) Name and Address of Owner. The full name, post office address and telephone number of the well owner, if different from that of the applicant.

(2) Source of Supply. The applicant shall clearly state whether the Edwards Aquifer is the source from which the withdrawal of groundwater is proposed.

(3) Amount of Withdrawal. The total amount of groundwater proposed to be withdrawn from the aquifer and beneficially used over the duration of the permit, stated in number of acre-feet.

(4) Purpose of Use. The proposed purpose of use stated in definite terms. If the groundwater is to be used for more than one purpose, the approximate amount to be used for each purpose shall be clearly stated.

(5) Rate of Withdrawal. The maximum rate of withdrawal that the well is capable of, in gallons per minute or cubic feet per second, shall be stated.

(6) Place of Use. The proposed place of use of groundwater to be withdrawn from each well.

(7) Location of Points of Withdrawal. A reasonably clear and precise description of the location of any wells.

(8) Other Permits. A complete list of all other permits applied for or issued by the Authority to the applicant.

(9) Basis for Emergency. Information establishing that the issuance of the emergency permit is necessary to prevent the loss of life or to prevent a severe, imminent threat to the public health or safety.

(10) Any other information as may be required by the general manager.

§707.409. Applications to Renew Emergency Permits.

(a) An application to renew an emergency permit must contain the information specified in § 707.408 of this title (relating Applications for Emergency Permits).

(b) Time to File. An application to renew an emergency permit must be filed with the Authority before the existing emergency permit has expired.

§707.410. Well Registrations.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), a well registration shall contain the following:

(1) Name and Address of Owner. The full name, post office address, and telephone number of the owner of the well, if different from that of the registrant.

(2) Location. A legal description of the location of the well, including: the county, section, block and survey, labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority.

(3) Map. A map showing the location of:

(A) the well;

(B) the three nearest wells within a quarter of a mile of the well and the names and addresses of the owners of the nearby wells; and

(C) any possible sources of contamination such as existing and proposed livestock or poultry yards, septic system absorption fields, underground or above ground petroleum storage tanks;

(4) Purpose of Use. The purpose of use of the groundwater stated in definite terms. If the groundwater is used for more than one purpose, the approximate amount used for each purpose shall be stated.

(5) Amount of Withdrawal. The total amount of groundwater withdrawn from the aquifer and beneficially used on an annual and monthly basis, stated in number of acre-feet.

(6) Rate of Withdrawal. The maximum rate of withdrawal that the well is capable of, in gallons per minute or cubic feet per second.

(7) Depth. The depth of the well, the depth of the cement casing, and other well specifications.

(8) Pump. The size of the pump and pumping method.

(9) Date of Construction. The date or approximate date that the well was constructed.

(10) Other Permits. A list of all other permits applied for or issued by the Authority to the applicant.

(11) Any other information as may be required by the general manager.

§707.411. Applications for Well Construction Permits.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application for a new well construction permit shall contain the following:

(1) Name and Address of Owner. The full name, post office address, and telephone number of the owner of the proposed well, if different from the applicant.

(2) Location. A legal description of the location of the proposed well, including: the county; section, block and survey; labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority.

(3) Map. A map showing the location of :

(A) the proposed well;

(B) the three nearest wells within a quarter of a mile of the proposed location, and the names and addresses of the owners of the nearby wells; and

(C) any possible sources of contamination such as existing and proposed livestock or poultry yards, septic system absorption fields, underground or above ground petroleum storage tanks.

(4) Purpose of Use. The proposed purpose of use stated in definite terms. If the groundwater is to be used for more than one purpose, the approximate amount to be used for each purpose shall be stated.

(5) Amount of Withdrawal. The total amount of groundwater proposed to be withdrawn from the aquifer and beneficially used on an annual and monthly basis, stated in number of acre-feet.

(6) Rate of Withdrawal. The maximum rate of withdrawal that the proposed well would be capable of, in gallons per minute or cubic feet per second, shall be stated.

(7) Depth. The proposed depth of the well and proposed depth of cement casing.

(8) Pump. The size of the proposed pump and pumping method.

(9) Proposed Construction Date. The approximate date that well construction operations are proposed to begin.

(10) Identity of Well Drilling Contractor. The name, address, telephone number and license number of the well drilling contractor.

(11) Other Permits. A list of all other permits applied for or issued by the Authority to the applicant.

(12) Legal Basis of Right to Withdraw Groundwater. The applicant shall identify the claimed legal basis under which groundwater will be withdrawn from the aquifer.

(13) Any other information as may be required by the general manager.

§707.412. Meter Registrations.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), a meter registration shall contain the following:

(1) Name and Address of Owner. The full name, post office address, and telephone number of the owner of the well on which the meter is installed, if different from that of the registrant.

(2) Location. A legal description of the location of the well on which the meter is installed including: the county, section, block and survey, labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority;

(3) Map. A map showing the location of the well on which the meter is installed;

(4) Status of Well. Whether the well on which the meter is installed is an exempt well or a permitted well.

(5) Purpose of Use. The purpose of use of groundwater withdrawn from the well on which the meter is installed stated in definite terms. If the groundwater is used for more than one purpose, the approximate amount to be used for each purpose shall be stated.

(6) Description of the Meter. A description of the meter or alternative measuring method including:

(A) a description of the method used to measure the flow rate;

(B) a description of the method used to measure the cumulative amount of groundwater withdrawn from the aquifer;

(C) its size;

(D) the units in which the measurements will be recorded;

(E) a statement describing its accuracy;

(F) a description of the manufacturer's quality control and assurance program;

(G) its normal operating range;

(H) its pressure rating;

(I) a description of its construction materials;

(J) a description of its design;

(K) a description of its mechanical operation;

(L) a statement of whether the totalizer is resettable;

(M) the date that the meter was last calibrated and who calibrated it;

(N) the maximum period of time and maximum amount that the totalizer may record the cumulative amount of groundwater withdrawn from the aquifer;

(O) a description of its instantaneous readout capabilities for flow rate and total quantity measured; and

(P) a statement that the meter was installed according to the manufacturer's specifications.

(7) Date Installed. The date or approximate date that the meter was installed or the alternative measuring method was first implemented.

(8) Any other information as may be required by the general manager.

§707.413. Applications for Permits to Install or Modify Meter.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application for a permit to install or modify meter shall contain the following:

(1) Name and Address of Owner. The full name, post office address, and telephone number of the owner of the well on which the meter is proposed to be installed if different from the applicant.

(2) Location. A legal description of the location of the well on which the meter is to be installed including: the county; section, block and survey; labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority.

(3) Map. A map showing the location of the well on which the meter is to be installed.

(4) Status of Well. Whether the well on which the meter is to be installed is an exempt well or a permitted well.

(5) Purpose of Use. The purpose of use of groundwater withdrawn from the well on which the meter is to be installed stated in definite terms. If the groundwater is used for more than one purpose, the approximate amount to be used for each purpose shall be clearly stated.

(6) Description of the Meter. A description of the meter or alternative measuring method including:

(A) a description of the method used to measure the flow rate;

(B) a description of the method used to measure the cumulative amount of groundwater withdrawn from the aquifer;

(C) its size;

(D) the units in which the measurements will be recorded;

(E) a statement describing its accuracy;

(F) a description of the manufacturer's quality control and assurance program;

(G) its normal operating range;

(H) its pressure rating;

(I) a description of its construction materials;

(J) a description of its design;

(K) a description of its mechanical operation;

(L) a statement of whether the totalizer is resettable;

(M) the maximum period of time and maximum amount that the totalizer may record the cumulative amount of groundwater withdrawn from the aquifer; and

(N) a description of its instantaneous readout capabilities for flow rate and total quantity measured.

(7) any other information as may be required by the general manager.

§707.414. Applications to Transfer Interim Authorization Status and Amend Application for Initial Regular Permit.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application to transfer interim authorization status and amend application for initial regular permit shall contain the following with respect to both the well which currently has interim authorization status and the well (or proposed well) to which the transfer is proposed:

(1) Names and Addresses of Owners. The full name, post office address and telephone number of the person who seeks to transfer his or her interim authorization status and the name and address of the person to whom that status is proposed to be transferred as well as the name, address, and telephone numbers of any contact persons, if different from the transferor or transferee.

(2) Locations. A legal description of two locations of the two wells including: the county; section, block and survey, labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority.

(3) Purposes of Use. The purpose of use for the well which has current interim authorization status and the proposed purpose of use for the well to which the transfer is proposed stated in definite terms.

If the groundwater is used (or is proposed to be used) for more than one purpose, the approximate amount used for each purpose shall be clearly stated.

(4) Withdrawal amounts. The amount of groundwater which is proposed to be withdrawn at the well to which the transfer is proposed.

(5) Place of Use. The place of use of groundwater withdrawn from the well under interim authorization status and the place of use of groundwater withdrawn from the well to which the transfer is proposed.

(6) Term of Transfer. The period of time for which the transfer is proposed;

(7) A copy of the transfer agreement and any supporting documents.

(8) The price per acre-foot.

(9) Any other information as may be required by the general manager.

§707.415. Applications to Transfer and Amend Permit.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application to transfer and amend a permit shall contain the following with respect to both the currently permitted well and the well (or proposed well) to which the transfer is proposed:

(1) Names and Addresses of Owners. The full name, post office address and telephone numbers of the person who seeks to transfer his or her permitted right and the name and address of the person to whom those rights are proposed to be transferred as well as the name, address, and telephone numbers of any contact persons, if different from the transferor or transferee.

(2) Locations. A legal description of the locations of the two wells including: the county, section, block and survey, labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority.

(3) Purpose of Use. The purpose of use for the currently permitted well and the proposed purpose of use for the well to which the transfer is proposed stated in definite terms. If the groundwater is used (or is proposed to be used) for more than one purpose, the approximate amount used for each purpose shall be clearly stated.

(4) Withdrawal amounts. The amount of groundwater proposed to be withdrawn at the well to which the transfer is proposed.

(5) Places of use. The place of use of groundwater withdrawn from the permitted well and the place of use of groundwater withdrawn from the well to which the transfer is proposed.

(6) Term of Transfer. The period of time for which the transfer is proposed.

(7) A copy of transfer agreement and any supporting documents.

(8) The price per acre-foot.

(9) Any other information as may be required by the general manager.

§707.416. Applications for Exempt Well Status.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application for exempt well status shall contain the following:

(1) Name and Address of Owner. The full name, post office address and telephone number of the owner of the well (or proposed well) if different from that of the applicant.

(2) Location. A legal description of the location of the well (or proposed well), including: the county, section, block and survey, labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority.

(3) Map. A map showing the location of the well (or proposed well).

(4) Purpose of Use. The purpose (or proposed purpose) of use stated in definite terms. If the groundwater is used (or is proposed to be used) for more than one purpose, the approximate amount used (or proposed to be used) for each purpose shall be clearly stated.

(5) Maximum Amount of Withdrawal Per Day. The maximum amount of groundwater that the well (or proposed well) is (or will be) capable of withdrawing per day stated in gallons.

(6) Rate of Withdrawal. The maximum rate of withdrawal of groundwater that the well (or proposed well) is (or will be) is capable of in gallons per minute or cubic feet per second.

(7) Depth. The depth or proposed depth of the well, the depth of the cement casing, and other well specifications.

(8) Pump. The size of the pump and pumping method.

(9) Date of Construction. The approximate date that the well was constructed (or will be constructed).

(10) Other Permits. A list of all other permits applied for or issued by the Authority to the applicant.

(11) A statement as to whether the well (or proposed well) is within a subdivision requiring platting pursuant to Chapter 711, Subchapter C, of this title (relating to Groundwater Withdrawal Permits).

(12) A statement as to whether the well (or proposed well) serves (or will serve) a subdivision requiring platting pursuant to Chapter 711, Subchapter C, of this title.

(13) Plat. If the well (or proposed well) is within or serves a subdivision requiring platting pursuant to Chapter 711, Subchapter C, of this title, the applicant shall include a copy of any plat prepared for that subdivision.

(14) Any other information as may be required by the general manager.

§707.417. Applications for Monitoring Well Permits.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application for a monitoring well permit shall contain the following:

(1) Name and Address of Owner. The full name, post office address, and telephone number of the owner of the well, if different from that of the registrant.

(2) Location. A legal description of the location of the well, including: the county, section, block and survey, labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority.

(3) Map. A map showing the location of the well.

(4) Purpose. A clear statement of the intended purpose of the monitoring well including a statement of whether monitoring is

required by any other agency, as part of site investigation, cleanup or remedial action plan and whether the well is part of monitoring well network.

(5) Method. A description of the method or device to be used to measure water depth and a description of the method or device to be used to measure water quality.

(6) Withdrawal Amount. The amount of water to be withdrawn per annum.

(7) Depth. The depth of the well stated in feet.

(8) Any additional information as may be required by the general manager.

§707.422. Applications for Agricultural Conservation Loans.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application submitted to the Authority for an agricultural conservation loan pursuant to the Texas Water Code, §§ 17.894-17.903 shall include the following:

(1) Name, address and telephone number. The complete name, physical and mailing address and phone number of the applicant.

(2) Tax identification number and social security number. The applicant's social security number, or when the applicant is a corporation, partnership or other entity, the entity's tax identification number.

(3) Description of intended use of loan proceeds. A detailed description of the proposed use of the loan proceeds.

(4) Description of the item(s) to be purchased. A description of the item(s) and/or services proposed to be purchased with the loan proceeds, an itemized detail of the cost of each item and/or service to be purchased, and the loan amount requested.

(5) Description of the real property affected. A legal description of the real property on which the conservation activities and/or equipment are proposed to take place and/or be installed (including the survey name, number, volume, page(s) and abstract number) and, if the land is not owned by the loan applicant, the name, address, telephone number of the owner and copies of all leases and other documents reflecting the applicant's right to or interest in the real estate.

(6) EAA Permit Application Permit Number. If the loan applicant has applied to the Authority for any type of groundwater withdrawal permit, an identification of the permit application number or permit number.

(7) For each credit reference, the loan applicant shall provide the name and address of the institution, the name of a loan officer or contact person, and type of account and account number. The applicant must also execute an authorization form that authorizes the credit references to furnish relevant financial information to the Authority and agrees to hold harmless the Authority and the credit references and their employees, agents, representatives and assigns for any claims arising from information given regarding the applicant's credit history. Identification of entities which the Authority my contact for credit references. The loan applicant shall identify as credit references:

(A) a primary lending institution;

(B) a secondary lending institution; and

(C) if the applicant so chooses, additional credit references.

(8) Dealer's or manufacturer's invoice. A copy of a dealer's or manufacturer's invoice, which states the purchase price, model, serial and other identifying numbers and associated installation costs of each item and/or service to be purchased with loan proceeds.

(9) Re-financing loans. If the proposed loan is for the re-financing of equipment, a statement of the date said equipment was purchased and installed and whether the equipment was purchased new or used. The applicant must submit a copy of the invoices pertaining to the original purchase and installation. For loan applications to re-finance equipment, such equipment must be inspected and appraised by a qualified appraiser, pre-approved by the Authority, at the applicant's expense. The appraisal and inspection report must be submitted with the loan application and be dated within 30 days prior to the application date.

(10) Applicant's consent and compliance. A statement indicating that the applicant agrees to the following:

(A) to grant the Authority and the Texas Water Development Board a first lien on the equipment that will be purchased with the loan proceeds and, if necessary to fully secure loan, to grant other forms of security acceptable to the Authority which, cumulatively, equal or exceed in value the loan amount.

(B) to:

(i) obtain and keep in force throughout the term of the loan insurance on the collateral acceptable to the Authority to protect against all risks, including, but not limited to, loss from destruction and theft and that names the Authority as loss payee; and

(ii) provide proof of insurance to the Authority upon closing of the loan and annually thereafter.

(C) that the applicant will allow the Authority, its agents and employees to perform a pre-closing irrigation system inspection and a post-closing irrigation system inspection and evaluation;

(D) that the applicant will, at any time and from time to time upon request of the Authority, execute and deliver to the Authority, in form and substance satisfactory to the Authority, such documents as the Authority shall deem necessary or desirable to perfect or maintain perfected the security interest of the Authority in the collateral given to secure the loan or which may be necessary to comply with the provisions of the law of any jurisdiction in which applicant may then be situated or in which any of the collateral may be located; and

(E) that the applicant is current on all Edwards Aquifer aquifer management fees payable to the Authority and has a property installed and functioning meter on any Edwards Aquifer well related to the equipment to be financed.

(11) Financial records. A current financial statement for the applicant which includes a balance sheet, statement of cash flow and income statement, a statement providing the applicant's estimated annual income and estimated annual expenses; and copies of the applicant's federal income tax returns for the preceding three years and, if available, the applicant's financial statement (balance sheet, statement of cash flow, and income statement), for the preceding two years.

(12) Organization, existence and authority. The following documents verifying the applicant's organization, existence and authority to enter into the transaction shall be submitted with application:

(A) Corporate applications. For corporate applicants, a copy of the applicant's Certificate of Incorporation, a file-marked copy of its Articles of Incorporation and any amendments thereto, current bylaws, and resolution of the board of directors authorizing the corporation to enter into the transaction and naming the individual that is authorized by the corporation to execute documents on behalf of the

corporation to conclude the transaction shall be submitted with the application.

(B) Limited liability company applications. For limited liability company applicants, the company's Articles of Organization, current regulations and a resolution of the members authorizing the transaction, if member managed, or of the managers, if manager managed, and naming the individual that is authorized by the company to execute documents on behalf of the company to conclude the transaction shall be submitted with the application.

(C) Partnership applications. For general and limited partnership applicants, the partnership agreement, if any, with all amendments thereto and a consent of the partners who are required to give consent under the partnership agreement or applicable law shall be submitted with the application. In the case of limited partnership applicants, the certificate of limited partnership, with any amendments thereto, shall be submitted with the application. Additionally, financial statements will be required from the general partners of partnerships, as well as from the partnership.

(13) Additional information. Any other information which may be required by the General Manager of the Authority.

§707.424. Applications for Declaration of Abandonment of a Groundwater Withdrawal Permit.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application for declaration of abandonment of a groundwater withdrawal permit shall contain the following:

(1) Names and Addresses of Owners. The full name, post office address and telephone numbers of the person who owns the groundwater withdrawal permit.

(2) Non-Use. A detailed description of all facts demonstrating the non-use of all or part of the groundwater authorized to be withdrawn under the permit.

(3) Intent to Abandon. A detailed description of all facts showing the intent of the owner of the permit to discontinue permanently the beneficial use of all or part of the groundwater withdrawal permit.

(4) Any other information as may be required by the general manager.

§707.426. Applications to Cancel a Groundwater Withdrawal Permit.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application to cancel a groundwater withdrawal permit shall contain the following:

(1) Names and Addresses of Owners. The full name, post office address and telephone numbers of the person who owns the groundwater withdrawal permit.

(2) Non-Use. A detailed description of all facts demonstrating that all or part of the groundwater authorized to be withdrawn pursuant to a groundwater withdrawal permit issued by the authority has not been put to beneficial use at any time during the 10-year period immediately preceding the filing of an application to cancel a groundwater withdrawal permit.

(3) Any other information as may be required by the general manager.

§707.428. Applications to Convert Base Irrigation Groundwater.

In addition to the information specified in § 707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application to convert base irrigation groundwater shall contain the following:

(1) Names and Addresses of Owners. The full name, post office address and telephone numbers of the person who owns a regular permit.

(2) Physical Impossibility. If the application is based on physical impossibility, a detailed description of all facts demonstrating that it is physically impossible for the owner of a regular permit, or an applicant for a regular permit for a well qualifying for interim authorization status, to place base irrigation groundwater to beneficial use at the place of use identified in the regular permit or the application for an initial regular permit.

(3) Conservation. If the application is based on conservation:

(A) A statement that groundwater from the aquifer has been conserved after the installation of water conservation equipment;

(B) Location. A legal description of the location of the water conservation equipment including: the county, section, block and survey, labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority;

(C) Map. A map showing the location of the water conservation equipment;

(D) Description of the Water Conservation Equipment. A description of the water conservation equipment:

(E) Measurement Method. A description of the method used to measure the amount of groundwater from the aquifer cumulatively conserved on an annual basis;

(F) Accuracy. A statement describing the accuracy of the water conservation equipment;

(G) Quality Control. A description of the manufacturer's quality control and assurance program;

(H) Operating Range. A description of the water conservation equipment's normal operating range;

(I) Materials. A description of the water conservation equipment's construction materials;

(J) Design. A description of the equipment's design;

(K) Mechanical Operation. A description of the equipment's mechanical operation;

(L) Operational Life. An estimate of the maximum period of time that the equipment will be reasonably functional in conserving groundwater from the aquifer;

(M) Factory Specifications. A statement that the equipment was installed according to the manufacturer's specifications.

(N) Date Installed. The date that the equipment was installed.

(O) Any other information as may be required by the general manager.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005251
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Earliest possible date of adoption: September 10, 2000
For further information, please call: (210) 222-2204

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SUBCHAPTER F. ACTIONS ON APPLICATIONS AND REGISTRATIONS BY THE AUTHORITY

31 TAC §§707.501 - 707.519

The articles or sections of the Act or any other code that are affected by the proposed rule are: §§1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), 1.34(a), and 1.34(c) of the Act, and §2001.004(1) of the APA. The sections of Chapter 31, Texas Administrative Code, that are to be affected are §§707.1, 707.101, 707.102, 707.103, 707.104, 707.105, 707.106, 707.201, 707.202, 707.203, 707.204, 707.205, 707.206, 707.207, 707.208, 707.301, 707.302, 707.303, 707.304, 707.305, 707.306, 707.307, 707.308, 707.309, 707.310, 707.311, 707.312, 707.313, 707.314, 707.315, 707.401, 707.402, 707.403, 707.404, 707.405, 707.406, 707.407, 707.408, 707.409, 707.410, 707.411, 707.412, 707.413, 707.414, 707.415, 707.416, 707.417, 707.422, 707.424, 707.426, 707.428, 707.501, 707.502, 707.503, 707.504, 707.505, 707.506, 707.507, 707.508, 707.509, 707.510, 707.511, 707.512, 707.513, 707.514, 707.515, 707.516, 707.517, 707.518, 707.519, 707.601, 707.602, 707.603, 707.604, 707.605, 707.606, 707.607, 707.608, 707.609, 707.610, 707.611, 707.612, 707.613, 707.614, 707.615, 707.616, 707.617, 707.618, 707.619, 707.620, 707.621, 707.622, 707.623, 707.624, 707.625, and 707.626.

§707.501. Initial Action on Applications and Registrations.

All applications and registrations received by the Authority shall be stamped or marked "Received" by the docket clerk with the date of receipt clearly indicated.

§707.502. Review for Administrative Completeness.

(a) The general manager shall conduct an initial review of each application or registration for administrative completeness within 45 business days of the receipt of the application or registration by the Authority and payment of applicable fees. For applications for emergency permits, such review shall be conducted within ten business days.

(b) In reviewing an application or registration for administrative completeness, the general manager shall assess whether the application or registration contains the necessary information in legible form which will allow:

(1) the general manager to forward the application or registration to the docket clerk to be filed and maintained in the permanent records of the Authority;

(2) the Authority staff to conduct a technical review, if appropriate; and

(3) the general manager to take or recommend action on the application, as appropriate.

(c) Upon determining that an application or registration is administratively complete, the general manager shall notify the applicant of that determination by mail and forward the registration or application to the docket clerk with a request that it be filed and maintained in the permanent records of the Authority.

§707.503. Return of Applications and Registrations Deemed Not Administratively Complete.

(a) If the general manager determines that an application or registration is not administratively complete, the general manager will notify the applicant or registrant of any such deficiencies by letter sent certified mail/return-receipt requested. Illegible applications and registrations will be returned to the applicant or registrant

(b) The applicant or registrant may submit any additional necessary information in response to a letter sent by the general manager pursuant to subsection (a) of this section, within 30 days of receipt of the letter noting the deficiencies.

(c) If the additional necessary information is not forthcoming within 30 days of the date of receipt of the letter noting the deficiencies, the general manager shall return the incomplete application or registration to the applicant or registrant.

§707.504. Technical Review.

(a) After an application is determined by the general manager to be administratively complete, Authority staff shall commence a technical review of the application as necessary and appropriate. Authority staff shall complete the technical review of an application within 90 business days of the determination, by the general manager, of the application's administrative completeness. For applications for emergency permits, such review shall be conducted within 20 business days.

(b) The applicant shall be promptly notified of any additional material necessary for a complete technical review. If the applicant provides the information within the period of time noted in subsection (a) of this section, Authority staff will complete the technical review of the application within the original technical review period extended by the number of days from the request to the submittal of the additional information. If the necessary additional information is not received by the general manager before expiration of the technical review period and the information is considered essential by the general manager, the general manager may return the application to the applicant. In no event, however, will the applicant have fewer than 30 days to provide the technical data before an application is returned. Decisions to return an application to the applicant during the technical review will be made on a case-by-case basis.

(c) The general manager or his designee is entitled to enter public or private property at any reasonable time and upon reasonable notice for the purpose of inspecting, investigating or verifying conditions or information submitted in connection with an application or a registration.

§707.505. Changes to Applications or Registrations.

Upon express written or verbal approval of the applicant or the applicant's agent (or the registrant or registrant's agent), any Authority employee may make non-substantive changes to any document submitted. Substantive changes to an application or registration may be made only by the applicant or the applicant's agent (or registrant or registrant's agent) and only in the form of a written, notarized amendment to the application or registration signed by the proper person. For the purposes of this section, non-substantive changes are changes that are editorial in nature. Substantive changes are changes that alter any of the information required to be included in any registration or application pursuant to Subchapter E of this Chapter (relating to Requirements for Applications and Registrations).

§707.506. Extension of Time to Process Applications.

If Authority staff determines that technical review of an application cannot be completed within the period of time prescribed by §707.504 of this title (relating to Technical Review), Authority staff shall furnish the general manager with written information regarding the reasons that necessitate the delay and the amount of additional time required by the staff to complete the review. Any extension of the period for technical review must be approved by the general manager in writing.

§707.507. Proposed Permit and Technical Summary.

(a) Applicability. This section applies to all applications for groundwater withdrawal permits.

(b) Following completion of technical review, the general manager shall prepare a proposed permit consistent with the Act and Authority rules (unless the general manager recommends to deny the application). The proposed permit shall be filed with the docket clerk to be presented to the Authority along with the application. The proposed permit is subject to change by the general manager during the course of the proceedings on the application. The proposed permit shall be available for public review and inspection. If the general manager recommends to deny the application, the general manager shall prepare a proposed denial stating the reasons for that recommendation.

(c) In conjunction with the proposed permit or denial, the general manager will prepare a technical summary that shall include the following, as appropriate:

(1) the applicant's name and address;

(2) the location of each point of withdrawal;

(3) the maximum beneficial amount of water that was used by the applicant during any one calendar year during the historical period;

(4) the purpose(s) of use;

(5) any equitable adjustment made pursuant to §711.94(f) of this title (relating to Beneficial Use) due to any effect of a requirement of or participation in a federal program on the applicant's historic use of groundwater;

(6) the maximum permit withdrawal amount stated on a per annum and per month basis;

(7) the maximum rate of withdrawal for each point of withdrawal in gallons per minute or cubic feet per second;

(8) a description of any existing metering or measuring devices;

(9) the place of use of the groundwater;

(10) notice that the general manager may modify the proposed permit, or seek additional information from the applicant, in the course of the Authority's proceeding on the application;

(11) any permit conditions;

(12) a statement that the applicant, any applicant for another groundwater withdrawal permit, or any permittee holding a groundwater withdrawal permit may file a request for a contested case hearing on the application on or before the 30th day after the date of publication of notice of proposed permit, authorization, approval or denial and technical summary in the Texas Register; and

(13) any other information that the general manager determines to be appropriate.

(d) The general manager will notify the applicant by mail that technical review of the application is complete and provide the applicant with a copy of the proposed permit (or denial) and the technical summary.

(e) If the application is for an initial regular permit, the general manager shall issue the proposed permit or denial and technical summary no later than 90 days following the effective date of these rules.

§707. 508. Proposed Approval and Technical Summary.

(a) Applicability. This section applies to all applications other than applications for groundwater withdrawal permits.

(b) Following completion of technical review, the general manager shall prepare a proposed approval or authorization consistent with the Act and Authority rules (unless the general manager recommends to deny the application). The proposed approval or authorization shall be filed with the docket clerk to be presented to the Authority along with the application. The proposed approval or authorization is subject to change by the general manager during the course of the proceedings on the application. If the general manager recommends to deny the application, the general manager shall prepare a proposed denial stating the reasons for that recommendation.

(c) In conjunction with the proposed approval, authorization or denial, the general manager will prepare a technical summary that shall include the following, as appropriate:

(1) the applicant's name and address;

(2) the location of each point of withdrawal;

(3) the purpose(s) of use;

(4) the place of use of the groundwater; and

(5) other information that the general manager determines appropriate.

(d) The general manager will notify the applicant by mail that technical review of the application is complete and provide the applicant with a copy of the proposed approval, authorization, or denial, and the technical summary.

§707.509. Referral to Docket Clerk.

When administrative and technical review has been completed and the general manager has prepared the proposed permit, approval, authorization or denial, and completed the technical summary, the proposed permit, approval, authorization or denial, application, and technical summary, shall be forwarded to the docket clerk for presentation to the Authority for action and publication, if appropriate.

§707.510. Publication of Notice of Proposed Permit and Technical Summary in the Texas Register and in Local Newspapers.

(a) Applicability. This section applies to applications for initial regular permits, additional regular permits, term permits, aquifer recharge and storage permits, and recharge recovery permits. This section also applies to:

(1) applications to transfer interim authorization status and amend application for initial regular permit where the location of the point of withdrawal to which the transfer is proposed is East of Cibolo Creek; and

(2) applications to transfer and amend permit where the location of the point of withdrawal to which the transfer is proposed is East of Cibolo Creek.

(b) Upon receipt of the proposed permit, approval, authorization or denial, and the technical summary from the general manager, the docket clerk shall arrange for publication of a notice of the proposed permit, approval, authorization or denial, and technical summary in:

(1) the Texas Register;

(2) a newspaper of general circulation throughout the Authority's jurisdiction; and

(3) at least five other newspapers within the jurisdiction of the Authority.

(c) Time of Publication. The notice referred to in subsection (b) of this section shall be published no later than 30 days following the referral of the proposed permit, approval, authorization or denial to the docket clerk.

(d) Such notice shall contain:

(1) a description of the proposed permit, authorization or approval including any conditions;

(2) a brief description of the technical summary; and

(3) a statement that a copy of the proposed permit or approval, technical summary, and application are available for inspection by the public at the offices of the Authority;

(4) if the proposal is that the application be denied, a summary of the reasons for denial;

(5) a statement that the proposed permit, approval, authorization or denial will be presented to the Board for action within 60 days unless a request for hearing is submitted within 30 days pursuant to §§ 707.601-707.604 of this title (relating to Procedures for Contested Case Hearings on Applications); and

(6) a statement that the applicant, another applicant for a groundwater withdrawal permit, or a permittee holding a groundwater withdrawal permit may request a hearing on this application by filing with the docket clerk, on or before the 30th day after the publication of the notice of the proposed permit, authorization, approval or denial, and technical summary, in the Texas Register, in accordance with §§707.601-.604 of this title.

§707.511. Supplementation of Application Required by Change in Rules.

If any pending application is affected by a change in these rules before final action on the application is taken by the Authority, the applicant shall have a right to submit information as necessary to comply with such change.

§707.512. Withdrawal of Application.

(a) An applicant may submit to the Authority, in writing, a request to withdraw its application at any time before the proposed permit is issued.

(b) If the request to withdraw the application is with prejudice, the Authority shall issue an order dismissing the application with prejudice. For the purposes of this section, a withdrawal of an application with prejudice means that the applicant waives any potential right to refile that application.

(c) If the request to withdraw the application is without prejudice, the general manager must agree, in writing, to such a withdrawal. For the purposes of this section, a withdrawal of an application without prejudice means that the applicant seeks to preserve any potential right to refile that application. If the general manager agrees to a withdrawal without prejudice, the general manager shall submit a recommendation to the Authority which shall include the reasons why he or she believes that such a withdrawal advances the policies set forth in the Act and the Authority's rules. The Authority may issue an order dismissing the application without prejudice or may decline to dismiss the application. Following a dismissal without prejudice, the applicant my file a new application. If the application is for an initial regular permit, the applicant must rely on the original declaration of historical use filed by that applicant.

§707.513. Action by Board on Applications Where There is no Right to a Contested Case Hearing.

(a) Applicability. This section applies to applications for an agricultural conservation loan and for a variance from the comprehensive management plan. This section also applies to the denial of any application listed in §707.515(b) of this title (relating to Actions on Applications by the General Manager) and to a decision of the board regarding the loss of exempt well status.

(b) Scheduling the Board Meeting. Following technical review and the referral of the proposed permit, approval, authorization or denial to the docket clerk by the general manager, the docket clerk shall schedule the presentation of the application and the proposed permit, approval, authorization or denial to the board. The board may reschedule the presentation of the application and the proposed permit, approval, authorization or denial.

(c) Notice of Board Meeting. The docket clerk shall notify the applicant of the date of the board meeting referred to above via certified mail/return-receipt requested. If rescheduled by the board, the docket clerk shall send notice of the rescheduled meeting date to the parties no later than ten days before the rescheduled meeting. In addition, the docket clerk shall provide public notice that the application and the proposed permit, approval, authorization or denial will be considered by the board by including an item on the board's agenda pursuant to the Open Meetings Act. Copies of the application and the proposed permit, approval, authorization or denial shall be made available to the public for inspection and copying at the offices of the Authority during regular business hours.

(d) Consolidation or Severance of Matters. Consistent with notices required by law, the board may consolidate related matters if the consolidation will not injure any party and may save time and expense or otherwise benefit the public interest and welfare. The board may sever issues in a proceeding or hold special hearings on separate issues if doing so will not injure any party and may save time and expense or benefit the public interest and welfare.

(e) Oral Presentation Before the Board. The applicant and the general manager or his or her designee may make an oral presentation at the board meeting at which the application and the proposed permit, approval, authorization or denial are presented to the board. Oral presentations before the board shall be limited to 15 minutes each, excluding time for answering questions, unless the chair or the general counsel establishes other limitations. Before the board meeting, the general counsel may allot time for oral presentations. Oral presentations and responses to questions shall be directed to the board.

(f) Public Comment. In addition, public comment on the application and the proposed permit, approval, authorization or denial will be accepted pursuant to Subchapter C of this Chapter (relating Meetings of the Board).

(g) Upon consideration of the application and the proposed permit, approval, authorization or denial at its meeting, the board may grant or deny an application in whole or in part, dismiss proceedings, amend or modify a proposed permit, or take any other appropriate action.

§707.514. Action by Board on Applications Where There is a Right to a Contested Case Hearing But None Was Requested or Requests Were Withdrawn.

(a) Applicability. This section applies to all applications listed in §707.510(a) of this title (relating to Publication of Notice of Proposed Permit and Technical Summary in the Texas Register and in Local Newspapers) where, after the time for the filing of a hearing request provided in §707.604 of this title (relating to Time for Filing of Request for Contested Case Hearing):

(1) no timely hearing request has been received;

(2) all timely hearing requests have been withdrawn; or

(3) the judge has remanded the application because of settlement.

(b) Scheduling the Board Meeting. Following the expiration of the time to file a hearing request pursuant to §707.604 of this title, and if any of the conditions stated in subsection (a)(1)-(3) of this section have been met, the docket clerk shall schedule the presentation of the application and the proposed permit, approval, authorization or denial to the board. The board may reschedule the presentation of the application and the proposed permit, approval, authorization or denial.

(c) Notice of Board Meeting. The docket clerk shall notify the applicant of the date of the board meeting referred to above via certified mail/return-receipt requested. If rescheduled by the board, the docket clerk shall send notice of the rescheduled meeting date to the parties no later than ten days before the rescheduled meeting. In addition, the docket clerk shall provide public notice that the application and the proposed permit, approval, authorization or denial will be considered by the board by including an item on the board's agenda pursuant to the Open Meetings Act. Copies of the application and the proposed permit, approval, authorization or denial shall be made available to the public for inspection and copying at the offices of the Authority during regular business hours.

(d) Consolidation or Severance of Matters. Consistent with notices required by law, the board may consolidate related matters if the consolidation will not injure any party and may save time and expense or otherwise benefit the public interest and welfare. The board may sever issues in a proceeding or hold special hearings on separate issues if doing so will not injure any party and may save time and expense or benefit the public interest and welfare.

(e) Oral Presentation Before the Board. The applicant and the general manager or his or her designee may make an oral presentation at the board meeting in which the application and the proposed permit, approval, authorization or denial are presented to the board. Oral presentations before the board shall be limited to 15 minutes each, excluding time for answering questions, unless the chair or the general counsel establishes other limitations. Before the board meeting, the general counsel may allot time for oral presentations. Oral presentations and responses to questions shall be directed to the board.

(f) Public Comment. In addition, public comment on the application and the proposed permit, approval, authorization or denial will be accepted pursuant to Subchapter C of this Chapter.

(g) Upon consideration of the application and the proposed permit, approval, authorization or denial at its meeting, the board may grant or deny an application in whole or in part, dismiss proceedings, amend or modify a proposed permit, or take any other appropriate action.

§707.515. Actions on Applications by the General Manager.

(a) The purpose of this section is to delegate authority to the general manager to take action on behalf of the board for the actions listed in subsection (b) of this section.

(b) The general manager may grant the following:

(1) applications for new well construction permits;

(2) applications for exempt well status

(3) applications for permit to install or modify meter or alternative measuring method installation;

(4) applications to:

(A) transfer interim authorization status and amend application for initial regular permit where the location of the point of withdrawal to which the transfer is proposed to occur is West of Cibolo Creek; and

(B) applications to transfer and amend permit where the location of the point of withdrawal to which the transfer is proposed to occur is West of Cibolo Creek;

(5) applications for operation of monitoring well;

(6) applications for conservation plan approval; and

(7) applications for reuse plan approval.

(c) Following technical review, the general manager may grant a permit, authorization or approval under this section if:

(1) the application meets all relevant statutory and administrative criteria; and

(2) the application does not raise new issues that require the interpretation of Authority policy.

(d) The general manager shall inform the applicant of his or her decision, where appropriate, by sending a copy of such permit, authorization or approval along with the technical summary to the applicant by certified mail/return-receipt requested.

§707.516. Corrections to Permits by the General Manager.

(a) The general manager, on his own motion or at the request of a permittee, may make non-substantive corrections to any permit either by reissuing the permit or by issuing an endorsement to the permit, without observing formal amendment or public notice procedures. The general manager must notify the permittee that the correction has been made and forward a copy of the endorsement or corrected permit for filing in the Authority's official records.

(b) The general manager may issue non-substantive permit corrections under this section:

(1) to correct a clerical or typographical error;

(2) to change the mailing address of the permittee, if updated information is provided by the permittee in writing;

(3) if updated information is provided by the permittee, to change the name of an incorporated permittee that amends its articles of incorporation only to reflect a name change, provided that the secretary of state can verify that a change in name alone has occurred;

(4) to describe more accurately the location of the point(s) of withdrawal specified in a permit;

(5) to update or redraw maps that have been incorporated by reference in a permit;

(6) to state more accurately or update any provision in a permit without changing the authorizations or requirements addressed by the provision.

(c) Before the general manager makes a correction to a permit under this section, the general manager shall inform the general counsel of the proposed correction. The general counsel shall act within ten working days of receiving the general manager's proposal. If the general counsel determines that the proposed correction should not be

issued under this section, the general manager shall not issue the correction, but may set the matter for Authority action during a board meeting. If the general counsel fails to act within ten working days, the general manager may issue the correction as proposed.

§707.517. Special Procedures Regarding Loss of Exempt Well Status.

(a) If the Authority receives information from a person other than the well owner indicating that the well no longer qualifies as an exempt well, the general manager shall notify the owner of such information and provide an opportunity for the owner to demonstrate why the exempt well status should not be canceled. Such notification shall be sent to the owner by letter sent via certified mail/return-receipt requested.

(b) Information responding to notice provided by the general manager under subsection (a) of this section must be submitted within 30 days of the owner's receipt of such notice. This time period may be extended by the Authority.

(c) If no such information is submitted, or if upon review of such information, the general manager believes that exempt well status should be canceled, the general manager shall submit a proposed denial of exempt well status to the docket clerk for presentation to the board pursuant to the procedures set forth in §707.513 of this title (relating to Action by Board on Applications where There was no Right to a Contested Case Hearing).

§707.518. Special Procedures Regarding Emergency Permits.

(a) Applicability. This section applies to applications for emergency permits and applications to renew emergency permits.

(b) If upon the completion of the abbreviated technical review pursuant to §707.504(a) of this title (relating to Technical Review), the general manager finds that the issuance of an emergency permit, or the renewal of an emergency permit, is warranted, the general manager shall issue that permit for a term not exceeding 30 days. If the general manager finds that the issuance of an emergency permit, or the renewal of an emergency permit, is not warranted, the general manager shall deny the permit. The applicant shall be informed of the general manager's action and the reasons for that action as soon as possible by letter sent via certified mail/return-receipt request.

(c) Upon the issuance or denial of the emergency permit or renewal, the general manager shall submit the permit, if any, and a statement summarizing the reasons for the general manager's action on the application to the docket clerk.

(d) The docket clerk shall set the application and the statement for presentation to the board at its next meeting in which notice of the board's consideration of the application may be provided to the public pursuant to the Open Meetings Act. The docket clerk shall provide such notice pursuant to the Open Meetings Act.

(e) Following the opportunity for public comment the board may ratify the general managers' action, rescind the action, grant or renew the permit, or modify the permit.

§707.519. Moratorium on Processing of Applications for Additional Regular Permits.

The Authority will not consider any application for an additional regular permit until a final determination has been made on all applications for initial regular permits.

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

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TRD-200005252
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Earliest possible date of adoption: September 10, 2000
For further information, please call: (210) 222-2204

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SUBCHAPTER G. PROCEDURES FOR CONTESTED CASE HEARINGS ON APPLICATIONS

31 TAC §§707.601 - 707.626

The articles or sections of the Act or any other code that are affected by the proposed rule are: §§ 1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), 1.34(a), and 1.34(c) of the Act, and §2001.004(1) of the APA. The sections of Chapter 31, Texas Administrative Code, that are to be affected are §§707.1, 707.101, 707.102, 707.103, 707.104, 707.105, 707.106, 707.201, 707.202, 707.203, 707.204, 707.205, 707.206, 707.207, 707.208, 707.301, 707.302, 707.303, 707.304, 707.305, 707.306, 707.307, 707.308, 707.309, 707.310, 707.311, 707.312, 707.313, 707.314, 707.315, 707.401, 707.402, 707.403, 707.404, 707.405, 707.406, 707.407, 707.408, 707.409, 707.410, 707.411, 707.412, 707.413, 707.414, 707.415, 707.416, 707.417, 707.422, 707.424, 707.426, 707.428, 707.501, 707.502, 707.503, 707.504, 707.505, 707.506, 707.507, 707.508, 707.509, 707.510, 707.511, 707.512, 707.513, 707.514, 707.515, 707.516, 707.517, 707.518, 707.519, 707.601, 707.602, 707.603, 707.604, 707.605, 707.606, 707.607, 707.608, 707.609, 707.610, 707.611, 707.612, 707.613, 707.614, 707.615, 707.616, 707.617, 707.618, 707.619, 707.620, 707.621, 707.622, 707.623, 707.624, 707.625, and 707.626.

§707.601. Applicability.

The provisions of this subchapter apply to contested case hearings on applications before the board. Contested case hearings may be requested and granted in connection with applications for initial regular permits, additional regular permits, term permits, aquifer recharge and storage permits, and recharge recovery permits. Contested case hearings may also be requested and granted in connection with:

(1) applications to transfer interim authorization status and amend application for initial regular permit where the location of the point of withdrawal to which the transfer is proposed is east of Cibolo Creek; and

(2) applications to transfer and amend permit, where the location of the point of withdrawal to which the transfer is proposed is east of Cibolo Creek.

§707.602. Persons Entitled to Request a Contested Case Hearing.

The following persons or entities may request a contested case hearing on an application under this chapter:

(1) the applicant for that permit or approval;

(2) an applicant for another groundwater withdrawal permit issued by the Authority; and

(3) any permittee holding a groundwater withdrawal permit issued by the Authority.

§707.603. Form and Contents of Request for Contested Case Hearing.

(a) A request for a contested case hearing by a person must be in writing and be filed by United States mail, facsimile, or hand-delivery with the docket clerk within the time provided by § 707.604 of this title (relating to Time for Filing of Request for Contested Case Hearing).

(b) A hearing request must substantially comply with the following:

(1) give the name, address, daytime telephone number, and, where possible, fax number, of the person filing the request. If the request is made by a group or association, the request must identify the group and one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) provide evidence of specific facts which the person believes gives rise to the need for a contested case hearing;

(3) request a contested case hearing;

(4) provide any other information requested in the notice of proposed permit and technical summary published in the Texas Register; and

(5) be verified by an affidavit.

(c) Where a request for a contested case hearing is filed by a person other than the applicant, a copy of that request must be served on the applicant at or before the time that the request is filed. The request shall include a certificate indicating the date and manner of service and the name and address of all persons served.

(d) If a person or entity is requesting a contested case hearing on more than one application, a separate request must be filed in connection with each application.

§707.604. Time for Filing of Request for Contested Case Hearing.

Unless a different time limit is specified in the notice of the proposed permit and technical summary, a hearing request must be filed with the docket clerk on or before the 30th day following the date of publication of that notice in the Texas Register.

§707.605. Processing of Hearing Request.

(a) Applicability. The requirements in this section apply only to hearing requests that are filed within the time period specified in §707.604 of this title (relating to Time for Filing of Request for Contested Case Hearing). Hearing requests not filed within the time period specified in § 707.604 of this title shall not be processed and shall be returned by the docket clerk to the person filing the request.

(b) After a hearing request is filed, the docket clerk shall schedule the hearing request for a board meeting.

(c) The docket clerk shall provide notice to the applicant, general manager and any persons making a timely hearing request at least 20 days prior to the first meeting at which the board considers the request. The docket clerk shall explain how the person may submit public comment, explain that the board may hold a public meeting, and explain the requirements of this subchapter.

(d) Persons may submit written responses to the hearing request no later than 20 days before a board meeting at which the board will evaluate the hearing request. Responses shall be filed with the docket clerk and served on the same day to the general manager, the applicant and any persons filing hearing requests.

(e) The person who filed the hearing request may submit a written reply to a response no later than six days before the scheduled board meeting at which the board will evaluate the hearing request. A reply may also contain additional information responding to the notice by the docket clerk required by subsection (d) of this section. A reply shall be filed with the docket clerk and served on the same day to the general manager, the applicant, and any person filing hearing requests.

§707.606. Action by Board on Hearing Request.

(a) The determination of whether a hearing request should be granted is not, in itself, a contested case subject to the APA.

(b) The board will evaluate the hearing request at the scheduled board meeting, and may:

(1) determine that the hearing request does not meet the requirements of this subchapter and deny the hearing request.

(2) determine that the hearing request does not meet the requirements of this subchapter, deny the hearing request, and refer the application to a public meeting to develop public comment before acting on the application; or

(3) determine that a hearing request meets the requirements of this subchapter and direct the docket clerk to refer the application to SOAH for a contested case hearing.

(c) A request for a contested case hearing shall be granted if the request:

(1) is supported by competent evidence;

(2) is submitted by a person entitled to request under § 707.602 of this title (relating to Persons Entitled to Request a Contested Case Hearing);

(3) complies with the requirements set forth in § 707.603 of this title (relating to Form and Contents of Request for Contested Case Hearing); and

(4) is timely filed with the docket clerk.

§707.607. Service of Documents filed in a Contested Case.

(a) Service of all Documents Required. For any document filed with the Authority or the Judge in a contested case, the person filing that document must serve a copy on all parties to the contested case including the General Manager at or before the time that the request is filed.

(b) Certificate of Service. A document presented for filing must contain a certificate of service indicating the date and manner of service and the name and address of each person served. The docket clerk may permit a document to be filed without a certificate of service but will require the certificate be filed promptly thereafter.

§707.608. Delegation to SOAH.

(a) The board delegates to SOAH the authority to conduct contested case hearings designated by the board.

(b) As supplemented by this subchapter, the applicable rules of practice and procedure of SOAH (Title 1, Chapter 155, Texas Administrative Code) govern any contested case hearing of the Authority conducted by SOAH.

§707.609. Referrals to SOAH.

(a) When a case is referred to SOAH by the board, the docket clerk shall:

(1) file with SOAH a completed Request to Docket Case form (or any other form prescribed by SOAH) and otherwise provide any additional information as required by SOAH;

(2) issue public notice of the hearing in accordance with applicable law and Authority rules, including a specific citation to 1 Tex. Admin. Code Chapter 155; and

(3) send a copy of the docket clerk's case file to SOAH.

(b) The Authority shall provide to the judge a list of issues to be addressed. In addition, the board 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.

§707.610. Designation of Parties.

(a) The general manager is a party in all contested case hearings.

(b) The applicant is a party in a contested case hearing on its application.

(c) The person who requested the contested case hearing that was granted by the Authority is a party to that contested case hearing.

(d) An applicant for an initial regular permit who files a notice of party status pertaining to §707.626 of this title (relating to Party Status) is a party in all contested case hearings for which notice has been given.

§707.611. Burden of Proof.

The burden of proof is on the applicant to establish by convincing evidence that he is entitled to have an application for a groundwater withdrawal permit granted.

§707.612. Subpoenas.

(a) Requests for issuance of subpoenas or commissions in a contested case shall be in writing and directed to the Authority.

(b) A party requesting the issuance of a subpoena shall file an original and one copy of the request with the docket clerk who shall arrange for the request to be presented to the board at its next meeting, in compliance with the Open Meetings Act and other applicable law.

(c) If good cause is shown for the issuance of a subpoena, the Authority shall request that the judge issue the subpoena, in compliance with §2001.089 of the Texas Government Code.

§707.613. Remand to Board.

At the request of the applicant, a judge may remand an application to the board if all timely hearing requests have been withdrawn or denied or, if parties have been named, all parties to a contested case reach a settlement so that no facts or issues remain controverted. After remand, the application shall be uncontested, and the applicant shall be deemed to have agreed to the action proposed by the general manager. The docket clerk shall set the application for consideration at a board meeting.

§707.614. Certified Questions.

(a) At any time during a contested case proceeding, on a motion by a party or on the judge's own motion, the judge may certify a question to the Authority.

(b) Issues regarding Authority policy, jurisdiction or the imposition of any sanction by the judge that would substantially impair a party's ability to present its case are appropriate for certification. Policy questions for certification purposes include, but are not limited to:

(1) the Authority's interpretation of its rules and applicable statutes;

(2) which rules or statutes are applicable to a proceeding;

(3) whether Authority policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.

(c) If a question is certified, the judge shall submit the certified issue to the docket clerk. The docket clerk shall place the certified issue on the agenda of the earliest possible meeting of the board that is not earlier than 20 days after its submission, in compliance with the Open Meetings Act and other applicable law. The docket clerk shall give the judge and parties notice of the meeting at which the certified question will be considered. Within ten days after the certified question is filed, parties to the proceeding may file briefs on the certified question. Within ten days of the filing of such briefs, parties may file responses to such brief. Briefs and responses shall be filed with the docket clerk with copies served on the judge. The docket clerk shall provide copies of the certified questions and any briefs and responses to the general counsel and to each board member. The judge may abate the hearing until the Authority answers the certified question, or continue with the hearing if the judge determines that no party will be substantially harmed.

(d) The Authority shall issue a written decision on the certified issue within 60 days following the meeting at which the certified issue is considered. A decision on a certified issue is not subject to a motion for rehearing, appeal or judicial review prior to the issuance of the Authority's final decision in the proceeding.

§707.615. Proposal for Decision.

Following the completion of the contested case hearing, the judge shall submit a proposal for decision to the Authority. A proposal for decision shall, where applicable, include any recommended changes to the permit originally proposed by the general manager.

§707.616. Waiver of Right to Review Judge's Proposal.

Any party may waive the right to review and comment upon the judge's proposal for decision. The waiver shall be either in writing or stated on the record at the hearing.

§707.617. Pleadings Following Proposal for Decision.

(a) Unless right of review has been waived, any party to the contested case hearing may, within 20 days after the date of the judge's submittal of the proposal for decision, file exceptions or briefs in response to the proposal for decision with the docket clerk. Replies to exceptions or briefs, if any, shall be filed within 30 days after the date of submittal of the proposal for decision. Such exceptions, briefs or replies may include proposed findings of fact.

(b) The judge may file an amended proposal for decision in response to exceptions, replies, or briefs submitted by the parties. The parties are not entitled to file exceptions or briefs in response to the amended proposal for decision, but may raise any issues before the Authority as permitted by the Authority at the time of oral presentation.

§707.618. Scheduling of a Meeting of the Board.

(a) The docket clerk, in coordination with the judge, shall schedule the presentation of the proposal for decision to the board. The judge, when submitting the proposal for decision, shall notify the parties of the date of the board meeting and the deadlines for the filing of exceptions and replies. The board may reschedule the presentation of the proposal for decision. The docket clerk shall send notice of the rescheduled meeting date to the parties no later than ten days before the rescheduled meeting.

(b) Consistent with notices required by law, the board may consolidate related matters if the consolidation will not injure any party and may save time and expense or otherwise benefit the public interest and welfare.

(c) The board may sever issues in a proceeding or hold special hearings on separate issues if doing so will not injure any party and may save time and expense or benefit the public interest and welfare.

§707.619. Oral Presentation Before the Board.

(a) Any party to the contested case hearing may make an oral presentation at the board meeting in which the proposal for decision in that case is presented to the board.

(b) Oral presentations before the board shall be limited to 15 minutes each, excluding time for answering questions, unless the chair or the general counsel establishes other limitations. Before the board meeting, the general counsel may allot time for oral presentations. Oral presentations and responses to questions shall be directed to the board.

§707.620. Reopening the Record.

The board, on the motion of any party to a contested case or on its own motion, may order the judge to reopen the record for further proceedings on specific issues in dispute. The order shall include instructions as to the subject matter of further proceedings and the judge's duties in preparing supplemental materials or revised proposals based upon those proceedings for the board's adoption.

§707.621. Decision.

(a) The board shall render its decision upon the expiration of 30 days or later following service of the judge's proposal for decision, unless the parties have waived review. The decision, if adverse to any party, shall include findings of fact and conclusions of law separately stated.

(b) The board's decision will be rendered no more than 90 days after the date of that the proposal for decision is presented to the board, unless the board determines that there is good cause for continuing the proceeding.

§707.622. Motion for Rehearing.

(a) Filing motion. Only a party to the contested case proceeding may file a motion for rehearing. A motion for rehearing is a prerequisite to appeal. The motion shall be filed with the docket clerk within 20 days after the date the party or his attorney of record is notified of the decision or order. A party or attorney of record is presumed to have been notified on the date that the decision or order is mailed by first-class mail. On or before the date of filing of a motion for rehearing, a copy of the motion shall be mailed or delivered to all parties with certification of service furnished to the Authority. The motion shall contain:

(1) the name and representative capacity of the person filing the motion;

(2) the style and official docket number assigned by SOAH, and official docket number assigned by the Authority;

(3) the date of the decision or order; and

(4) a concise statement of each allegation of error.

(b) Reply to motion for rehearing. Only a party to the contested case proceeding may reply to a motion for rehearing. A reply to a motion for rehearing must be filed with the docket clerk within 30 days after the date a party or his attorney of record is notified of the decision or order. A party or attorney of record is presumed to have been notified on the date that the decision or order is mailed by first-class mail.

(c) Ruling on motion for rehearing.

(1) Upon the request of the general counsel or a board member, the motion for rehearing will be scheduled for consideration during a board meeting. Unless the board or the general counsel extends time or rules on the motion for rehearing within 45 days after the date the party or his attorney of record is notified of the decision or order, the motion is overruled by operation of law.

(2) A motion for rehearing may be granted in whole or in part. When a motion for rehearing is granted, the decision or order is nullified. The board may reopen the hearing to the extent it deems necessary. Thereafter, the board shall render a decision or order as required by this subchapter.

(d) Extension of time limits. With the agreement of the parties or on their own motion, the board or the general counsel may, by written order, extend the period of time for filing motions for rehearing and replies and for taking action on the motions so long as the period for taking agency action is not extended beyond 90 days after the decision or order.

(e) Motion overruled. 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 of the decision or order.

§707.623. Decision Final and Appealable.

In the absence of a timely motion for rehearing, a decision or order of the board is final on the expiration of the period for filing a motion for rehearing. If a party files a motion for rehearing, a decision or order of the board is final and appealable on the date of the order overruling the motion for rehearing or on the date the motion is overruled by operation of law.

§707.624. Appeal of Final Decision.

(a) Petition. A person who was a party to a contested case before the Authority and is affected by a final decision or order of the Authority in that case may file a petition for judicial review within 30 days after the decision or order is final and appealable. General procedures for appealing an order of the board in contested cases are governed by provisions of the APA governing judicial review of contested case decisions.

(b) The record. The record in a contested case shall include the following:

(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) summaries of the results of any conferences held before or during the hearing;

(6) proposed findings, exceptions and briefs;

(7) any decision, opinion or report issued by the judge;

(8) pre-filed testimony;

(9) all memoranda or data submitted to or considered by the judge; and

(10) the final order and all interlocutory orders.

§707.625. Costs of Record on Appeal.

A party who appeals a final decision in a contested case shall pay all costs of preparation of the record of the proceeding that is required to be transmitted to the reviewing court. A charge imposed as provided by this section is considered to be a court cost and may be assessed by the court in accordance with the Texas Rules of Civil Procedure.

§707.626. Notice of Party Status.

(a) Any applicant for an initial regular permit may obtain party status in any or all contested cases by filing a notice thereof.

(b) A notice of party status must be in writing and be filed by United States mail, facsimile, or hand-delivery with the docket clerk within the time provided by §707.604 of this title (relating to Time for Filing of Request for Contested Case Hearing).

(c) The notice must contain the following information:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person filing the request. If the request is made by a group or association, the request must identify the group and one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all the official communications and documents for the group.

(2) give the style and docket number of the application for initial regular permit to which party status is sought, unless party status is sought in all contested cases, in which case the notice must so state.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005253
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Earliest possible date of adoption: September 10, 2000
For further information, please call: (210) 222-2204

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CHAPTER 709. FEES

The Edwards Aquifer Authority ("Authority") proposes the adoption of §§709.1, 709.3, 709.5, 709.7, 709.9, 709.11, 709.13, 709.15, 709.17, 709.19, 709.21, 709.23, 709.25, 709.27, 709.29, 709.31, 709.33, and 709.35, 31 TAC, which will consist of provisions relating to the fee structure of the Authority.

Proposed §709.1 would set forth definitions that will apply to all the Authority rules issued for chapter 709. This rule has been written to provide uniform definitions for words and phrases that are expected to be used consistently throughout Chapter 709. Collectively, every definition contained in proposed §709.1 falls into one of the following three categories: (1) new definitions constructed directly from language used in the Act; and (2) new definitions for factually accurate elaboration of a short-form word that is necessary to further fully the develop the relevant rules for this chapter. The definitions are not intended to create substantive meanings separate and apart from what is otherwise intended by the Act. The definitions are designed to provide useful "short-hand" to reduce the amount of cumbersome regulatory language necessary on other Authority rules. Additionally, a purpose of the definitions is to benefit any interested person's understanding of Authority actions by providing direction to the sections in the Act which effectively define a given term.

Definitions for the following new terms simply consist of a reference to language contained in the Act, where such language introduces or makes self-evident a term that is associated with potential future actions by the Authority:

Agricultural use(term established through the effect of §1.29(e) of the Act);

Aquifer use (term established through the effect of §§1.29(b) and (e) of the Act);

Downstream water right holder (term established through the effect of §1.29(c) and (d) of the Act); and

Permit retirement special fee (term established through the effect of §1.29(c) and (d) of the Act).

Definitions for the following terms simply provide factually accurate elaboration of a short-form word for convenience: Annual operating revenue requirements; Cash needs approach; Costs of aquifer management; Fiscal year; Non-agricultural use; Permit retirement revenue requirement; and Unit cost basis.

Proposed §709.3 states that the purpose of subchapter B providing for registration fees is to establish registration fees consistent with § 1.29(g) of the Act.

Proposed §709.5 states the general manager shall assess a $10 fee to file any registration application with the Authority, to be paid at the time the registration is filed.

Proposed §709.7 provides enforcement provisions for failure to pay the registration fee or any other fee that is due and owing from the registrant to the Authority. The section states that the general manager may refuse to accept for filing, or otherwise process, a registration application, or may commence with any other action to enforce the subchapter as authorized by law.

Proposed §709.9 states that the purpose of subchapter C providing for permit application fees is to establish permit application fees consistent with §1.29(f) of the Act.

Proposed §709.11 states the general manager shall impose a $25 fee to file with the Authority an application for a regular, term, or an emergency groundwater withdrawal permit, a well construction permit, monitoring well permit, aquifer recharge and storage permit, and recharge recovery permits. The section further states the fee must be paid at the time the application is filed.

Proposed §709.13 provides enforcement provisions for failure to pay the permit application fee or any other fee that is due and owing from the applicant to the Authority. The section allows the general manager to refuse to accept for filing, or otherwise process, a permit application.

Proposed §709.15 states the purpose of subchapter D providing for aquifer management fees is to establish the formula and procedures for the calculation, assessment, billing and collection of aquifer management fees consistent with §§1.11(f) and 1.29(b) and (e) of the Act.

Proposed §709.17 provides for the applicability of aquifer management fees and states that aquifer management fees shall be assessed by the Authority for all aquifer use except for withdrawals of groundwater from the aquifer made from an exempt well pursuant to §§1.16(c) and 1.33 of the Act.

Proposed §709.19 provides detailed procedures for the adoption and assessment of an aquifer management fee for the succeeding year, which is based on aquifer use. This section provides that the aquifer management fee shall be based on two user blocks: non-agricultural users and agricultural users, and is to be uniform such that the average unit cost of groundwater, regardless of quantity withdrawn, remains constant and is applicable to all the aquifer users within the same user block. The unit cost for the aquifer management fees shall be expressed in dollars per acre-foot per annum.

Proposed §709.21 provides procedures for the billing and collection of aquifer management fees for all persons authorized for aquifer use under interim authorization status pursuant to §1.17 of the Act and the rules of the Authority, or under a final groundwater withdrawal permit issued by the Board. This section further provides that the general manager shall bill to and collect from all aquifer users an aquifer management fee for the fiscal year as calculated and assessed by the general manager pursuant to

this subchapter, unless subject to a user contract under §709.25 of the Act.

Proposed §709.23 states the Authority may not collect a total amount of aquifer management fees that is more than is reasonably necessary for the annual operating revenue requirements for the administration of the Authority, as reflected in the adopted annual fiscal year budget.

Proposed §709.25 provides for user contracts and states that no later than September 30th of the year preceding the calendar year for which a user contract will be effective, the general manager may contract with any non-agricultural user for the user to commit to aquifer use less than an amount to which the user would otherwise be authorized. This section further states that the Authority shall assess aquifer management fees for the reduced amount of contracted aquifer use.

Proposed §709.27 states the aquifer management fee calculated and assessed by the general manager shall be effective on a calendar year basis beginning January 1st through December 31st.

Proposed §709.29 states the Authority may not expend aquifer management fee revenues for purchasing or operating water supply facilities.

Proposed §709.31 provides for the waiver of fees by the Authority and states if the Authority is a creditor of a person required to pay aquifer management fees pursuant to §709.17 (Applicability) and §709.21(a) (Billing and Collection), the general manager may enter into a contract that authorizes a credit against the payment of the fees that may be owed by the person as an offset to all or part of the amount owed to the person by the Authority.

Proposed §709.33 provides for enforcement for nonpayment of delinquent aquifer management fees by the general manager who may suspend the processing of any application pending before the Authority or commence any action to enforce payment and collection as may be authorized by law.

Proposed §709.35 relates to prohibitions and states no person may withdraw groundwater from the aquifer if the person, or his predecessor in interest, is delinquent in the payment of an aquifer management fee that is due and payable to the Authority.

Section 2001.0225 of the Texas Government Code requires an agency to perform, under certain circumstances, a regulatory analysis of "major environmental rules." The Authority has determined that none of the proposed rules are "major environmental rules" as that term is defined by §2001.0225(g)(3) of the Texas Government Code. The basis for this determination is that the proposed rules do not have the specific intent to "protect the environment" or "reduce risks to human health from environmental exposure." The specific intent of these rules is to provide an outline of procedures for implementing and collecting fees by the Authority, resulting in the development of a uniform fee system that generates revenue for the Authority. This revenue is used by the Authority to regulate the use of the aquifer. For this reason, the Authority finds that none of the proposed rules are "major environmental rules" and that, therefore, no further analysis is required by §2001.0225 of the Texas Government Code.

Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act," requires governmental entities, under certain circumstances, to prepare a takings impact assessment ("TIA") in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the proposal of these rules. First, the Authority has made a "categorical determination" that rules establishing procedures for implementing and collecting fees do not affect private real property. The proposed rules set forth the various types of fees imposed by the Authority and provide procedures for the adoption and assessment, as well as the billing and collection, of those fees. They have no direct affect on private real property and may not result in a taking. Second, the Authority's action in adopting these rules is an action that is reasonably taken to fulfill an obligation mandated by state law and is thus excluded from the Texas Private Real Property Rights Preservation Act under §2007.003(b)(4) of the Texas Government Code. See Act §1.11(a); TEXAS GOVERNMENT CODE ANNOTATED §2001.004(1). It was held in *Edwards Aquifer Authority v. Bragg,* S.W.3d., No. 04-99-00059-CV, 2000 WL 35582 (Tex. App. San Antonio 2000, no history), that the Edwards Aquifer Act expressly mandates the adoption of substantive and procedural permitting rules and that such actions are therefore excepted from the Texas Private Real Property Rights Preservation Act. Third, it is the position of the Authority that all valid actions of the Authority are excluded from the Texas Private Real Property Rights Preservation Act under §2007.003(b)(11)(C) of the Texas Government Code as actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the proposal of these rules.

Texas Government Code, §2001.024(a)(4) requires that a fiscal note be prepared which discusses, for each year of the first five years that the proposed rules, if adopted, would be in effect: (1) the additional estimated costs to state and local governments expected as a result of enforcing or administering the rules; (2) the estimated reductions in costs to state and local governments expected as a result of enforcing or administering the rules; (3) the estimated loss or increase in revenues to state or local governments expected as a result of enforcing or administering the rules; and (4) if applicable, that enforcing or administering the proposed rules would have no foreseeable implications relating to costs or revenues of state or local governments.

Gregory M. Ellis, General Manager of the Authority, is responsible for preparing or approving this fiscal note that was prepared in connection with these proposed rules.

A Programmatic Assessment of the Authority's proposed rules, which addresses the combined effects of Chapters 707 (relating to Procedure before the Authority), 709 (relating to Fees), and 711 (relating to Groundwater Withdrawal Permits) has been prepared on behalf of the Authority. The information presented below pertains particularly to the proposed Chapter 709 rules and, by itself, satisfies the requirements of §2001.024(a)(4) of the Texas Government Code. Some of the information presented below is derived from the Programmatic Assessment. Persons interested in viewing the Programmatic Assessment prepared on behalf of the Authority may arrange to do so by contacting the Authority at the telephone number shown below.

In general, as will be discussed in detail below, proposed Chapter 709, both by itself and in conjunction with proposed Chapters 707 (relating to Procedure Before the Authority) and 711 (relating to Groundwater Withdrawal Permits) which are considered for adoption concurrent with this proposed chapter, will have fiscal impacts on local governments, as well as on the Authority.

These proposed rules will directly affect the budgets of local governments within the Authority's boundaries and other jurisdictions that rely on the Edwards Aquifer for water supplies. Local governments close to, but outside, the Authority's boundaries may experience secondary effects from changes in economic activity within the boundaries caused by these proposed rules. Such secondary effects are unlikely to be material to those political subdivisions. The total affected region consists of those counties wholly or partially lying within the Edwards Aquifer Authority's boundaries. The fiscal effects of these proposed rules fall primarily into two categories: (1) increased water supply costs for local governments; and (2) changes in tax revenues resulting from decreased irrigated farming.

The Authority anticipates, on the other hand, that the proposed rules will not have material fiscal impacts upon state government. The most notable impact may be oversight costs incurred by the state. The Act creates an Edwards Aquifer Legislative Oversight Committee which oversees and reviews the Authority's actions. In addition, the Texas Natural Resource Conservation Commission is likewise charged with certain responsibilities to monitor the Authority's activities. The proposed rules may lead to additional oversight expenses incurred by either of these two entities.

A detailed discussion of the fiscal impacts of these proposed rules on state and local governments is included below.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter A will be in effect, there will be no estimated (1) additional costs to state or local governments, (2) reductions in costs to state or local governments, or (3) loss or increase in revenues to state or local governments expected as a result of enforcing or administering the proposed rules in subchapter A. In addition, enforcing or administering the proposed rules in subchapter A does not have foreseeable implications relating to cost or revenues of state or local governments. The basis for this determination is that the adoption of the proposed rules would impose no regulatory requirement or compliance obligations on actions of state or local government that might result in an impact on costs or revenues. The definitions, standing alone, do not impose regulatory requirements. Instead, the definitions are applied through other rules within the chapter. Because the definitions, standing alone, do not impose regulatory requirements but, instead, the definitions are applied through other rules within the chapter which impose regulatory requirements, there are no direct costs expected as a result of adoption of this subchapter for state or local governments. The direct cost would be expected to derive from the substantive rule in which the definition may have been incorporated and will be considered at the appropriate subchapter below in this fiscal note.

Proposed §709.3 merely states the purpose of the proposed subchapter B rules. This section imposes no specific regulatory requirement or compliance obligation that might have a fiscal impact. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there will be no estimated additional costs to state or local governments.

Proposed §709.5 imposes a $10 registration fee for registration of exempt wells and meters. The registration fee is applicable per well or meter. Most, if not all, persons claiming exempt well status or registering a pre-existing meter that the Authority is aware of would do so for only one such well or meter. Thus the $10 fee would be multiplied only by one time. The Authority is not aware of any state or local government that claims exempt well status. The Authority is not aware of any state agency that owns a well that has an existing meter that would be required to be registered. Nor is it likely that in the next five years a state agency will own wells that may have exempt well status or have existing meters. Moreover, it is not likely that in the next five years a local government own a well for which they may claim exempt well status. Some local governments, however, may own wells that have an existing meter that would be required to be registered. Even if a state or local government sought exempt well status or registered an existing meter, the $10 registration fee (even if multiplied by the few individual wells or meters to which the fee may apply) is so immaterial to the overall costs associated with the ownership and operation of the well or meter that any increase in cost would be essentially negligible. In addition, the administrative steps that would be required by a state or local government to pay the $10 registration fee are very minimal one-time staff actions that would be easily absorbed by the current staffing levels of any state or local government. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there will effectively be no materially significant estimated additional costs to state or local governments.

Proposed §709.7 authorizes the Authority to bring enforcement actions for the failure to pay a registration fee that is due and owing. Enforcement would be brought by the Authority only for the volitional conduct of a state or local government that results in non-compliance. As noted above, the administrative steps required to comply with this subchapter are minimal. Additionally, the Authority is not aware of any state or local government that claims exempt well status or owns a well that has an existing meter that would be required to be registered. Nor is it likely that in the next five years a state agency will own wells that may have exempt well status or have existing meters. However, if a state or local government failed to comply with this registration fee, any additional costs would have resulted from their own conduct rather than the operation of this proposed rule. The costs which would be incurred by a state or local government that sought to defend itself against such an enforcement action would so far exceed the cost of compliance that it is difficult to imagine a credible scenario when this might occur. However, if a state or local government did seek to defend itself from having to pay the $10 registration fee, the defense cost could range from many hundreds of dollars to several thousands of dollars depending on the vigor of the defensive efforts, as improbable as this might be. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there will effectively be no estimated additional costs to state or local governments.

Mr. Ellis has determined that for each year of the first five years that the proposed section rules in subchapter B will be in effect, there will be no estimated reductions in costs to state or local governments expected as a result of enforcing or administering these proposed rules. The basis for this determination is that none of the proposed sections in subchapter B have the effect of eliminating or minimizing a regulatory requirement or compliance obligation applicable to state or local governments.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter B will be in effect, there will be no estimated increase in revenues to state and local governments expected as a result of enforcing or administering these proposed rules. The basis for this determination is that none of the proposed sections in subchapter B contain any mechanism for the raising of revenues by state or local governments. In addition, there are no secondary effects due to the operation of any of the proposed rules in subchapter B that affect any known

current revenue streams of state or local government be they by taxation, assessments, fees, or otherwise.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter B will be in effect, there will be no estimated loss in revenues to state or local government expected as a result of enforcing or administering these proposed rules. The basis for this determination is that none of the proposed sections in subchapter B contain any mechanism for the diversion of or reduction in current revenue sources of state or local government. In addition, there are no secondary effects due to the operation of any of the proposed rules in subchapter B that affect any known current revenue streams of state or local governments be they by taxation, assessments, fees, or otherwise.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter B will be in effect, that enforcing or administering these proposed rules does not have foreseeable implications relating to cost or revenues of state or local governments.

Proposed §709.9 merely states the purpose of the proposed subchapter C rules. This section imposes no specific regulatory requirement or compliance obligation that might have a fiscal impact. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there will be no estimated additional costs to state or local governments.

Proposed §709.11 imposes a $25 permit application fee for certain applications. The application fee is applicable per application filed with the Authority. Some state or local governments may in the next five years, file an application to which subchapter C applies. Thus, the $25 fee would be multiplied by the number of applications a state or local government may file. The Authority is not aware of any state government that has or intends to file with the Authority an application for a groundwater withdrawal permit within the next five years. Relative to groundwater withdrawal permits, any local government that is an applicant for an initial regular permit will have already filed the application and will have already paid the $25 application fee. Thus, this proposed section would not apply to applications that would have already been filed. As for term or emergency permits, local governments are not likely to apply for such permits because they are generally unsuitable (except for possible aquifer storage and recovery projects to which term permits may be appropriate) to satisfy the municipal demand requirement these governments would have. Some state or local governments may apply for well construction permits in the next five years. However, for any state or local government that is constructing wells, the Authority would expect the number of applications for well construction by a state or local government to range from zero to ten. Some state or local governments may apply for monitoring well permits in the next five years. However, for any state or local government that seeks a monitoring well permit, the Authority would expect the number of applications for monitoring wells by a state or local government to range from zero to thirty. Relative to aquifer recharge or storage permits, or recharge recovery permits, the Authority does not expect any state agencies to file such applications in the next five years. Although, none are pending, there may be local governments that file applications for aquifer recharge and storage permits, or recharge recovery permits within the next five years. The number of applications per local government interested in such projects is estimated to be from one to two. If a state or local government files the above-mentioned applications for groundwater withdrawal permits, well construction, monitoring well, aquifer recharge and storage, or recharge recovery permits, the number of applications for typical state or local government is expected to range from zero to forty. Therefore, the $25 permit application fee (even if multiplied by the few individual permit applications any particular government may file) is so immaterial to the overall costs associated with cost of the preparing and obtaining the application, and implementing the permit, that any increase in cost would be essentially negligible. In addition, the administrative steps that would be required by a state or local government to pay the $25 permit application fee are very minimal one-time staff actions that would be easily absorbed by the current staffing levels of any state or local government. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there will effectively be no materially significant estimated additional costs to state or local governments.

Proposed §709.13 authorizes the Authority to bring enforcement actions for the failure to pay permit application fees by refusing to process the application. The Authority's refusal to process the application would be only for the volitional conduct of a state or local government that fails to pay the fee. As noted above, the administrative steps required to comply with this subchapter are minimal. If a state or local government failed to comply with this application fee requirement, any additional costs due to the delays associated with the refusal to process the application would have resulted from the government's own conduct rather than the operation of this proposed rule. The costs which would be incurred by a state or local government that sought to defend itself against such refusal to process would so far exceed the cost of compliance that it is difficult to imagine a credible scenario when this might occur. However, if a state or local government did seek to defend itself from having to pay the $25 permit application fee, the defense cost could range from many hundreds of dollars to several thousands of dollars depending on the vigor of the defensive efforts, as improbable as this might be. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there will effectively be no estimated additional costs to state or local governments.

Mr. Ellis has determined that for each year of the first five years that the proposed section rules in subchapter C will be in effect, there will be no estimated reductions in costs to state or local governments expected as a result of enforcing or administering these proposed rules. The basis for this determination is that none of the proposed sections in subchapter C have the effect of eliminating or minimizing a regulatory requirement or compliance obligation applicable to state or local governments.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter C will be in effect, there will be no estimated increase in revenues to state and local governments expected as a result of enforcing or administering these proposed rules. The basis for this determination is that none of the proposed sections in subchapter C contain any mechanism for the raising of revenues by state or local governments. In addition, there are no secondary effects due to the operation of any of the proposed rules in subchapter C that affect any known current revenue streams of state or local government be they by taxation, assessments, fees, or otherwise.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter C will be in effect, there will be no estimated loss in revenues to state or local government expected as a result of enforcing or administering these

proposed rules. The basis for this determination is that none of the proposed sections in subchapter C contain any mechanism for the diversion of or reduction in current revenue sources of state or local government. In addition, there are no secondary effects due to the operation of any of the proposed rules in subchapter C that affect any known current revenue streams of state or local governments be they by taxation, assessments, fees, or otherwise.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter C will be in effect, that enforcing or administering these proposed rules does not have foreseeable implications relating to cost or revenues of state or local governments.

Proposed §709.15 merely states the purpose of the proposed subchapter D rules. This section imposes no specific regulatory requirement or compliance obligation that might have a fiscal impact. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there will be no estimated additional costs to state or local governments.

Proposed §709.17 by creating an exemption from the duty to pay aquifer management fees cannot impose an additional cost. However, as discussed above, no state or local government currently claims exempt well status, nor are any likely to do so in the next five years. Accordingly, no state or local government will likely be able to take advantage of this exemption. However, if they do claim exempt well status, they then will be able to claim the exemption and will not have additional costs associated with the operation of this aspect of proposed §709.17. Therefore, Mr. Ellis has determined that for each year of the first five years that this aspect of proposed §709.17 will be in effect, there will be no estimated additional costs to state or local governments.

Proposed §709.17 also provides that aquifer management fees must be assessed for all aquifer use. The only entities that are eligible to make use of the aquifer are those entities with interim authorization status, or who hold a groundwater withdrawal permit. No state agency currently claims interim authorization status, or is likely to do so in the next five years. Moreover, no state agency is an applicant for an initial regular permit, or likely to become such an applicant in the next five years. State governments may utilize non-Edwards Aquifer water resources, or receive water service based on being a customer of a water utility that does not withdraw groundwater from the Edwards Aquifer. Under this circumstance, proposed §709.17 would have no fiscal impact on the state agency. Therefore, based on the above, Mr. Ellis has determined that for each year of the first five years that this aspect of proposed §709.17 will be in effect, there will be no estimated additional costs to state government fitting into these factual scenarios.

If a state agency did make withdrawals from the aquifer based on obtaining a groundwater withdrawal permit or interim authorization status due to a transfer of an application for an initial regular permit, then the additional costs to the state agency are not expected to be any different than those for local government users of the aquifer as will be discussed below. Moreover, there is the potential for secondary additional costs to state government based on being a customer of a water utility that withdraws groundwater from the Edwards Aquifer to supply its customers. Such utilities will likely pass through the aquifer management fee costs to its customer base as increases in water service rates. The additional costs to the state agency under this circumstance are not expected to be any different than those for local government users of the aquifer as will be discussed below.

Local governments may utilize non-Edwards Aquifer water resources, or receive water service based on being a customer of a water utility that does not withdraw groundwater from the Edwards Aquifer. Under this circumstance, proposed § 709.17 would have no fiscal impact on the local government. Therefore, Mr. Ellis has determined that for each year of the first five years that this aspect of proposed §709.17 rule will be in effect, there will be no estimated additional costs to local government fitting into these factual scenarios.

There are many local governments that make withdrawals from the aquifer currently based on either interim authorization status, and once permits are issued, based on a groundwater withdrawal permit (and more specifically an initial regular permit). There is the potential for secondary additional costs to those local governments who are wholesale customers of a water utility that withdraws groundwater from the Edwards Aquifer to supply its customers. Such utilities will likely pass through the aquifer management fee costs to its customer base as increases in water service rates. The fiscal effects of this aspect of proposed §709.17 may result in increased water supply costs for local governments.

The proposed rules in subchapter D in general, establish the procedures to levy and collect aquifer management fees. Proposed Chapters 707 (relating to Procedure Before the Authority) and 711 (relating to Groundwater Withdrawal Permits) determine a large part of the revenue requirements for which these fees will satisfy the implementation of the Authority's permit program. The revenue requirements for aquifer management fees will depend on the administrative and program budgets adopted by the Authority, and by the market price of voluntary withdrawal reductions based on the abandonment of permit applications and paid for by aquifer management fees.

The estimated aquifer management fees contained in this fiscal note are based on detailed assumptions and a mathematical model. The assumptions include: Estimates of the Authority's operating budget for each of the next five years. The division of withdrawal rights between irrigators (i.e. agricultural users) and other nonagricultural aquifer users. The costs of the contested case hearings process described in the discussion of the fiscal note for proposed Chapter 707. Estimates of the amounts needed to abandon initial regular permit applications for withdrawal reductions in voluntary transactions so that the Authority only issues initial regular permits for 450,000 acre-feet.

Table 709-C shows the results of the model runs. Assuming an average cost of $700 per acre-foot to achieve such withdrawal reductions, the aquifer management fee that would be assessed under proposed §709.17, and developed pursuant to the procedures in proposed §§709.19 and 709.21 will cost each local government about $29 to $38 per year per acre-foot of permitted withdrawals. The cost will likely be at the lower end of the cost range in the early years of the five-year period, rise to the high end of the range by the middle of the five-year period, and fall to the middle of the range thereafter. The first-year estimate assumes that virtually no permits have been issued and that the budget requirement is divided among a relatively large number of existing users with interim authorization status under the rules to be proposed in subchapter D of Chapter 711 (relating to Interim Authorization) and the proposed rules for subchapter G of Chapter 711 (relating to Groundwater Withdrawal Permits). The sharp increase in the second year assumes interim authorizations in excess of initial regular permit amounts and full compensation costs, but minimal water marketing. The final year reflects

all necessary water marketing, 450,000 acre-feet of initial regular permits, and a larger share of initial regular permits held by the nonirrigation sector. Assuming that an acre-foot of water supplies 2.4 households for a year, the additional revenue per household collected by a local government to pay the aquifer management fees is also shown. Local governments of any given size may estimate the impacts of the aquifer management fee rules using the appropriate multiplication.

Figure: 31 TAC, Part 20, Chapter 709, Preamble-1

Proposed §§709.19, 709.21, and 709.27 are basically procedural rules that regulate the internal processes of the Authority in how it calculates, assesses and collects an aquifer management fee. For these purely procedural features of these proposed sections, no specific regulatory requirements or compliance obligations are created that might have a fiscal impact. Therefore, Mr. Ellis has determined that for each year of the first five years that the procedural aspects of these rules will be in effect, there will be no estimated additional costs to state or local governments.

Proposed §709.19 also contains a provision that limits the aquifer management fees assessed against agricultural users to not to exceed 20 percent of that assessed against non-agricultural users. This 20 percent limitation has the effect of adding significant additional costs to what local governments would pay if all aquifer users were assessed on an equal unit basis. Therefore, Mr. Ellis has determined that for each year of the first five years that the 20 percent limitation this rule will be in effect, there will be estimated additional costs to local governments.

Proposed §§709.23 and 709.29 place limitations on the amount of the aquifer management fees the Authority may collect. These sections need to be read in conjunction with proposed §§709.19 and 709.21 to establish the amount of the annual budget that the Authority may adopt each fiscal year at its discretion providing the starting point for the calculation and assessment of the aquifer management fee pursuant to §§709.19 and 709.21. It is this calculated aquifer management fee that is assessed pursuant to proposed §709.17. Based on the above discussion, Mr. Ellis has determined that for each year of the first five years that proposed §§ 709.17, 709.19, 709.21 and 709.23 will be in effect, there will be estimated additional costs to state or local governments as indicated above.

Proposed §§709.25 and 709.31 provide for certain of aquifer management fee reduction contracts and fee waiver agreements that may be entered into. Such contracts could only occur based on the voluntary conduct of the state or local government who may have aquifer management fees due and owning. While state or local governments may chose to reduce or waive all of the duty to pay an aquifer management fee and may incur transaction costs, these costs would have been voluntarily incurred. Therefore, Mr. Ellis has determined that for each year of the first five years that these proposed rules will be in effect, there will be no estimated additional costs to state or local governments.

Proposed §709.33 authorizes the Authority to bring enforcement actions for the failure to pay an aquifer management fee that is due and owing. Enforcement would be brought by the Authority only for the volitional conduct of a state or local government that results in non-compliance by failure to pay an aquifer management fee. Proposed §709.35 prohibits withdrawals by persons who are delinquent in the payment of aquifer management fees. Section 709.35 works in concert with §709.33 as an enforcement tool. Additionally, the Authority is not aware of any state government that currently pays aquifer management fees under interim authorization, or is likely to pay aquifer management fees in the next five years by virtue of holding a groundwater withdrawal permit. On the other hand, many local governments currently pay aquifer management fees under interim authorization, and will pay aquifer management fees in the next five years by virtue of holding a groundwater withdrawal permit. However, if a state or local government failed to pay its aquifer management fees any additional costs to defend itself, other enforcement costs, delay costs resulting from the Authority's refusal to process a pending application, or the inability to make withdrawals would have resulted from their own conduct rather than the operation of this proposed rule. However, if a state or local government did seek to defend itself from having to pay aquifer management fees, the defense costs could range from many hundreds of dollars to many tens of thousands of dollars depending on the vigor of the defensive efforts. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there will effectively be no estimated additional costs to state or local governments.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter D will be in effect, there will be no estimated reductions in costs to state or local governments expected as a result of enforcing or administering these proposed rules. The basis for this determination is that none of the proposed sections in subchapter D have the effect of eliminating or minimizing a regulatory requirement or compliance obligation applicable to state or local governments.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter D will be in effect, there will be no estimated increase in revenues to state and local governments expected as a result of enforcing or administering these proposed rules. The basis for this determination is that none of the proposed sections in subchapter D contain any mechanism for the raising of revenues by state or local governments. In addition, there are no secondary effects to state government due to the operation of any of the proposed rules in subchapter D that affect any known current revenue streams of state government be they by taxation, assessments, fees, or otherwise. However, with respect to local government, a secondary effect of the operation of the proposed rules will be to provide a rational basis for the increase of retail or wholesale water rates by local governments in order to recover the costs of assessment of the aquifer management fees by the Authority. These secondary effects on revenues are estimated to result in no net increase in the revenues of local governments for each year of the first five years that the proposed rules are in effect.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter D will be in effect, there will be no estimated loss in revenues to state or local government expected as a result of enforcing or administering these proposed rules. The basis for this determination is that none of the proposed sections in subchapter D contain any mechanism for the diversion of or reduction in current revenue sources of state or local government. In addition, there are no secondary effects due to the operation of any of the proposed rules in subchapter C that affect any known current revenue streams of state or local governments be they by taxation, assessments, fees, or otherwise.

As discussed above in this subchapter, Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter D will be in effect, that enforcing or administering

these proposed rules may have foreseeable implications relating to cost or revenues of state or local governments.

Section 2001.024(a)(5) of the Texas Government Code requires the Authority to prepare a "public benefit and cost note" assessing the (1) public benefits expected as a result of adoption of the proposed rules, (2) and the probable economic costs to persons required to comply with a rule for each year of the first five years that the rules will be in effect.

Gregory M. Ellis, General Manager of the Authority, is responsible for preparing or approving this public benefit and cost note that was prepared in connection with these proposed rules. Mr. Ellis has approved the following determinations for the first five years that the proposed rules will be in effect.

A Programmatic Assessment of the Authority's proposed rules, which addresses the combined effects of Chapters 707 (relating to Procedure before the Authority), 709 (relating to Fees), and 711 (relating to Groundwater Withdrawal Permits) has been prepared on behalf of the Authority. The information presented below pertains particularly to the proposed Chapter 709 rules and, by itself, satisfies the requirements of §2001.024(a)(5) of the Texas Government Code. Some of the information presented below is derived from the Programmatic Assessment. Persons interested in viewing the Programmatic Assessment prepared on behalf of the Authority may arrange to do so by contacting the Authority at the telephone number shown below.

Generally, a person is required to comply with these proposed rules if he or she (1) owns an pre-existing exempt well or non-irrigation water meter; (2) files and application for a regular, term, or an emergency groundwater withdrawal permit, well construction permit, monitoring well permit, aquifer recharge and storage permit, or recharge recovery permit; (3) for an agricultural user, withdraws groundwater from the Edwards Aquifer pursuant to interim authorization status, or a groundwater withdrawal permit; or (4) for a non-agricultural user, is authorized to withdraw groundwater from the Edwards Aquifer pursuant to interim authorization status, or a groundwater withdrawal permit, irrespective of whether the person actually withdraws groundwater from the aquifer.

In general, as will be discussed in more detail below, Chapter 709, both by itself and in conjunction with proposed Chapters 707 and 711 which are considered for adoption concurrent with this proposed chapter, will have public benefits and economic costs to the regulated community. The benefits and costs of proposed Chapter 709 by itself are presented here. Proposed Chapters 707 and 711 create effects that would not be possible without Chapter 709 and to that extent they are also effects of Chapter 709. The proposed rules for Chapter 707 (relating to Procedure Before the Authority) and Chapter 711 (relating to Groundwater Withdrawal Permits) create demands for funds that are satisfied by these rules. The public benefit and cost notes for those chapters are prepared as part of the concurrent proposal of those chapters.

Most of the public benefits and costs from the proposed rules for Chapters 707, 711, and 709 are the result of Chapter 711. Minor effects result from the proposed rules for Chapter 707, which specifies the Authority's administrative procedures for its permitting program. More significant effects result from the proposed rules for Chapter 709, which specify the procedures for establishing the Authority's fees. These effects are identified in separate assessments of the proposed rules for Chapters 707 and 711.

Chapter 709 contains proposed rules establishing fees to be charged by the Authority. Registration and application fees (subchapters B and C) are extremely small (typically $10 to $25 per instrument filed) and do not have significant effects. The principal effects of the proposed rules for Chapter 709 arise from Subchapter D, which establishes aquifer-management fees that will be the principal source of revenue supporting the Authority's aquifer-management programs. The revenue requirements to be satisfied by these fees are determined by the proposed rules for Chapters 707 and 711. Revenue requirements will depend on the budgets adopted by the Authority's Board and by the costs to compensate for voluntary withdrawal reductions.

Management of the Edwards Aquifer will require ongoing actions by the Authority, with a consequent cost in financial resources for staffing, operations, support services, and implementation of specific provisions required by the Act. The Authority's fees assessment, billing, collecting, and expenditures will provide the following public benefits: 1. The raising of funds in an equitable manner for the Authority to implement its aquifer management and regulatory programs; 2. The equitable and efficient balancing of the needs and interests of existing users and affected stakeholders in the region; 3. The accomplishment of the transition away from near-total reliance on the aquifer as a water supply in a way that minimizes economic and social disruption; 4. The facilitation of the development of a regional water market to efficiently allocate water from the aquifer to its highest and best use; 5. Ensuring effective local management of the aquifer.

The public costs of the proposed rules for Chapter 709 are principally economic costs to persons required to comply with these proposed rules. Applicants for an initial regular permit have already paid an application fee and are also currently paying aquifer management fees. Aquifer management fees levied on permit holders are expected to increase. Currently, non-irrigation fees are charged based on interim authorizations. The proposed rules will charge aquifer management fees based on the groundwater withdrawal amount authorized in an initial regular permit, a quantity smaller than the interim authorization amount. When the total quantity of acre-feet being charged fees decreases, the charge per acre-foot authorization unit of withdrawal will increase.

The Authority's budget will increase because of costs for contested cases and to pay compensation to reduce withdrawals in accordance with the proposed rules for Subchapter G of Chapter 711, and the procedural rules in proposed Chapter 707.

The estimates summarized below represent those primary costs to persons required to comply with these rules: 1. For non-irrigators, annual aquifer management fees are projected to increase from the current $18.50 per acre-foot of authorized withdrawals to between $28.90 and $33.32 per year for each acre-foot permitted; 2. For agricultural users (i.e. irrigators), the proposed § 709.19 specifies aquifer management fees will be 20% of the rate for non-agricultural users (i.e. non-irrigators). Under the same assumptions used above, the agricultural fee would increase from $3.40 to between $5.20 and $6.00. These costs are the unavoidable consequences of implementing the Act.

There is a complex relationship between the aquifer management fees that will be charged to permit holders to pay for the withdrawal reductions (i.e. abandonment of all or part of an application for an initial regular permit) and the compensation those accepting reductions will receive. The relationship reflects several factors: All applicants with interim authorization status and

holders of initial regular permits will be charged aquifer management fees. Only those applicants who chose to be compensated will receive compensation. Compensation for those who partially or totally agree to withdrawal reduction by abandoning all or part of an application for an initial regular permit will probably be financed with revenue bonds or through structured settlements to be paid out over a period of up to 30 years. Agricultural users (i.e. irrigators) will pay lower fees than other non-agricultural users. This will encourage municipal and industrial users who acquire rights for future growth requirements to lease those rights to irrigators. Thus, municipal and industrial users will benefit both by avoiding aquifer management fees and by receiving lease payments. Irrigators with the highest marginal productivity of water will be able to afford the lease payments and will benefit from the additional farm income.

The public benefits and costs of these proposed rules are considered from the standpoint of the potentially affected parties who fall into three broad categories. This note will consider the effects of the rules on each of the following groups: Irrigators; and Municipal and industrial users.

The public benefits and costs for the proposed rules in chapter 709 are discussed in greater detail below.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter A will be in effect, the expected public benefits of the definitions are as follows: 1. Definitions are provided for terms used in the Act that are not defined, but for which definitions would be useful; 2. The use of definitions promotes consistency among the various substantive sections in the rules of the Authority in which they may be employed; 3. The use of definitions allows for "short-hand" to reduce the amount of cumbersome regulatory language necessary in other Authority rules; and 4. The definitions add clarity and fill in necessary gaps in the Act in order to properly implement the Act.

The Authority anticipates there will be no probable economic costs to persons required to comply with the proposed rules in subchapter A. The basis for this determination is that the adoption of the proposed rule would impose no regulatory requirement or compliance obligations on actions of persons required to comply with proposed subchapter A. The definitions, standing alone, do not impose regulatory requirements. Instead, the definitions are applied through other rules within the chapter. Because the definitions, standing alone, do not impose regulatory requirements but, instead, the definitions are applied through other rules within the chapter which impose regulatory requirements, there are no direct costs expected as a result of adoption of this subchapter. Any direct costs would be expected to derive from the substantive rule in which the definition may have been incorporated and will be considered at the appropriate subchapter below in this public benefit and note. Therefore, Mr. Ellis has determined that for each year of the first five years that this proposed rule will be in effect, there will be no estimated economic costs to persons required to comply with this proposed rule.

Mr. Ellis has determined that for each year of the first five years that proposed §709.3 will be in effect, the expected public benefits are that the public will have notice of the section of the Act that subchapter B implements.

Mr. Ellis has determined that for each year of the first five years that proposed §709.5 will be in effect, the expected public benefits are: (1) that the Authority will receive revenue from the user group that is most affected by the Authority's well registration program to offset a part, albeit by a very small amount, of the costs of its well registration program; and (2) the amount is small enough so as not to discourage persons from registering their exempt wells thereby improving the data base of the Authority for these wells.

Mr. Ellis has determined that for each year of the first five years that proposed §709.7 will be in effect, the expected public benefit is that compliance with the registration fee program of the Authority is encouraged.

Proposed §709.3 merely states the purpose of the proposed subchapter B rules. This section imposes no specific regulatory requirement or compliance obligation that might have a fiscal impact. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there will be no probable economic costs to person required to comply with these rules.

Proposed §709.5 imposes a $10 registration fee for registration of exempt wells and meters. The registration fee is applicable per well or meter. Most, if not all, persons claiming exempt well status or registering a pre-existing meter that the Authority is aware of would do so for only one such well or meter. Thus the $10 fee would be multiplied only by one time. There are many persons who claim exempt well status or that own a well that has an existing meter that would be required to be registered. However, the $10 registration fee (even if multiplied by the few individual wells or meters to which the fee may apply) is so immaterial to the overall costs associated with the ownership and operation of the well or meter that any increase in cost would be essentially negligible. In addition, the administrative steps that would be required by a person to pay the $10 registration fee are very minimal one-time actions that would be easily absorbed by the persons owning such wells or meters. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there are materially insignificant probable economic costs to persons required to comply with these rules.

Proposed §709.7 authorizes the Authority to bring enforcement actions for the failure to pay a registration fee that is due and owing. Enforcement would be brought by the Authority only for the volitional conduct of a person that results in non-compliance. As noted above, the administrative steps required to comply with this subchapter are minimal. However, if a person failed to comply with this registration fee, any additional costs would have resulted from their own conduct rather than the operation of this proposed rule. The costs which would be incurred by a person that sought to defend itself against such an enforcement action would so far exceed the cost of compliance that it is difficult to imagine a credible scenario when this might occur. However, if a person did seek to defend itself from having to pay the $10 registration fee, the defense cost could range from many hundreds of dollars to several thousands of dollars depending on the vigor of the defensive efforts, as improbable as this might be. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there are no probable economic costs to person required to comply with these rules.

Mr. Ellis has determined that for each year of the first five years that proposed §709.9 will be in effect, the expected public benefits are that the public will have notice of the section of the Act that subchapter C implements.

Mr. Ellis has determined that for each year of the first five years that proposed §709.11 will be in effect, the expected public benefits are: (1) that the Authority will receive revenue from the user group that is most affected by the Authority's permit application

program to offset a part, albeit by a very small amount, of the costs of this program; and (2) the amount is small enough so as not to discourage persons from filing permit applications thereby improving the data base of the Authority.

Mr. Ellis has determined that for each year of the first five years that proposed §709.13 will be in effect, the expected public benefit is that compliance with the application fee program of the Authority is encouraged.

Proposed §709.9 merely states the purpose of the proposed subchapter C rules. This section imposes no specific regulatory requirement or compliance obligation that might have a fiscal impact. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there will be no probable economic costs to person required to comply with these rules.

Proposed §709.11 imposes a $25 permit application fee for certain applications. The application fee is applicable per application filed with the Authority. Many persons in the next five years may file applications to which subchapter C applies. Thus, the $25 fee would be multiplied by the number of applications a person may file. Persons may file an application for a groundwater withdrawal permit within the next five years. Relative to groundwater withdrawal permits, any person that is an applicant for an initial regular permit will have already filed the application and will have already paid the $25 application fee. Thus, this proposed section would not apply to applications that would have already been filed. As for term or emergency permits, persons are not likely to apply for such permits because they are generally unsuitable (except for possible aquifer storage and recovery projects to which term permits may be appropriate) to satisfy the demand requirements these person may have. Some persons may apply for well construction permits in the next five years. However, for any person that is constructing wells, the Authority would expect the number of applications for well construction by a person to range from zero to two. Some persons may apply for monitoring well permits in the next five years. However, for any person that seeks a monitoring well permit, the Authority would expect the number of applications for monitoring wells by a person to range from zero to three. Relative to aquifer recharge or storage permits, or recharge recovery permits, there may be persons that file applications for aquifer recharge and storage permits, or recharge recovery permits within the next five years. The number of applications per person interested in such projects is estimated to be from one to two. If a person files the above-mentioned applications for groundwater withdrawal permits, well construction, monitoring well, aquifer recharge and storage, or recharge recovery permits, the number of applications for a typical person is expected to range from zero to forty. Therefore, the $25 permit application fee (even if multiplied by the few individual permit applications any particular person may file) is so immaterial to the overall costs associated with cost of the preparing and obtaining the application, and implementing the permit, that any increase in cost would be essentially negligible. In addition, the administrative steps that would be required by a person to pay the $25 permit application fee are very minimal one-time actions that would be easily absorbed by the person proposing the project. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there will effectively be no materially significant probable economic costs to persons required to comply with these rules.

Proposed §709.13 authorizes the Authority to bring enforcement actions for the failure to pay permit application fees by refusing to process the application. The Authority's refusal to process the application would be only for the volitional conduct of a person that fails to pay the fee. As noted above, the administrative steps required to comply with this subchapter are minimal. If a person failed to comply with this application fee requirement, any additional costs due to the delays associated with the refusal to process the application would have resulted from the person's own conduct rather than the operation of this proposed rule. The costs which would be incurred by a person that sought to defend itself against such refusal to process would so far exceed the cost of compliance that it is difficult to imagine a credible scenario when this might occur. However, if a person did seek to defend itself from having to pay the $25 permit application fee, the defense cost could range from many hundreds of dollars to several thousands of dollars depending on the vigor of the defensive efforts, as improbable as this might be. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there will effectively be no probable economic costs to person required to comply with these rules.

Mr. Ellis has determined that for each year of the first five years that proposed §709.15 will be in effect, the expected public benefits are that the public will have notice of the section of the Act that subchapter D implements.

Mr. Ellis has determined that for each year of the first five years that proposed §709.17 will be in effect, the expected public benefits are as follows: 1. the Authority will receive revenue from the user group that is most affected by the Authority's permit aquifer management program to offset of the costs of managing and regulatory the aquifer; 2. the public benefits identified in the public benefit and cost note for chapter 711 (relating to Groundwater Withdrawal Permits) may be fostered and achieved because the Authority will have revenue to implement the substantive provisions of chapter 711; and 3. the public benefits identified in the public benefit and cost note for chapter 707 (relating to Procedure before the Authority) may be fostered and achieved because the Authority will have revenue to implement the procedural provisions Chapter 707.

Mr. Ellis has determined that for each year of the first five years that proposed §709.19 will be in effect, the expected public benefits are as follows: 1. the public will have notice of the aquifer management fee adoption and assessment procedures that will be used by the Authority; 2. the board of directors of the Authority retains the discretion as elected officials to establish a budget to provide fees to implement the Authority's aquifer management and regulatory programs; and 3. the aquifer management fee is equitably established by providing for a differential fee between agricultural users and non-agricultural users by helping to keep irrigation affordable at a very small unit cost to municipal and industrial users, who for the most part have much less economic sensitivity to the price of water.

Mr. Ellis has determined that for each year of the first five years that proposed §709.21 will be in effect, the expected public benefits are as follows: 1. the public will have notice of the aquifer management fee billing and collecting procedures that will be used by the Authority; 2. installment payment of aquifer management fees is permitted; and 3. agricultural users are billed the aquifer management fee based on actual withdrawals.

Mr. Ellis has determined that for each year of the first five years that proposed §709.23 will be in effect, the expected public benefit is that aquifer management fees will be reasonable and used only for the Authority's aquifer management and regulatory programs.

Mr. Ellis has determined that for each year of the first five years that proposed §709.25 will be in effect, the expected public benefit is to (1) encourage conservation of the use of groundwater from the aquifer; (2) maintain or increase spring flows at Comal and San Marcos Springs; (3) maintain or increase downstream uses; (4) increase protection for federally listed threatened or endangered species; (5) maintain higher water levels in the aquifer; (6) reduce frequency of initial regular permits being interrupted; and (7) create incentive for more efficient water use and management.

Mr. Ellis has determined that for each year of the first five years that proposed §709.27 will be in effect, the expected public benefit is to coincide payment cycles with the calendar year to foster economic planning on an annual basis.

Mr. Ellis has determined that for each year of the first five years that proposed §709.29 will be in effect, the expected public benefit is to (1) recognize the traditional role of water utilities in owning, financing, constructing, operating, and maintaining water supply facilities, and (2) assess the costs of the project to the customers of the project sponsor that will primarily benefit from the construction of the project.

Mr. Ellis has determined that for each year of the first five years that proposed §709.31 will be in effect, the expected public benefit is to reduce administrative paperwork associated with claims offsets.

Mr. Ellis has determined that for each year of the first five years that proposed §§709.33 and 709.35 will be in effect, the expected public benefit is that compliance with the aquifer management fee program of the Authority will be encouraged.

Proposed §709.15 merely states the purpose of the proposed subchapter D rules. This section imposes no specific regulatory requirement or compliance obligation that might have a fiscal impact. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there will be no probable economic costs to persons required to comply with these rules.

Proposed §709.17, by creating an exemption from the duty to pay aquifer management fees on exempt wells, cannot impose an additional cost on owners of such wells. Many persons currently claim exempt well status and others are likely to do so in the next five years. Therefore, persons whose wells qualify for exempt well status will be able to claim the exemption and will not have additional costs associated with the operation of this aspect of proposed §709.17. By exempting owners of exempt wells from the payment of aquifer management fees, the Authority estimates it would not reduce its revenues for the next five years because any fees not assessed against owners of exempt wells would be made up by assessing the fee against owners of non-exempt wells. This would result in the amount of the aquifer management fee that would be required to be paid by owners of non-exempt wells in the estimated range of $250,000 to $500,000 over the next five years. These amounts are estimated to represent between 2 and 4 percent of the potential budget of the Authority over the next five years. Therefore, Mr. Ellis has determined that for each year of the first five years that this aspect of proposed § 709.17 will be in effect, there will be no probable economic costs to persons owning exempt wells required to comply with these rules. In addition, Mr. Ellis has determined that for each year of the first five years that this aspect of proposed §709.17 will be in effect, there will be probable economic costs to persons owning non-exempt wells required to comply with these rules in the range of 2 to 4 percent below the aquifer management fees estimated below.

Proposed §709.17 also provides that aquifer management fees must be assessed for all aquifer use. The only entities that are eligible to make use of the aquifer are those entities with interim authorization status, or who hold a groundwater withdrawal permit. Many persons currently claim interim authorization status, or are likely to do so in the next five years. Moreover, no state agency is an applicant for an additional regular permit, or likely to become such an applicant in the next five years. Persons may utilize non-Edwards Aquifer water resources, or receive water service based on being a customer of a water utility that does not withdraw groundwater from the Edwards Aquifer. Under this circumstance, proposed §709.17 would have no fiscal impact on the persons. Therefore, based on the above, Mr. Ellis has determined that for each year of the first five years that this aspect of proposed § 709.17 rule will be in effect, there will be no probable economic costs to persons required to comply with these rules.

Persons may utilize non-Edwards Aquifer water resources, or receive water service based on being a customer of a water utility that does not withdraw groundwater from the Edwards Aquifer. Under this circumstance, proposed § 709.17 would have no fiscal impact on the person. Therefore, Mr. Ellis has determined that for each year of the first five years that this aspect of proposed §709.17 rule will be in effect, there will be no probable economic costs to persons required to comply with these rules.

There are many persons that make withdrawals from the aquifer currently based on either interim authorization status, and once permits are issued, based on a groundwater withdrawal permit (and more specifically an initial regular permit). There is also the potential for secondary additional costs to those persons who are wholesale or retail customers of a water utility that withdraws groundwater from the Edwards Aquifer to supply its customers. Such utilities will likely pass through the aquifer management fee costs to its customer base as increases in water service rates. However, these persons who are wholesale or retail customers of a water utility would not be persons required to comply with these rules and, therefore, the Authority has not assessed the secondary impacts of these customers.

The proposed rules in subchapter D in general, establish the procedures to levy and collect aquifer management fees. Proposed Chapters 707 (relating to Procedure Before the Authority) and 711 (relating to Groundwater Withdrawal Permits) determine a large part of the revenue requirements for which these fees will satisfy the implementation of the Authority's permit program. The revenue requirements for aquifer management fees will depend on the administrative and program budgets adopted by the Authority, and by the market price of voluntary withdrawal reductions based on the abandonment of permit applications paid for by aquifer management fees.

The estimates summarized below represent those primary costs to persons required to comply with these rules: 1. For non-irrigators, annual aquifer management fees are projected to increase from the current $18.50 per acre-foot of authorized withdrawals to between $28.90 and $33.32 per year for each acre-foot permitted; 2. For agricultural users (i.e. irrigators), the proposed § 709.19 specifies that aquifer management fees will be 20% of the rate for non-agricultural users (i.e. non-irrigators). Under the same assumptions used above, the agricultural fee would increase from $3.40 to between $5.20 and $6.00.

These costs are the unavoidable consequences of implementing the Act.

There is a complex relationship between the aquifer management fees that will be charged to permit holders to pay for the withdrawal reductions (i.e. abandonment of all or part of an application for an initial regular permit) and the compensation those accepting reductions will receive. The relationship reflects several factors: All applicants with interim authorization status and holders of initial regular permits will be charged aquifer management fees. Only those applicants who chose to be compensated will receive compensation. Compensation for those who partially or totally agree to withdrawal reduction by abandoning all or part of an application for an initial regular permit will probably be financed with revenue bonds or through structured settlements to be paid out over a period of up to 30 years. Agricultural users (i.e. irrigators) will pay lower fees than other non-agricultural users. This will encourage municipal and industrial users who acquire rights for future growth requirements to lease those rights to irrigators. Thus, municipal and industrial users will benefit both by avoiding aquifer management fees and by receiving lease payments. Irrigators with the highest marginal productivity of water will be able to afford the lease payments and will benefit from the additional farm income.

The public benefits and costs of these proposed rules are considered from the standpoint of the potentially affected parties who fall into three broad categories. This note considers the effects of the rules on each of the following groups: Irrigators; and Municipal and industrial users. The estimated aquifer management fees contained in this public benefit and cost note are based on detailed assumptions and a mathematical model. The assumptions include: Estimates of the Authority's operating budget for each of the next five years. The division of withdrawal rights between irrigators (i.e. agricultural users) and other nonagricultural aquifer users. The costs of the contested case hearings process described in the discussion of the fiscal note for proposed Chapter 707. Estimates of the amounts needed to abandon initial regular permit applications for withdrawal reductions in voluntary transactions so that the Authority only issues initial regular permits for 450,000 acre-feet.

Table 709-C shows the results of the model runs. Assuming an average cost of $700 per acre-foot to achieve such withdrawal reductions, the aquifer management fee that would be assessed under propose §709.17, and developed pursuant to the procedures in proposed §§709.19 and 709.21 will cost each person about $29.00 to $38.00 per year per acre-foot of permitted withdrawals. The cost will likely be at the lower end of the cost range in the early years of the five-year period, rise to the high end of the range by the middle of the five-year period, and fall to the middle of the range thereafter. The first-year estimate assumes that virtually no permits have been issued and that the budget requirement is divided among a relatively large number of existing users with interim authorization status under the rules to be proposed in subchapter D of Chapter 711 (relating to Interim Authorization) and the proposed rules for subchapter G of Chapter 711 (relating to Groundwater Withdrawal Permits). The sharp increase in the second year assumes interim authorizations in excess of initial regular permit amounts and full compensation costs, but minimal water marketing. The final year reflects all necessary water marketing, 450,000 acre-feet of initial regular permits, and a larger share of initial regular permits held by the nonirrigation sector. Assuming that an acre-foot of water supplies 2.4 households for a year, the additional revenue per household collected by a person to pay the aquifer management fees is also shown. Persons with water supply requirements of any given size may estimate the impacts of the aquifer management fee rules using the appropriate multiplication.

Figure: 31 TAC, Part 20, Chapter 709, preamble-2

Proposed §§709.19, 709.21, and 709.27 are basically procedural rules that regulate the internal processes of the Authority in how it calculates, assesses and collects an aquifer management fee. For these purely procedural features of these proposed sections, no specific regulatory requirements or compliance obligations are created that might have a fiscal impact. Therefore, Mr. Ellis has determined that for each year of the first five years that the procedural aspects of these rules will be in effect, there will be no probable economic costs to persons required to comply with these rules.

Proposed §709.19 also contains a provision that limits the aquifer management fees assessed against agricultural users to not to exceed 20 percent of that assessed against non-agricultural users. This 20 percent limitation has the effect of adding significant additional costs to what non-agricultural persons would pay if all aquifer users were assessed on an equal unit basis. Because §129(e) of the Act does not authorize the Authority to assess aquifer management fees equally to all users and requires the imposition of the 20 percent maximum rule, the Authority has not assessed this scenario to determine the fiscal effects on all agricultural and non-agricultural users in light of the 20 percent rule. The Authority may not assess the aquifer management fees in a rate in excess of the 20 percent limit and, therefore, the Authority has not analyzed the fiscal effects of this scenario. The Authority may assess the aquifer management fee against agricultural users at a percentage below the 20 percent limit, however, the Authority has not exercised its discretion to do so. The aquifer management fee revenues associated with agricultural users currently represents an estimated range of 4 to 6 percent of the total aquifer management fee revenues generated during any particular fiscal year. Because this percentage is such a minor component of the overall revenue base of the Authority, any setting of the aquifer management fee percentage for agricultural users below the 20 percent maximum rate will increase in an insignificant amount the aquifer management fee that would be assessed against non-agricultural users. Therefore, Mr. Ellis has determined that for each year of the first five years that the 20 percent limitation will be in effect, there will be probable economic costs to persons as discussed above.

The proposed rules define "agricultural use" to mean "irrigation use" only as defined in proposed §709.1, instead of also including nurseries, aquaculture, feedlot operations, and other users that may qualify as agricultural users under other laws. As a result, these other categories of users would not benefit from the 20 percent limitation. The aggregate annual groundwater withdrawals from these other categories of users is estimated to be 0 to 53,000 acre feet per year. As such, the potential aquifer management fee cost for users in these categories if assessed as non-agricultural users is estimated to be up to $2,000,000. If these users are assessed based on the 20 percent agricultural use fee rate then the aquifer management fee revenues are estimated to be up to $385,000. Therefore, Mr. Ellis has determined that for each year of the first five years that the 20 percent limitation will be in effect, the probable economic costs to these categories of users that are not classified as agricultural users is estimated to be $385,000 to $1,615,000.

Proposed §§709.23 and 709.29 place limitations on the amount of the aquifer management fees the Authority may collect. These sections need to be read in conjunction with proposed §§709.19 and 709.21 to establish the amount of the annual budget that the Authority may adopt each fiscal year at its discretion providing the starting point for the calculation and assessment of the aquifer management fee pursuant to §§709.19 and 709.21. It is this calculated aquifer management fee that is assessed pursuant to proposed §709.17.

Based on the above discussion, Mr. Ellis has determined that for each year of the first five years that proposed §§709.17, 709.19, 709.21 and 709.23 will be in effect, there will be probable economic costs to persons required to comply with these rules as indicated above.

Proposed §§709.25 and 709.31 provide for certain of aquifer management fee reduction contracts and fee waiver agreements that may be entered into. Such contracts could only occur based on the voluntary conduct of persons who may have aquifer management fees due and owing. While persons may choose to reduce or waive all of the duty to pay an aquifer management fee and may incur transaction costs, these costs would have been voluntarily incurred. Therefore, Mr. Ellis has determined that for each year of the first five years that these proposed rules will be in effect, there will be no probable economic costs to persons.

Proposed §709.33 authorizes the Authority to bring enforcement actions for the failure to pay an aquifer management fee that is due and owing. Enforcement would be brought by the Authority only for the volitional conduct of a person that results in non-compliance by failure to pay an aquifer management fee. Proposed §709.35 prohibits withdrawals by persons who are delinquent in the payment of aquifer management fees. §709.35 works in concert with §709.33 as an enforcement tool. If a person failed to pay its aquifer management fees, any additional costs to defend itself, other enforcement costs, delay costs resulting the Authority's refusal to process a pending application, or the inability to make withdrawals would have resulted from their own conduct rather than the operation of this proposed rule. However, if a person did seek to defend itself from having to pay aquifer management fees, the defense costs could range from many hundreds of dollars to many tens of thousands of dollars depending on the vigor of the defensive efforts. Therefore, Mr. Ellis has determined that for each year of the first five years that this rule will be in effect, there will effectively be no probable economic costs to persons required to comply with these rules.

Section 2001.022 of the Texas Government Code requires agencies to request that the Texas Workforce Commission prepare a Local Employment Impact Statement in connection with certain proposed rules. Under the appropriate circumstances, the Commission is then to prepare, within 25 days, an impact statement which includes a description of the probable effects of the rule on employment in each geographic area affected by the rules for each year of the first five years that the rules will be in effect. On April 21, 2000, after having determined that the proposed Chapter 709 rules may affect a local economy, the Authority submitted to the Commission a copy of the proposed Chapter 709 rules and other supporting and initial information, including information that the Commission requires on a form prescribed by the Commission. On April 28, 2000, the Authority provided to the Commission certain supplemental information relating to these rules.

In a letter to Gregory M. Ellis, dated May 19, 2000, the Commission stated, in regard to the "Authority's Draft Proposed Rules 31 TAC 709 . . . concerning Fees as follows: After reviewing the information provided to our Department, there is no apparent basis to refute the proposed employment impacts outlined in the information submitted on behalf of the Authority. Our data will not confirm nor deny the potential lost jobs nor the newly created jobs based upon the impact of these proposed rules.

This letter does not constitute a Local Employment Impact Statement because it does not meet the criteria identified in §2001.022(a) of the Texas Government Code. Because the Commission did not prepare and deliver to the Authority a Local Employment Impact Statement within 25 days after the date on which the Commission received the proposed rules, the proposed rules are presumed not to affect local employment pursuant to §2001.022(e) of the Texas Government Code. Accordingly, there is no Local Employment Impact Statement required by §2001.024(a)(6) of the APA to be included in this Notice of Proposed Rule.

Interested persons may submit written comments on the proposed rules. Comments must be submitted in writing to Brenda Davis, Docket Clerk, Edwards Aquifer Authority, P.O. Box 15830, 1615 N. St. Mary's St., San Antonio, Texas 78212-9030, within 30 days of the publication of this notice in the *Texas Register*. The written comments should be filed on 8 1/2 x 11 inch paper and be typed or legibly written. Written comments must indicate whether the comments are generally directed at all of the proposed rules, or whether they are directed at specific proposed rules. If directed at specific proposed rules, the number of the proposed rule must be identified and followed by the comments thereon.

The Authority has scheduled the following public hearings on this proposed rule: Wednesday, August 9, 2000, 6:00 p.m., Conference Center Edwards Aquifer Authority, 1615 N. St. Mary's San Antonio, Texas 78215, (210) 222-2204; Tuesday, August 15, 2000, 6:00 p.m., New Braunfels Civic Center, 380 S. Seguin Avenue New Braunfels, Texas 78130, (830) 625-2385; Thursday, August 17, 2000, 6:00 p.m., St. Paul's Lutheran Church, 1303 Avenue M Hondo, Texas 78861,(830) 426-3222; Tuesday, August 22, 2000, 6:00 p.m., Sgt. Willie DeLeon Civic Center, 300 E. Main Street Uvalde, Texas 78801, (830) 278-9922; Thursday, August 24, 2000, 6:00 p.m., San Marcos Activity Center, 501 E. Hopkins San Marcos, Texas 78666, (512) 393-8280.

The new sections are proposed pursuant to §§1.08(a), 1.11(a), (b), (d)(2), (f), and (h), 1.15(a), 1.16(b) and (d)(1), 1.29(a), (b), (c), (d), (e), (f), (g), and (h), 1.36(b), 1.44(c)(2) of the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634 ("Act"); §2001.004(1) of the Texas Administrative Procedure Act (TEXAS GOVERNMENT CODE ANNOTATED §§ 2001.001-.902 (Vernon 2000)) ("APA"); and §36.205 of the Texas Water Code (TEXAS GOVERNMENT CODE ANNOTATED §36.205 (Vernon 2000)).

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage,

conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under Article 1 of the Act, including rules governing procedures of the Board and the authority." This section directs the Board to adopt rules as necessary to implement the various substantive programs set forth in the Act related to the Edwards Aquifer, which includes applications, rules and registration, aquifer management, and regular permit special retirement fees, and in particular, administrative procedures to be used before the Board and the Authority.

Section 1.11(b) of the Act requires the Authority "ensure compliance with permitting, metering, and reporting requirements and shall regulate permits." This section, in conjunction with §1.11(a) and (h) of the Act, and § 2001.004(1) of the APA, empowers the Authority to establish procedures related to the filing and processing of various applications and registrations with and by the Authority.

Section 1.11(d)(2) of the Act provides, among other things, that the Authority may enter into contracts.

Section 1.11(f) of the Act provides the Authority may contract with a person who uses water from the aquifer for the Authority or that person to construct, operate, own, finance, and maintain water supply facilities which include a dam, reservoir, treatment facility, transmission facility, or recharge project. This section further provides management fees or special fees may not be used for purchasing or operating these facilities.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. Pursuant to this section, the Authority is required to comply with the APA in connection with its rulemaking, even though the Authority is not a state agency and would therefore otherwise not generally be subject to APA requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures."

Section 1.15(a) of the Act directs the Authority to manage withdrawals from the aquifer and manage all withdrawal points from the aquifer as provided by this Act.

Section 1.16(b) of the Act sets forth certain requirements concerning an existing user's declaration of historical use and an applicant's payment of application fees required by the Board.

Section 1.16(d)(1) of the Act requires the Board to grant an initial regular permit to an existing user who files a declaration and pays fees as required by this section.

Section 1.29(a) of the Act relates to fees. This section provides that the allocation of the cost of reducing withdrawals or permit retirements must be borne: solely by users of the aquifer for reducing withdrawals from the level on the effective date of this article to 450,000 acre-feet a year, or the adjusted amount determined under §1.14(b) for the period ending December 31, 2007; and equally by downstream water rights holders for permit retirements from 450,000 acre-feet a year, or the adjusted amount determined under §1.14(d) for the period ending December 31, 2007, to 400,000 acre-feet a year, or the adjusted amount determined under 1.14(d) for the period beginning January 1, 2008.

Section 1.29(b) of the Act provides for the assessment of aquifer management fees based on aquifer use under the water management plan to finance the Authority's authorized administrative expenses and programs. This section also allows water districts governed by Chapter 52 of the Texas Water Code and within the Authority's boundaries, to contract with the Authority to pay the Authority's expenses through taxes in lieu of user fees, to be paid by water users in the district. This section provides the Authority with the power to assess fees in order to generate revenue to finance the operation of the Authority, however, the Authority may not collect a total amount of fees and taxes that is more than is reasonably necessary for the administration of the Authority.

Section 1.29(c) of the Act provides that the Authority shall assess an equitable special fee based on permitted aquifer water rights to be used only to finance the retirement of rights necessary to meet the goals of the Authority for reducing the maximum annual volume of water withdrawals from the aquifer. The section further provides the Authority shall set the fees on permitted aquifer users at a level sufficient to match the funds raised from the assessment of equitable special fees on downstream water rights holders.

Section 1.29(d) of the Act provides for the assessment of equitable special fees by the Commission on all downstream water rights holders in the Guadalupe River Basin to be used to finance the retirement of aquifer rights necessary to meet the goals of the Authority for reducing the maximum annual volume of water withdrawals from the aquifer. This section further provides that downstream water rights holders shall pay the assessed fees to the Authority. This section prohibits the assessment of fees by the Commission on contractual deliveries of water stored in Canyon Lake that may be diverted downstream of the San Marcos Springs or Canyon Dam.

Section 1.29(e) of the Act provides for the development of an equitable fee structure under §1.29 and authorizes the Authority to establish different fee rates on a per acre-foot basis for different types of use. The fees must be equitable between types of uses and shall be assessed on the amount of water a permit holder is authorized to withdraw under the permit. Certain fee rates for agricultural use shall be based on the volume of water withdrawn and may not be more than 20 percent of the fee rate for municipal use.

Section 1.29(f) of the Act requires the Authority to impose a permit application fee of not more than $25.

Section 1.29(g) of the Act empowers the Authority to impose a registration application fee of not more than $10.

Section 1.29(h) of the Act states that special fees collected under subsection (c) or (d) of §1.29 may not be used to finance a surface water supply reservoir project.

Section 1.36(b) of the Act provides the Authority with enforcement power and states that Authority shall provide for the suspension of a permit of any class for failure to pay a required fee or for a violation of a permit condition, order of the Authority, or rule adopted by the Authority.

Section 1.44(c)(2) of the Act relates to cooperative contracts for artificial recharge and states the political subdivision causing artificial recharge of the aquifer is entitled to withdraw during any 12-month period the measured amount of water actually injected or artificially recharged during the preceding 12-month period, as demonstrated and established by expert testimony, less an amount determined by the Authority to account for that part of

the artificially recharged water discharged through springs, and to compensate the Authority in lieu of users' fees.

Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures." This proposed rulemaking is in furtherance of this legislative mandate. These proposed rules are rules of practice that state the procedures applicable to the fee setting process of the Authority.

Section 36.205 of the Texas Water Code authorizes groundwater conservation districts to set fees for administrative acts of the districts. Such fees may not unreasonably exceed the cost to the district of performing the administrative function for which the fee is charged.

SUBCHAPTER A. DEFINITIONS

31 TAC §709.1

The statutes, articles, or sections of the Act or any other code that are affected by the proposed rule are §§1.08(a), 1.11(a), (b), (d)(2), (f), and (h), 1.15(a), 1.16(b) and (d)(1), 1.29(a), (b), (c), (d), (e), (f), (g), and (h), 1.36(b), 1.44(c)(2) of the Act, §2001.004(1) of the APA, and §36.205 of the Texas Water Code. The sections of Chapter 31, Texas Administrative Code, that are to be affected are §§709.1, 709.3, 709.5, 709.7, 709.9, 709.11, 709.13, 709.15, 709.17, 709.19, 709.21, 709.23, 709.25, 709.27, 709.29, 709.31, 709.33, and 709.35.

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

(1) Agricultural use-The use of water for irrigation use.

(2) Annual operating revenue requirement-The total revenues reflected in an annual budget adopted by the board that are reasonably required to adequately meet all of the projected costs of aquifer management by the Authority.

(3) Aquifer use-The withdrawal of groundwater from the aquifer under interim authorization status pursuant to §1.17 of the Act, or under a final regular, term, or emergency permit issued by the board.

(4) Cash needs approach-The method of determining annual operating revenue requirement of the Authority based on, and sufficient to cover, all cash needs for administrative and program expenses, including but not limited to, operation and maintenance expenses, costs of withdrawal reductions pursuant to §711.176(c) of this title (relating to Groundwater Withdrawal Amounts for Initial Regular Permits; Compensation for Phase-2 Proportional Amounts) and §711.180 of this title (relating to Voluntary Waiver of Applications for Initial Regular Permits), debt service and capital expenditures from current revenues for the specific fiscal year for which the annual operating revenue requirements have been determined and for which the aquifer management and permit retirement fees for the corresponding fiscal year are intended to be adequate.

(5) Costs of aquifer management-The reasonably necessary administrative and program expenses incurred or estimated to be incurred by the Authority to manage the aquifer as authorized by Article 1 of the Act, and other applicable law.

(6) Downstream water right holder-The owner of any permit to divert and place to beneficial use surface water issued by the commission pursuant to chapter 11, Texas Water Code, at any location in the Guadalupe River Basin below the orifices of Comal Springs or San Marcos Springs.

(7) Fiscal year-January 1 through December 31.

(8) Non-agricultural use-The beneficial use of groundwater withdrawn from the aquifer for any use other than irrigation use.

(9) Permit retirement revenue requirement-The total revenues reflected in an annual budget adopted by the board that are reasonably required to adequately meet in each fiscal year all or a part of the projected costs of the retirement of initial regular permits.

(10) Permit retirement special fee-The fee authorized under §1.29(c) of the Act to be assessed by the Authority to finance the retirement of initial regular permits pursuant to Chapter 715, Subchapter H (relating to Regular Permit Retirement Rules; Comprehensive Water Management Plan Implementation).

(11) Unit cost basis- The amount of a fee expressed in dollars per acre-foot per annum.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005254
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Earliest possible date of adoption: September 10, 2000
For further information, please call: (210) 222-2204

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SUBCHAPTER B. REGISTRATION FEES

31 TAC §§709.3, 709.5, 709.7

The statutes, articles, or sections of the Act or any other code that are affected by the proposed rule are §§ 1.08(a), 1.11(a), (b), (d)(2), (f), and (h), 1.15(a), 1.16(b) and (d)(1), 1.29(a), (b), (c), (d), (e), (f), (g), and (h), 1.36(b), 1.44(c)(2) of the Act, § 2001.004(1) of the APA, and § 36.205 of the Texas Water Code. The sections of Chapter 31, Texas Administrative Code, that are to be affected are §§ 709.1, 709.3, 709.5, 709.7, 709.9, 709.11, 709.13, 709.15, 709.17, 709.19, 709.21, 709.23, 709.25, 709.27, 709.29, 709.31, 709.33, and 709.35.

§709.3. Purpose.
The purpose of this subchapter is to establish registration fees consistent with § 1.29(g) of the Act.

§709.5. Registration Fees; Applicability.
The general manager shall assess a $10 fee to file with the Authority any registration application. The fee shall be paid at the time the registration is filed.

§709.7. Enforcement for Nonpayment.
If the registrant has failed to pay the registration fee or is delinquent to the Authority with respect to any other fee that is due and owing from the registrant to the Authority, the general manager may:

(1) refuse to accept for filing, or otherwise process, a registration application; or

(2) commence any other action to enforce this subchapter as authorized 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.

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Gregory M. Ellis
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Edwards Aquifer Authority
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For further information, please call: (210) 222-2204

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SUBCHAPTER C. PERMIT APPLICATION FEES

31 TAC §§709.9, 709.11, 709.13

The statutes, articles, or sections of the Act or any other code that are affected by the proposed rule are §§ 1.08(a), 1.11(a), (b), (d)(2), (f), and (h), 1.15(a), 1.16(b) and (d)(1), 1.29(a), (b), (c), (d), (e), (f), (g), and (h), 1.36(b), 1.44(c)(2) of the Act, § 2001.004(1) of the APA, and § 36.205 of the Texas Water Code. The sections of Chapter 31, Texas Administrative Code, that are to be affected are §§ 709.1, 709.3, 709.5, 709.7, 709.9, 709.11, 709.13, 709.15, 709.17, 709.19, 709.21, 709.23, 709.25, 709.27, 709.29, 709.31, 709.33, and 709.35.

§709.9. Purpose.

The purpose of this subchapter is to establish permit application fees consistent with §1.29(f) of the Act.

§709.11. Permit Application Fees; Applicability.

The general manager shall impose a $25 fee to file with the Authority an application for a regular, term, or an emergency groundwater withdrawal permit, a well construction permit, monitoring well permit, aquifer recharge and storage permit, and recharge recovery permits. The fee must be paid at the time the application is filed.

§709.13. Enforcement for Nonpayment.

If the applicant has failed to pay the permit application fee or is delinquent to the Authority with respect to any other fee that is due and owing from the applicant to the Authority, the general manager may refuse to accept for filing, or otherwise process, a permit application.

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SUBCHAPTER D. AQUIFER MANAGEMENT FEES

31 TAC §§709.15, 709.17, 709.19, 709.21, 709.23, 709.25, 709.27, 709.29, 709.31, 709.33, 709.35

The statutes, articles, or sections of the Act or any other code that are affected by the proposed rule are §§1.08(a), 1.11(a), (b), (d)(2), (f), and (h), 1.15(a), 1.16(b) and (d)(1), 1.29(a), (b), (c), (d), (e), (f), (g), and (h), 1.36(b), 1.44(c)(2) of the Act, §2001.004(1) of the APA, and §36.205 of the Texas Water Code. The sections of Chapter 31, Texas Administrative Code, that are to be affected are §§709.1, 709.3, 709.5, 709.7, 709.9, 709.11, 709.13, 709.15, 709.17, 709.19, 709.21, 709.23, 709.25, 709.27, 709.29, 709.31, 709.33, and 709.35.

§709.15. Purpose.

The purpose of this subchapter is to establish the formula and procedures for the calculation, assessment, billing and collection of aquifer management fees consistent with §§1.11(f) and 1.29(b) and (e) of the Act.

§709.17. Applicability.

Except for withdrawals of groundwater from the aquifer made from an exempt well pursuant to §§1.16(c) and 1.33 of the Act, aquifer management fees shall be assessed by the Authority for all aquifer use.

§709.19. Adoption and Assessment.

(a) Not later than December 31st of each year, the general manager shall, pursuant to this subchapter, calculate and assess an aquifer management fee for the succeeding year.

(b) The aquifer management fee shall be based on aquifer use.

(c) The aquifer management fee shall be based on two user blocks, and be uniform such that the average unit cost of groundwater, regardless of quantity withdrawn, remains constant and is applicable to all the aquifer users within the same user block. The Blocks shall be as follows:

(1) Block 1: non-agricultural users; and

(2) Block 2: agricultural users.

(d) The aquifer management fee shall be calculated and assessed as follows:

(1) By resolution and order, the board shall adopt a budget reflecting its annual operating revenue requirement for the succeeding fiscal year based on a cash-needs approach. The budget shall determine the net annual operating revenue requirement by subtracting from the annual operating revenue requirement any carryover funding from the current fiscal year in addition to funding from other sources expected to be available for expenditure during the fiscal year, including but not limited to, aquifer management fees for agriculture use for preceding calendar years.

(2) Not later than November 30th, the general manager shall determine the total volume of aquifer use as reported in the groundwater users reports for the prior year by Block 1 non-agricultural users.

(3) By December 20th, the general manager shall calculate the aquifer management fee that may be assessed against Block 1 non-agricultural use on a unit cost basis by dividing the net annual operating revenue requirements by the total authorized aquifer use of Block 1 non-agricultural users.

(4) By December 20th, except as provided in §711.420(3) of this title (relating to Enforcement), the general manager shall calculate the aquifer management fee for Block 2 agricultural users at an amount equal to 20 percent of the aquifer management fee for Block 1 non-agricultural users.

(e) The unit cost for the aquifer management fees shall be expressed in dollars per acre-foot per annum.

§709.21. Billing and Collection.

(a) All persons authorized for aquifer use under interim authorization status pursuant to §1.17 of the Act and the rules of the Authority, or under a final groundwater withdrawal permit issued by the board,

are required to pay to the Authority an aquifer management fee as assessed pursuant to this subchapter.

(b) The general manager shall bill to and collect from all aquifer users an aquifer management fee for the fiscal year as calculated and assessed by the general manager pursuant to this subchapter, unless subject to a user contract under §709.25 of this title (relating to User Contracts),

(1) If the aquifer use is agricultural, the aquifer management fee shall be assessed on the total volume of groundwater withdrawn in a calendar year from the aquifer by an aquifer user.

(2) If the aquifer use is non-agricultural, then the fee shall be assessed on:

(A) for an applicant qualifying for interim authorization status under §1.17 of the Act, the historical, maximum beneficial use set forth in §4B of the application for initial regular permit, irrespective of whether the groundwater was actually withdrawn; or

(B) for a permittee, the total volume of groundwater authorized to be withdrawn in a final permit issued by the board, irrespective of whether the groundwater was actually withdrawn.

(c) Not later than December 20th, the general manager shall mail an aquifer management fee invoice to all non-agricultural users. Not later than December 20th, the general manager shall mail a groundwater use report form to all agricultural users to report aquifer use for the preceding calendar year.

(d) An aquifer management fee invoice for a non-agricultural user becomes due and payable immediately upon mailing. If the total annual aquifer management fee invoice for the user is less than $600, the user shall pay the fee on a lump sum basis. Such an invoice becomes delinquent if payment in full is not received by the Authority on or before March 1st of the year for which the aquifer management fee is in effect. If the total annual aquifer management fee invoice for a non-agricultural user is equal to or greater than $600, then the user may elect to pay the fee on a lump sum or in equal monthly payments. Such an invoice becomes delinquent if payment in full for a lump sum payment is not received in full by March 1st of the year for which the aquifer management fee is in effect. If the non-agricultural user elects to pay on a monthly payment schedule, then the pro rata portion of the invoice becomes due monthly on the last working day of each month. Each monthly payment of an invoice becomes delinquent if payment in full is not received by the Authority on or before the last working day of each month for which the monthly payment becomes due and payable.

(e) For agricultural users, the groundwater use report shall constitute an aquifer management fee invoice. An agricultural user shall file a completed groundwater use report form with the Authority no later than January 31st of each year for aquifer use for the preceding calendar year. Payment of the aquifer management fee shall accompany the completed groundwater use report. This invoice for agricultural use becomes due and payable immediately upon mailing of the groundwater use report by the general manager. An invoice becomes delinquent if payment in full is not received by the Authority on or before January 31st of each year.

(f) For any aquifer management fee that is delinquent, if payment in full is not received on or before 10 days after the date the amount became delinquent, then the General Manager shall assess, for every month thereafter that the invoice remains delinquent, a penalty of 5.0% of the then delinquent amount.

§709.23. Limitation on Amount of Collections.

The Authority may not collect a total amount of aquifer management fees that is more than is reasonably necessary for the annual operating revenue requirements for the administration of the Authority as reflected in its adopted annual fiscal year budget.

§709.25. User Contracts.

In order to encourage water conservation, not later than September 30th of the year preceding the calendar year for which a user contract will be effective, the general manager may contract with any non-agricultural user for the user to commit to aquifer use less than an amount to which the user would otherwise be authorized. The Authority shall assess aquifer management fees for the reduced amount of contracted aquifer use. A user contract shall be effective on a calendar year basis and may not have a term of greater than a one-year period.

§709.27. Effective Period.

An aquifer management fee calculated and assessed by the general manager shall be effective on a calendar year basis beginning January 1st through December 31st.

§709.29. Prohibition on Expenditure of Aquifer Management Fees for Water Supply Facilities.

The Authority may not expend aquifer management fee revenues for purchasing or operating water supply facilities.

§709.31. Waiver of Fees.

If the Authority is a creditor of a person required to pay aquifer management fees pursuant to §709.17 of this title (relating to Applicability) and §709.21(a) of this title (relating to Billing and Collection), the general manager may enter into a contract that authorizes a credit against the payment of aquifer management fees that may be owed by the person as an offset to all or part of the amount owed to the person by the Authority.

§709.33. Enforcement for Nonpayment.

If the general manager determines that an aquifer management fee is delinquent, enforcement for nonpayment may be as follows:

(1) by suspending the processing of any application that the person owing the fee may have pending before the Authority; or

(2) commence any action to enforce payment and collection of the delinquent aquifer management fee as may be authorized by law.

§709.35. Prohibitions.

No person may withdraw groundwater from the aquifer if the person, or his predecessor in interest, is delinquent in the payment of an aquifer management fee that is due and payable to the Authority.

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

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CHAPTER 711. GROUNDWATER WITHDRAWAL PERMITS

The Edwards Aquifer Authority (the "Authority") proposes the adoption of §§711.1, 711.10, 711.12, 711.14, 711.90, 711.92, 711.94, 711.96, 711.98, 711.100, 711.102, 711.104, 711.108, 711.110, 711.112, 711.116, 711.118, 711.130, 711.132, 711.134, 711.160, 711.162, 711.164, 711.166, 711.168, 711.170, 711.172, 711.174, 711.176, 711.178, 711.180, 711.220, 711.222, 711.224, 711.226, 711.228, 711.230, 711.232, and 711.234, to be codified at Title 31, TEXAS ADMINISTRATIVE CODE (the "proposed Chapter 711 rules"), relating to the Authority's implementation of a groundwater withdrawal permitting program.

The Edwards Aquifer Authority Act (the "Act") requires the Authority to implement a permitting system whereby "existing users" of groundwater from the Edwards Aquifer and other potential users of aquifer water may apply for and receive initial regular permits issued by the Authority allowing for the withdrawal of groundwater from the aquifer. Other types of permits are also required by the Act for well construction and related work. Certain other withdrawals are exempted by the Act from permitting requirements. The Act also specifies an "interim authorization" period prior to the issuance by the Authority of final initial regular permits during which certain existing users of the aquifer may continue to make withdrawals. The Act imposes a number of restrictions upon the use of the aquifer during the interim authorization period as well as after permits are issued. It also places limits on the ability to transfer permits or interim authorization status. The proposed rules in this Chapter 711 are intended to effectuate these various components of the Act.

Proposed §711.1, Subchapter A of the proposed Chapter 711 rules, sets forth the definitions that will apply to all rules issued by the Authority in Chapter 711. These rules have been written to provide uniform definitions for words and phrases that are expected to be used consistently throughout Chapter 711. They are intended to provide useful "short-hand" to reduce the amount of cumbersome regulatory language necessary in other Authority rules, thus allowing for a more efficient understanding and operation of other rules of the Authority.

The Act requires the Authority to implement a permitting system whereby certain "existing users" of groundwater from the aquifer and other potential users of aquifer water may apply for and receive initial regular permits issued by the Authority allowing for the withdrawal of groundwater from the aquifer. Other types of permits are also required by the Act for well construction and related work. Sections 711.10 - 711.14, Subchapter B of the proposed Chapter 711 rules, set forth the activities for which a permit from the Authority is required.

Section 711.10 sets out the purposes of the proposed Chapter 711 rules, which relate to managing the aquifer to protect the various entities and other interests utilizing the aquifer.

Section 711.12 identifies the types of activities for which a permit is required from the Authority. This section provides that a permit is generally required before one may withdraw aquifer water; construct, alter or operate an aquifer well, including a monitoring well, a well pump, or a well meter or alternative measuring method; recharge water into the aquifer; construct or alter a well designed to withdraw non-Edwards groundwater if the well intersects the Edwards Aquifer; or store water within the aquifer. The section also creates an exception to the permit requirement for well construction if the work to be done is routine operation and maintenance and specified requirements are met.

Section 711.14 identifies the types of groundwater withdrawals for which a withdrawal permit is not required from the Authority -- withdrawals from wells qualifying for interim authorization status, or from exempt wells.

The Act requires the Authority to implement a permitting system whereby "existing users" of groundwater from the aquifer and other potential users of aquifer water may apply for and receive initial regular permits issued by the Authority allowing for the withdrawal of groundwater from the aquifer. The Act also requires the Authority to issue permits for the construction of Edwards Aquifer wells. Sections 711.90-711.118, Subchapter E of the proposed Chapter 711 rules, fulfill these requirements by setting forth the types of permits issued by the Authority, the conditions governing how and when such permits could be issued, the quantity of and conditions under which water could be withdrawn or wells constructed pursuant to such permits, the duration of such permits, the required contents of permit applications, and the rights and limitations associated with being the holder of such permits.

Section 711.90 identifies the types of permits which may be issued by the Authority.

Section 711.92 provides that, as designated in a groundwater withdrawal permit, aquifer water may be beneficially used only for irrigation use, municipal use or industrial use.

Section 711.94 requires that groundwater withdrawn from the aquifer must be placed to beneficial use without waste. The section also provides that the beneficial use of water by a "contract user" (one who withdrew or purchased and put to beneficial use aquifer water during the statutory historical period pursuant to a contract or other legal right from a prior or existing user from an existing well) may be claimed by the prior or existing user in support of a permit application. The section also describes various irrigation practices which are presumed to constitute beneficial use without waste. The section also provides a mechanism whereby prior or existing users whose historic use has been affected by a requirement of or participation in a federal program shall be given a credit in their permit applications for the amount of water they would have withdrawn and beneficially used were it not for the federal program. Finally, the section provides a mechanism whereby beneficial use of aquifer water during the historical period on the same place of use by multiple existing users each owning different wells will be shared on a pro rata basis.

Section 711.96 clarifies that the Authority's permitting program is limited to withdrawals from the Edwards Aquifer. Therefore, the section states that the Authority cannot issue a permit for the withdrawal of water from non-Edwards aquifers. Similarly, the section provides a mechanism whereby applications for wells withdrawing water from multiple aquifers including the Edwards Aquifer will be granted by the Authority only for a quantity generally corresponding to the amount the well withdraws from the Edwards Aquifer.

Section 711.98 identifies those who may apply for an initial regular permit and describes the attributes of such permits by stating that they are transferrable, have a perpetual term, may be proportionally adjusted in accordance with the Authority's rules, may be retired in accordance with the Authority's rules, may be suspended in accordance with the Authority's rules, may be interrupted in accordance with the Authority's rules, may be abandoned in accordance with the Authority's rules, and may be canceled in accordance with the Authority's rules. The section also

lists the elements which an initial regular permit applicant must prove in order to be granted such a permit.

Section 711.100 identifies those who may apply for an additional regular permit and when such applications can be made. The section also describes the attributes of such permits by stating that they are transferrable, have a perpetual term, may be retired in accordance with the Authority's rules, may be suspended in accordance with the Authority's rules, may be interrupted in accordance with the Authority's rules, may be abandoned in accordance with the Authority's rules, and may be canceled in accordance with the Authority's rules. The section also lists the elements which an additional regular permit applicant must prove in order to be granted such a permit.

Section 711.102 identifies those who may apply for a term permit and when such applications can be made. The section also describes the attributes of such permits by stating that they are transferrable, explaining when they may be interrupted in accordance with the Authority's rules, and explaining that they may have a term of up to ten years. The section also lists the elements which a term permit applicant must prove in order to be granted such a permit and provides that the Authority Board shall annually determine that total quantity of water which may be withdrawn pursuant to term permits.

Section 711.104 identifies those who may apply for an emergency permit. The section also describes the attributes of such permits by stating that they are not transferrable or interruptible, and explaining that they may have a term of up to 30 days but are renewable. The section also lists the elements which an emergency permit applicant must prove in order to be granted such a permit.

Section 711.108 identifies those who may apply for a well construction permit. The section also describes the attributes of such permits by stating that they are not transferrable and explaining that they have a term of 180 days. The section also lists the elements which a well construction permit applicant must prove in order to be granted such a permit.

Section 711.110 identifies those who may apply for a monitoring well permit. The section also describes the attributes of such permits by stating that they are transferrable, have a perpetual term, and are not interruptible. The section also lists the elements which a well construction permit applicant must prove in order to be granted such a permit.

Section 711.112 identifies the many provisions that shall be included in any groundwater withdrawal permit issued by the Authority.

Section 711.116 identifies the many provisions that shall be included in any well construction permit issued by the Authority.

Section 711.118 identifies the many provisions that shall be included in any monitoring well permit issued by the Authority.

While the Act requires the Authority to implement a permitting system, it also imposes a number of restrictions, limitations and other requirements upon the withdrawal of water from the Edwards Aquifer. Sections 711.130-711.134, Subchapter F of the proposed Chapter 711 rules, harmonize these provisions of the Act by clarifying that holders of groundwater withdrawal permits must comply with a number of conditions, including: avoiding actions that adversely affect water quality or threatened or endangered aquifer-dependent species; complying with other Authority rules, including rules designed to protect water quality, conserve water, maximize beneficial use of water, protect aquatic and wildlife habitat and threatened or endangered species, and protect instream uses, bays and estuaries; and complying with the Act.

Section 711.130 states that the purpose of Subchapter F is to establish the standard conditions required in a groundwater withdrawal permit.

Section 711.132 states that Subchapter F applies to all groundwater withdrawal permits issued by the Authority.

Section 711.134 lists the conditions to which any groundwater withdrawal permit issued by the Authority is subject.

The Act requires the Authority to implement a permitting system. The Act also imposes two "caps" which limit the aggregate amount of certain permitted withdrawals which may be issued by the Authority. Specifically, the Act mandates that, initially, total permitted withdrawals for initial and additional regular permits may not exceed 450,000 acre-feet per year and, after January 1, 2008, total permitted withdrawals may not exceed 400,000 acre-feet per year. In the absence of these "caps," total permitted withdrawals might exceed the cap amounts. Therefore, the Act requires the Authority to "proportionally adjust" initial regular permit amounts to reach the 450,000 acre-feet cap, and implement "equal percentage reductions" in order to reach the 400,000 acre-feet cap. The Act also imposes several permit "minimums" applicable to certain initial regular permit holders. Sections 711.160-711.182, Subchapter G of the proposed Chapter 711 rules, would implement these provisions of the Act by establishing the amount of groundwater available for permitting, explaining which types of permits are subject to the caps, implementing a method of calculating the permit minimums, and setting out the procedures for carrying out "proportional adjustment" and "equal percentage reductions."

Section 711.160 explains that the purpose of the subchapter is to establish the amount of groundwater available for permitting, and to set forth the procedures to be used to proportionally adjust permit amounts and implement equal percentage reductions to permit amounts.

Section 711.162 provides that Subchapter G only applies to certain categories of groundwater permits.

Section 711.164 provides that, the aggregate withdrawal "caps" for initial and additional regular permits will be 450,000 acre-feet from the effective date of these rules through December 31, 2007 and 400,000 acre-feet thereafter, unless either of the caps is increased by the Authority pursuant to §1.14(d) of the Act.

Section 711.166 states that the amount of groundwater which may be withdrawn pursuant to term permits is not subject to the withdrawal caps. Instead, the aggregate amount of term permits which can be issued by the Board will be governed by the amount specified in the Board's annual order authorizing the issuance of term permits. Further, term permit withdrawals will only be authorized when the key index well levels are greater than as specified as follows: 1) for wells within the San Antonio pool and within a county other than Atascosa or Medina, when well J-17 is greater than 665 feet above mean sea level; 2) for wells within the San Antonio pool and within Atascosa County or Medina County, when well TD 69-47-306 is greater than 685 feet above mean sea level; and 3) for wells within the Uvalde Pool, when well J-27 is greater than 865 feet above mean sea level.

Section 711.168 provides that the amount of groundwater which may be withdrawn pursuant to emergency permits is not subject

to the withdrawal caps. Instead, the amount of emergency permits the board may issue shall not exceed the amount necessary to prevent the loss of life or to prevent severe, imminent threats to public health or safety.

Section 711.170 provides that the amount of groundwater which may be withdrawn pursuant to monitoring well permits is not subject to the withdrawal caps. Instead, the amount of monitoring well permits may not exceed the amount reasonably necessary to property collect water quality samples from the aquifer.

Section 711.172 sets forth the mechanism by which initial regular permits will be proportionately adjusted, if necessary, in order to reach the 450,000 acre-feet withdrawal cap or other applicable cap. Under this section, if the total aggregate maximum historical use of all initial regular permits exceeds the withdrawal cap of 450,000 acre-feet, or other applicable cap, then the board shall proportionately adjust the permit amounts as follows: 1) The board shall determine each user's maximum historical use (MHU) during the historical period. 2) The board shall determine and assign an "irrigator minimum" to each entitled existing user which will be equal to two acre-feet times each acre of land the user irrigated in any one year of the historical period. 3) Each existing user with more three or more years' use during the historical period will have a "historical average minimum" calculated by dividing the user's total aggregate withdrawals during the historical period by the number of years during the historical period inclusive of and after the date of initial well installation. 4) A Phase-1 proportional adjustment factor (PA-1 Factor) will be calculated by subtracting 450,000 from the total of all maximum historical uses (MHUs) and dividing the result by the total of all MHUs. 5) The board will then calculate a Phase-1 proportionally adjusted amount (PA-1 Amount) for each applicant by multiplying the applicant's MHU times the PA-1 Factor and subtracting the product from the applicant's MHU. 6) Each applicant assigned an irrigator minimum or an historical average minimum and whose PA-1 Amount is less than the minimum will then be assigned a step-up amount (SUA) equal to the difference between the minimum and the PA-1 Amount. 7) Section 711.180, discussed more fully below, allows the Authority to further reduce withdrawals by entering into agreed orders whereby initial regular permit applicants may waive (possible by selling to the Authority) all or part of their applications for initial regular permits. If, despite these waivers, the total of all PA-1 amounts plus all SUAs still exceeds the 450,000 acre-feet cap, then the board shall calculate a Phase-2 proportional adjustment factor (PA-2 Factor) by: (a) adding the totals of all remaining PA-1 amounts and SUAs; (b) subtracting 450,000 from the sum; and (c) dividing the result by the totals of all remaining PA-1 amounts and SUAs. 8) The board will then calculate a Phase-2 proportionately adjusted amount (PA-2 amount) for each applicant as follows: (a) for applicants eligible for an SUA, their PA-2 amount will be calculated by multiplying the PA-2 factor by their PA-1 and SUA, and subtracting the result from the total of their PA-1 amount and SUA; (b) for those ineligible for an SUA, their PA-2 amount will be calculated by multiplying the PA-2 factor by their PA-1 amount and subtracting the result from their PA-1 amount. The section goes on to provide that if the "cap" is raised, then the proportionately adjusted amounts will be restored through the inverse application of this section.

Section 711.174 explains that initial regular permits will be retired by equal percentage reductions if necessary in order to reach the 400,000 acre-feet withdrawal cap or other applicable cap in accordance with Subchapter H of Chapter 715, rules yet to be adopted by the Authority.

Section 711.176 explains the method by which initial regular permit amounts will be determined. If the aggregate amount of MHUs does not exceed the 450,000 acre-feet cap or other applicable cap, then initial regular permits shall be issued for the amount of the applicant's MHU. Alternatively, if the aggregate of MHUs does exceed the cap, then each applicant shall receive an initial regular permit in the following applicable amount: 1) for irrigation use, in an amount not less than the irrigator minimum, or may be adjusted by the Phase-1 and Phase-2 proportional adjustment processes; and 2) for users with at least three years' use during the historical period, in an amount not less than the user's historical average minimum, as may be adjusted by the Phase-1 and Phase-2 proportional adjustment processes. In the event that an existing user is issued a permit for a PA-1 Amount which is less than his or her minimum, then the section provides that the step-up amount may be withdrawn, and that, in the event of a Phase-2 proportional adjustment, the PA-2 amount may not be withdrawn, but instead, compensation will be provided at the fair market value as defined in §11.0275 of the Texas Water Code.

Section 711.178 applies to initial regular permits, additional regular permits, and term permits. Under this section, each permittee must, by November 1 of the year after the permit is issued, file with the Authority a water withdrawal schedule containing specified information. The general manager is then to review and approve or return the schedule for correction. Permittees are not allowed to withdraw more the 110 percent of the scheduled monthly amount during any one month.

Section 711.180 provides that the Board may enter into voluntary agreed orders with applicants declaring the waiver of all or part of an applicant's MHU, PA Amount, step-up amount, base irrigation groundwater or unrestricted irrigation groundwater claimed in an application.

The Act requires the Authority to impose and enforce a number of restrictions, limitations and other requirements upon the use of water from the aquifer. Sections 711.220-711.234, Subchapter I of the proposed Chapter 711 rules, impose a number of prohibitions on aquifer use, including: requiring water withdrawn from the aquifer to be used within the Authority's boundaries; limiting withdrawals from new wells; requiring permits for most withdrawals and well construction; requiring registration of exempt wells; requiring compliance with the Act, the Authority's rules and the terms of Authority permits; and prohibiting waste or pollution of the aquifer.

Section 711.220 generally requires that groundwater withdrawn from the aquifer must be used within the Authority's boundaries, and that, for water processed into or used to produce a commodity, the place of use is the plant site where the commodity is produced.

Section 711.222 prohibits aquifer withdrawals from new wells unless the withdrawals are from an exempt well, a permitted well, or a well identified as a point of withdrawal in a transfer approved by the Authority.

Section 711.224 generally prohibits groundwater withdrawals or new well construction without a permit. It also prohibits operation of a well at a higher rate of production than authorized in a withdrawal permit.

Section 711.226 prohibits operation of an exempt well unless the well has been registered with the Authority.

Section 711.228 prohibits violations of the Act, the Authority's rules, or the terms or conditions of a permit.

Section 711.230 prohibits the waste of aquifer water.

Section 711.232 prohibits the pollution of the aquifer.

Section 711.234 identifies various practices which are declared to be nuisances.

Section 2001.0225 of the Texas Government Code requires an agency to perform, under certain circumstances, a regulatory analysis of major environmental rules ("RIAMER"). There are two primary components that must be met before a RIAMER is required. First, no RIAMER need be prepared if the rules in question are not "major environmental rules" or "MERs." Second, even if the rules are MERs, no RIAMER need be prepared if adoption of the MERs would not result in any one of the following criteria listed in §2001.0225(a)(1)-(4): 1. the MER would "exceed" a standard set by federal law, unless the MER is specifically required by state law; 2. the MER would "exceed" an express requirement of state law, unless the MER is specifically required by federal law; 3. the MER would "exceed" a requirement of a delegation agreement or contract between the state and an agency or representative of the federal governmental to implement a state and federal program; or 4. the MER is adopted solely under the "general powers" of the agency instead of under a specific state law.

The following analysis examines whether a RIAMER is required for any of the proposed rules on a subchapter by subchapter basis.

The Authority has determined that none of the rules proposed as Subchapter A of 31 Texas Administrative Code - §711.1 (the "Subchapter A Rules") are "major environmental rules" as that term is defined by 2001.0225(g)(3) of the Texas Government Code. The Subchapter A rules set forth the definitions that will apply to all rules issued by the Authority in Chapter 711. These rules have been written to provide uniform definitions for words and phrases that are expected to be used consistently throughout Chapter 711. They are intended to provide useful "shorthand" to reduce the amount of cumbersome regulatory language necessary in other Authority rules, thus allowing for a more efficient understanding and operation of other rules of the Authority. The definitions have no regulatory import outside of their incorporation in substantive rules that may be found elsewhere in Chapter 711. Because they do not have the specific intent to protect the environment or reduce risks to human health from environmental exposure, they are not MERs.

Further, even if any of the Subchapter A rules were MERs, no RIAMER need be prepared for those proposed rules because none of the rules in Subchapter A meet any of the criteria listed in APA §2001.0225(a)(1)-(4). First, the rules do not exceed a standard set by federal law. The only reasonably related federal law establishes the Sole Source Aquifer Program implemented by the EPA for portions of the Edwards Aquifer, which applies only to federally-funded projects conducted on the aquifer. Under that program, no federal financial assistance may be made to projects that the EPA determines may contaminate the Edwards Aquifer so as to create a significant hazard to public health. There is no federal law that specifically requires definitions such as those contained in the Subchapter A rules. Therefore, the Subchapter A rules do not exceed a standard set by federal law.

Second, the proposed Subchapter A rules do not exceed an express requirement of state law. Instead, the proposed rules are designed to carry out the Authority's statutory responsibility to: manage, conserve, preserve and protect the aquifer, adopt rules to carry out its powers and duties under the Act, to regulate permits, manage withdrawals and points of withdrawals from the aquifer, require various types of permits for certain withdrawals, allow for interim authorization withdrawals prior to permit issuance, impose various conditions and restrictions on aquifer use, require that aquifer use be limited to beneficial uses, prohibit waste of aquifer water, and regulate transfers of aquifer rights (pursuant to, *inter alia*, §§1.03(4), (10) and (21), 1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.17 and 1.34 of the Act). The proposed rules are designed to comply with these express requirements of state law and not exceed them. There are no other applicable "express requirements of state law" which are exceeded by these proposed rules.

Third, the proposed Subchapter A rules do not exceed a requirement of a delegation agreement or contract between the State of Texas and an agency or representative of the federal government to implement a state and federal program. The subject matter of the proposed rules is not covered by any delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program.

Fourth, the proposed Subchapter A rules would not be adopted solely under the general powers of the Authority instead of under a specific state law. While these proposed rules are adopted in part under the Authority's general powers, they are also adopted under the Act. In particular, the rules are adopted pursuant to, *inter alia*, §§ 1.03(4), (10) and (21), 1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.17 and 1.34 of the Act, which require the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits, manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals; allow for interim authorization withdrawals prior to permit issuance; impose various conditions and restrictions on aquifer use; require that aquifer use be limited to beneficial uses; prohibit waste of aquifer water; and regulate transfers of aquifer rights.

For these reasons, it is not necessary to perform a RIAMER on the proposed Subchapter A rules.

With respect to Subchapter B of 31 Texas Administrative Code - §§ 711.10 - 711.14 (the "Subchapter B Rules"), the Authority has determined that only §711.12 is a "major environmental rule" as that term is defined by 2001.0225(g)(3) of the Texas Government Code because it has the specific intent to protect the environment. The Subchapter B rules generally set forth the activities for which a permit from the Authority is required. The other Subchapter B rules do not have the specific intent to protect the environment or reduce risks to human health from environmental exposure and are, therefore, not MERs.

Further, no RIAMER need be prepared for any of the Subchapter B rules because none of the rules in Subchapter B meet any of the criteria listed in APA § 2001.0225(a)(1)-(4). First, the rules do not exceed a standard set by federal law. The only reasonably related federal law establishes the Sole Source Aquifer Program implemented by the EPA for portions of the Edwards Aquifer, which applies only to federally-funded projects conducted on the aquifer. Under that program, no federal financial assistance may be made to projects that the EPA determines may contaminate the Edwards Aquifer so as to create a significant hazard to public

health. There is no federal law that specifically requires permitting for withdrawals of Edwards Aquifer groundwater, or for well construction or related work. Therefore, the Subchapter B rules do not exceed a standard set by federal law. Moreover, even if the rules did exceed a standard set by federal law, the rules are specifically required by the Act, a state law which requires the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits, manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals and well construction; and protect the quality of the water within the aquifer (pursuant to, *inter alia*, §§1.08(a), 1.11(a), (b) and (d), 1.14 and 1.15 of the Act).

Second, the proposed Subchapter B rules do not exceed an express requirement of state law. Instead, the proposed rules are designed to carry out the Authority's statutory responsibility to: manage, conserve, preserve and protect the aquifer, adopt rules to carry out its powers and duties under the Act, to regulate permits, manage withdrawals and points of withdrawals from the aquifer, require various types of permits for certain withdrawals and well construction, and protect the quality of the water within the aquifer (pursuant to, *inter alia*, §§1.08(a), 1.11(a), (b) and (d), 1.14 and 1.15 of the Act). The proposed rules are designed to comply with these express requirements of state law and not exceed them. Other than the Act, there are no other "express requirements of state law" which could be exceeded by these proposed rules.

Third, the proposed Subchapter B rules do not exceed a requirement of a delegation agreement or contract between the State of Texas and an agency or representative of the federal government to implement a state and federal program. The subject matter of the proposed rules is not covered by any delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program.

Fourth, the proposed Subchapter B rules would not be adopted solely under the general powers of the Authority instead of under a specific state law. While these proposed rules are adopted in part under the Authority's general powers, they are also adopted under the Act, a specific state law regarding the Edwards Aquifer. In particular, the rules are adopted pursuant to, *inter alia*, §§1.08(a), 1.11(a), (b) and (d), 1.14 and 1.15 of the Act, which require the Authority to, among others: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits, manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals and well construction; and protect the quality of the water within the aquifer.

For these reasons, it is not necessary to perform a RIAMER on the proposed Subchapter B rules.

The proposed Subchapter E rules of 31 Texas Administrative Code - §§ 711.90.-711.118 (the "Subchapter E Rules") would implement the Authority's permitting program by essentially setting forth: the categories of permits issued by the Authority, the conditions governing how and when such permits could be issued, the quantity of and conditions under which water could be withdrawn or wells constructed pursuant to such permits, the duration of such permits, the required contents of permit applications, and the rights and limitations associated with being the holder of such permits. Because these rules impose limits on the legal authority to withdraw groundwater which did not exist under the common law, they would tend to have an environmental protection aspect. Therefore, Subchapter E rules are probably MERs because they have the specific intent to "protect the environment."

However, no RIAMER need be prepared for any of the Subchapter E rules because none of them meet any of the criteria listed in APA §2001.0225(a)(1)-(4). First, the rules do not exceed a standard set by federal law. The only reasonably related federal law establishes the Sole Source Aquifer Program implemented by the EPA for portions of the Edwards Aquifer, which applies only to federally-funded projects conducted on the aquifer. There is no federal law that specifically requires permitting for withdrawals of Edwards Aquifer groundwater or for construction of Edwards Aquifer wells. Therefore, the Subchapter E rules do not exceed a standard set by federal law. Moreover, even if the rules did exceed a standard set by federal law, the rules are specifically required by state law which requires the Authority to manage, conserve, preserve and protect the aquifer, adopt rules to carry out its powers and duties under the Act, to regulate permits, manage withdrawals and points of withdrawals from the aquifer, require various types of permits for certain withdrawals and well construction, and specify withdrawal amounts pursuant to those permits (pursuant to, *inter alia*, §§1.03(9), (11), (12), (13) and (14), 1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.18, 1.19, 1.20 and 1.33(a), (b) and (c) of the Act).

Second, the proposed Subchapter E rules do not exceed an express requirement of state law. Instead, the proposed rules are designed to carry out the Authority's statutory responsibility to manage, conserve, preserve and protect the aquifer, adopt rules to carry out its powers and duties under the Act, to regulate permits, manage withdrawals and points of withdrawals from the aquifer, require various types of permits for certain withdrawals and well construction, and specify withdrawal amounts pursuant to those permits (pursuant to, *inter alia*, §§1.03(9), (11), (12), (13) and (14), 1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.18, 1.19, 1.20 and 1.33(a), (b) and (c) of the Act). The proposed rules are designed to comply with these express requirements of state law and not exceed them. Other than the Act, there are no other "express requirements of state law" which are applicable to these proposed rules or which could be exceeded by these proposed rules.

Third, the proposed Subchapter E rules do not exceed a requirement of a delegation agreement or contract between the State of Texas and an agency or representative of the federal government to implement a state and federal program. The subject matter of the proposed rules is not covered by any delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program.

Fourth, the proposed Subchapter E rules would not be adopted solely under the general powers of the Authority instead of under a specific state law. While these proposed rules are adopted in part under the Authority's general powers, they are also adopted under the Act, a specific state law regarding the Edwards Aquifer. In particular, the rules are adopted pursuant to, *inter alia* §§1.03(9), (11), (12), (13) and (14), 1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.18, 1.19, 1.20 and 1.33(a), (b) and (c) of the Act, which require the Authority to manage, conserve, preserve and protect the aquifer, adopt rules to carry out its powers and duties under the Act, to regulate permits, manage withdrawals and points of withdrawals from the aquifer, require various types

of permits for certain withdrawals and well construction, and specify withdrawal amounts pursuant to those permits.

For these reasons, it is not necessary to perform a RIAMER on the proposed Subchapter E rules.

The Act requires the Authority to implement a permitting system. At the same time, the Act imposes a number of restrictions, limitations and other requirements upon the withdrawal of water from the Edwards Aquifer. The Subchapter F rules of 31 Texas Administrative Code - §§711.130.-711.134 (the "Subchapter F Rules") would harmonize these provisions of the Act by clarifying that holders of groundwater withdrawal permits must comply with a number of conditions, including: avoiding actions that adversely affect water quality, or threatened or endangered aquifer-dependent species; complying with other Authority rules, including rules designed to protect water quality, conserve water, maximize beneficial use of water, protect aquatic and wildlife habitat and threatened or endangered species, and protect instream uses, bays and estuaries; and complying with the Act. Because these rules impose limits on the legal authority to withdraw groundwater which did not exist under the common law, they would tend to have an environmental protection aspect. Therefore, the Subchapter F rules are probably MERs because they have the specific intent to "protect the environment."

However, no RIAMER need be prepared for any of the Subchapter F rules because none of them meet any of the criteria listed in APA §2001.0225(a)(1)-(4). First, the rules do not exceed a standard set by federal law. The only reasonably related federal law establishes the Sole Source Aquifer Program implemented by the EPA for portions of the Edwards Aquifer, which applies only to federally-funded projects conducted on the aquifer. There is no federal law that specifically requires permitting for withdrawals of Edwards Aquifer groundwater or for construction of Edwards Aquifer wells, or which imposes conditions upon such permits akin to those found in the proposed Subchapter F rules. Therefore, the Subchapter F rules do not exceed a standard set by federal law. Moreover, even if the rules did exceed a standard set by federal law, the rules are specifically required by the Act, a state law which requires the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits; manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals and well construction; develop and implement a demand management plan; close abandoned, wasteful or dangerous wells; regulate well construction, operation, maintenance and closure; ensure adequate springflows; protect threatened and endangered species; provide notice to permit holders of the limitations provided by the Act; retire permits to reduce withdrawals; implement water conservation and reuse measures; acquire permitted rights for aquifer management purposes; require water conservation and reuse plans; implement a conservation management plan, a demand management plan, and a critical period management plan; limit transport of water out of Uvalde and Medina Counties; impose fees; regulate withdrawals of water from the Guadalupe River in lieu of aquifer withdrawals; require meters on aquifer wells; require water use reports; and regulate transfers of aquifer rights (pursuant to, *inter alia*, §§ 1.07, 1.08(a), 1.10(i)(1) and (2), 1.11(a), (b), (d)(8), (d)(10) and (d) (11), 1.14, 1.15, 1.16, 1.17, 1.21, 1.22, 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.30, 1.31, 1.32, 1.34, 1.35, and 1.36 of the Act).

Second, the proposed Subchapter F rules do not exceed an express requirement of state law. Instead, the proposed rules are designed to carry out the Authority's statutory responsibility to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits; manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals and well construction; develop and implement a demand management plan; close abandoned, wasteful or dangerous wells; regulate well construction, operation, maintenance and closure; ensure adequate springflows; protect threatened and endangered species; provide notice to permit holders of the limitations provided by the Act; retire permits to reduce withdrawals; implement water conservation and reuse measures; acquire permitted rights for aquifer management purposes; require water conservation and reuse plans; implement a conservation management plan; a demand management plan, and a critical period management plan; limit transport of water out of Uvalde and Medina Counties; impose fees; regulate withdrawals of water from the Guadalupe River in lieu of aquifer withdrawals; require meters on aquifer wells; require water use reports; and regulate transfers of aquifer rights (pursuant to, *inter alia*, §§ 1.07, 1.08(a), 1.10(i)(1) and (2), 1.11(a), (b), (d)(8), (d)(10), and (d)(11), 1.14, 1.15, 1.16, 1.17, 1.21, 1.22, 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.30, 1.31, 1.32, 1.34, 1.35, and 1.36 of the Act). The proposed rules are designed to comply with these express requirements of state law and not exceed them. There are no other "express requirements of state law" which are applicable to these proposed rules or which could be exceeded by these proposed rules.

Third, the proposed Subchapter F rules do not exceed a requirement of a delegation agreement or contract between the State of Texas and an agency or representative of the federal government to implement a state and federal program. The subject matter of the proposed rules is not covered by any delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program.

Fourth, the proposed Subchapter F rules would not be adopted solely under the general powers of the Authority instead of under a specific state law. While these proposed rules are adopted in part under the Authority's general powers, they are also adopted under the Act, a specific state law regarding the Edwards Aquifer. In particular, the rules are adopted pursuant to, *inter alia,* §§1.07, 1.08(a), 1.10(i)(1) and (2), 1.11(a), (b), (d)(8), (d)(10) and (d)(11), 1.14, 1.15, 1.16, 1.17, 1.21, 1.22, 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.30, 1.31, 1.32, 1.34, 1.35, and 1.36 of the Act, which require the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits; manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals and well construction; develop and implement a demand management plan; close abandoned, wasteful or dangerous wells; regulate well construction, operation, maintenance and closure; ensure adequate springflows; protect threatened and endangered species; provide notice to permit holders of the limitations provided by the Act; retire permits to reduce withdrawals; implement water conservation and reuse measures; acquire permitted rights for aquifer management purposes; require water conservation and reuse plans; implement a conservation management plan, a demand management plan, and a critical period management plan; limit transport of

water out of Uvalde and Medina Counties; impose fees; regulate withdrawals of water from the Guadalupe River in lieu of aquifer withdrawals; require meters on aquifer wells; require water use reports; and regulate transfers of aquifer rights.

For these reasons, it is not necessary to perform a RIAMER on the proposed Subchapter F rules.

The Act requires the Authority to implement a permitting system. The Act also imposes two "caps" which limit the aggregate amount of certain permitted withdrawals which may be issued by the Authority. Specifically, the Act mandates that, initially, total permitted withdrawals may not exceed 450,000 acre-feet per year and, after January 1, 2008, total permitted withdrawals may not exceed 400,000 acre-feet per year. In the absence of these "caps," total permitted withdrawals might exceed the cap amounts. Therefore, the Act requires the Authority to "proportionally adjust" permit amounts to reach the 450,000 acre-feet cap, and implement "equal percentage reductions" in order to reach the 400,000 acre-feet cap. The Act also imposes several permit "minimums" applicable to certain initial regular permit holders. The proposed Subchapter G rules of 31 Texas Administrative Code - §§711.160-711.180 (the "Subchapter G Rules") would implement these provisions of the Act by establishing the amount of groundwater available for permitting, explaining which types of permits are subject to the caps, implementing a method of calculating the permit minimums, and setting out the procedures for carrying out "proportional adjustment" and "equal percentage reductions."

Because the Subchapter G rules implement caps on the aggregate amounts of groundwater withdrawal permits, and provide for proportional adjustment, and equal percentage reductions of permits, this subchapter would tend to have an environmental protection aspect. Therefore, the Subchapter G rules are probably MERs because they have the specific intent to "protect the environment."

However, no RIAMER need be prepared for any of the Subchapter G rules because none of them meet any of the criteria listed in APA §2001.0225(a)(1)-(4). First, the rules do not exceed a standard set by federal law. The only reasonably related federal law establishes the Sole Source Aquifer Program implemented by the EPA for portions of the Edwards Aquifer, which applies only to federally-funded projects conducted on the aquifer. There is no federal law that specifically requires permitting for withdrawals of Edwards Aquifer groundwater or limits the maximum amount which can be withdrawn pursuant to those permits. Therefore, the Subchapter G rules do not exceed a standard set by federal law. Moreover, even if the rules did exceed a standard set by federal law, the rules are specifically required by the Act, a state law which requires the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits; manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals; limit permitted withdrawals to achieve the caps and protect the aquifer; proportionately adjust, if necessary, to meet the 450,000 acre-feet cap; implement the permit minimums; and conduct equal percentage reduction, if necessary, to meet the 400,000 acre-feet cap (pursuant to, *inter alia,* §§1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.18, 1.19, 1.20, 1.21, and 1.44 of the Act).

Second, the proposed Subchapter G rules do not exceed an express requirement of state law. Instead, the proposed rules are designed to carry out the Authority's statutory responsibility to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits; manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals; limit permitted withdrawals to achieve the caps and protect the aquifer; proportionately adjust, if necessary, to meet the 450,000 acre-feet cap; implement the permit minimums; and conduct equal percentage reduction, if necessary, to meet the 400,000 acre-feet cap (pursuant to, *inter alia*, §§ 1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.18, 1.19, 1.20, 1.21, and 1.44 of the Act). The proposed rules are designed to comply with these express requirements of state law and not exceed them. There are no other "express requirements of state law" which could be exceeded by these proposed rules.

Third, the proposed Subchapter G rules do not exceed a requirement of a delegation agreement or contract between the State of Texas and an agency or representative of the federal government to implement a state and federal program. The subject matter of the proposed rules is not covered by any delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program.

Fourth, the proposed Subchapter G rules would not be adopted solely under the general powers of the Authority instead of under a specific state law. While these proposed rules are adopted in part under the Authority's general powers, they are also adopted under the Act, a specific state law regarding the Edwards Aquifer. In particular, the rules are adopted pursuant to, *inter alia*, §§1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.18, 1.19, 1.20, 1.21, and 1.44 of the Act, which require the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits; manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals; limit permitted withdrawals to achieve the caps and protect the aquifer; proportionately adjust, if necessary, to meet the 450,000 acre-feet cap; implement the permit minimums; and conduct equal percentage reduction, if necessary, to meet the 400,000 acre-feet cap.

For these reasons, it is not necessary to perform a RIAMER on the proposed Subchapter G rules.

The Act requires the Authority to impose and enforce a number of restrictions, limitations and other requirements upon the use of water from the aquifer. The proposed Subchapter I rules of 31 Texas Administrative Code - §§ 711.220-711.234 (the "Subchapter I Rules") impose a number of prohibitions on aquifer use, including: requiring water withdrawn from the aquifer to be used within the Authority's boundaries; limiting withdrawals from new wells; requiring permits for most withdrawals and well construction; requiring registration of exempt wells; requiring compliance with the Act, the Authority's rules and the terms of Authority permits; and prohibiting waste or pollution of the aquifer.

The Authority has determined that §§711.222, 711.224, 711.230, and 711.232 have the specific intent to protect the environment and are, therefore, probably MERs. The other Subchapter I rules do not have the specific intent to protect the environment or reduce risks to human health from environmental exposure and are, therefore, not MERs.

However, no RIAMER need be prepared for any of the Subchapter I rules because none of them meet any of the criteria listed in

APA §2001.0225(a)(1)-(4). First, the rules proposed in Subchapter I do not exceed a standard set by federal law. The only reasonably related federal law establishes the Sole Source Aquifer Program implemented by the EPA. There is no federal law that specifically imposes restrictions akin to those in the Subchapter I rules. Therefore, the Subchapter I rules do not exceed a standard set by federal law. Moreover, even if the rules did exceed a standard set by federal law, the rules are specifically required by the Act, a state law which requires the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits, manage withdrawals and points of withdrawals from the aquifer; limit withdrawals from new wells; prohibit transfers of water outside the Authority's boundaries; require compliance with permits, the Act, and Authority rules; and prohibit waste and pollution of the aquifer (pursuant to, *inter alia* 1.08(a), 1.11(a) and (b), 1.14(e), 1.15(a), 1.34(a), and 1.35 of the Act).

Second, the proposed Subchapter I rules do not exceed an express requirement of state law. Instead, the proposed rules are designed to carry out the Authority's statutory responsibility to: manage, conserve, preserve and protect the aquifer, adopt rules to carry out its powers and duties under the Act, regulate permits; manage withdrawals and points of withdrawals from the aquifer, limit withdrawals from new wells, prohibit transfers of water outside the Authority's boundaries, require compliance with permits, the Act, and Authority rules, and prohibit waste and pollution of the aquifer (pursuant to, *inter alia* §§1.08(a), 1.11(a) and (b), 1.14(e), 1.15(a), 1.34(a), and 1.35 of the Act). The proposed rules are designed to comply with these express requirements of state law and not exceed them. Other than the Act, there are no other "express requirements of state law" which could be exceeded by these proposed rules.

Third, the proposed Subchapter I rules do not exceed a requirement of a delegation agreement or contract between the State of Texas and an agency or representative of the federal government to implement a state and federal program. The subject matter of the proposed rules is not covered by any delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program.

Fourth, the proposed Subchapter I rules would not be adopted solely under the general powers of the Authority instead of under a specific state law. While these proposed rules are adopted in part under the Authority's general powers, they are also adopted under the Act, a specific state law regarding the Edwards Aquifer. In particular, the rules are adopted pursuant to, *inter alia*, §§1.08(a), 1.11(a) and (b), 1.14(e), 1.15(a), 1.34(a), and 1.35 of the Act, which require the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits; manage withdrawals and points of withdrawals from the aquifer; limit withdrawals from new wells; prohibit transfers of water outside the Authority's boundaries; require compliance with permits, the Act, and Authority rules; and prohibit waste and pollution of the aquifer

For these reasons, it is not necessary to perform a RIAMER on the proposed Subchapter I rules.

Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act," requires governmental entities, under certain circumstances, to prepare a takings impact assessment ("TIA") in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the proposal of these rules.

First, the Authority has made a "categorical determination" that these proposed Chapter 711 rules do not affect vested property rights and, as such, adoption of these rules is not an action that "may result in a taking." The rules at issue here implement a permitting program for the withdrawal of water from the Edwards Aquifer. The Act requires the Authority to implement a permitting system whereby existing users and other potential users of aquifer water may apply for and receive permits issued by the Authority allowing for the withdrawal of groundwater from the aquifer. Other types of permits are also required by the Act for well construction and related work. Certain other withdrawals are exempted by the Act from permitting requirements. The Act also specifies an interim authorization period prior to the issuance by the Authority of final permits during which certain existing users of the aquifer may continue to make withdrawals. The Act imposes a number of restrictions upon the use of the aquifer during the interim authorization period as well as after permits are issued. It also places limits on the ability to transfer permitted or interim authorization rights. These rules are intended to effectuate these various components of the Act.

TPRPRPA makes it clear that a TIA need only be performed when the proposed governmental action is one that "may result in a taking." *See id.*, §§2007.043(a), 2007.041(a), 2007.042(a). If an action is one that has no potential to result in a taking, then no TIA need be performed. Adoption of the rules at issue here is not an action that "may result in a taking" for two reasons.

The rules cannot result in the taking of a vested private real property right. Traditional takings doctrine dictates that, in order to constitute a compensable taking, the property right alleged to have been "taken" must rise to the level of a vested right. Prior to the adoption of the Act, a landowner's right to pump groundwater underlying his or her property derived from the common law English Rule, also known as the "Rule of Capture." The proposed rules implement a permitting structure which is admittedly at odds with the Rule of Capture. However, a landowner's common law Rule of Capture right does not rise to the level of a vested property right. Under the common law, water underlying a landowner's property may be reduced to possession by the pumping of another. In other words, a landowner has no right to exclude others from the water underlying his land. As such, the landowner's expectancy of water does not rise to the level of a vested property right which could be "taken" by the passage of these rules and passage of these rules is not an action that may result in a taking.

Additionally, with respect to Edwards Aquifer water, any common law rights a landowner may have had in the past have been effectively abolished by the Legislature within the boundaries of the EAA by the passage of the Act. Under the old common law, a landowner was essentially free to drill a well and pump as much water as he pleased for whatever use and location of use he pleased. Passage of the Act changed the rules within the boundaries of the EAA. The basis for the right to withdraw groundwater under the Act changed from being an incident of the ownership of land to one based on use during the statutorily-defined "historical period." *See* Act §1.16. Excluding "exempt" wells, a landowner must now obtain a permit prior to drilling a well and making withdrawals, and this permit may be issued only if there is "water available for permitting" or if certain aquifer conditions are met. *Id.* §§1.14, 1.15, 1.16, 1.18 and 1.19. The rate and total quantity

of withdrawals are subject to limitation. Id. § 1.15(d). Regulation under the Act leaves no room for the common law to operate within the boundaries of the EAA with respect to Edwards Aquifer groundwater. As a result, there are no vested property rights which could be taken by the passage of these rules and no TIA need be prepared.

Second, the Authority's action in adopting these rules is an action that is reasonably taken to fulfill an obligation mandated by state law and is thus excluded from the Texas Private Real Property Rights Preservation Act under §2007.003(b)(4) of the Texas Government Code. *See* §§1.03(4), (9) - (14), (21), 1.07, 1.08(a), 1.10(i)(1), (2), 1.11(a), (b), (d)(2), (8), (10), (11), (h), 1.14(a) - (f), (h), 1.15(a) - (d), 1.16(a), (c) - (h), 1.17(a) - (d), 1.18, 1.19, 1.20, 1.21, 1.22(a)(1)-(4), 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.31, 1.32, 1.33, 1.34, 1.35, 1.36 of the Act, §§36.101(a), 36.111, 36.113, 36.1131, 36.119(a), 49.211(a), and 49.221 of the Texas Water Code, and §2001.004(1) of the APA.

This conclusion is directly supported and controlled by the decision in *Edwards Aquifer Authority v. Bragg,* No. 04-99-00059, 2000 WL 35582, ___ S.W.3d ___ (Tex. App.-San Antonio January 19, 2000, no history) ("*EAA v. Bragg*"). In that case, the Plaintiffs sued to invalidate a set of rules adopted by the Authority (the "prior permitting rules") which were substantially similar to these proposed rules and which were designed, like these rules, to implement the Authority's permitting program. The Fourth Court of Appeals held that the Authority's adoption of its prior permitting rules was expressly mandated by the Act and was therefore excepted from the operation of TPRPRPA. 2000 WL 35582, *3. The holding in that case controls here.

Third, it is the position of the Authority that all valid actions of the Authority are excluded from the Texas Private Real Property Rights Preservation Act under §2007.003(b)(11)(C) of the Texas Government Code as actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the proposal of these rules.

Fourth, it is the position of the Authority that the adoption of these rules constitutes an action taken by a governmental entity to "to prohibit or restrict a condition or use of private real private real property if the governmental entity proves that the condition or use constitutes a public or private nuisance as defined by background principles of nuisance and property law of this state." TEXAS GOVERNMENT CODE ANNOTATED, §2007.003(b)(6).

Fifth, it is the position of the Authority that the adoption of these rules constitutes an action which: "(A) is taken in response to a real and substantial threat to public health and safety; (B) is designed to significantly advance the health and safety purpose; and (C) does not impose a greater burden than is necessary to achieve the health and safety purpose." TEXAS GOVERNMENT CODE ANNOTATED, §2007.003(b)(13).

Accordingly, for the reasons stated above, a TIA need not be performed in connection with the proposal of these rules.

Texas Government Code, §2001.024(a)(4) requires that a fiscal note be prepared which discusses, for each year of the first five years that the proposed rules, if adopted, would be in effect: (1) the additional estimated costs to state and local governments expected as a result of enforcing or administering the rules; (2) the estimated reductions in costs to state and local governments expected as a result of enforcing or administering the rules; (3) the estimated loss or increase in revenues to state or local governments expected as a result of enforcing or administering the rules; and (4) if applicable, that enforcing or administering the proposed rules would have no foreseeable implications relating to costs or revenues of state or local governments.

Gregory M. Ellis, General Manager of the Authority, is responsible for preparing or approving this fiscal note that was prepared in connection with these proposed rules.

A Programmatic Assessment of the Authority's proposed rules, which addresses the combined effects of Chapters 707 (relating to procedures before the Authority), 709 (relating to fees), and 711 (relating to groundwater withdrawal permits) has been prepared on behalf of the Authority. The information presented below pertains particularly to the proposed Chapter 711 rules and, by itself, satisfies the requirements of §2001.024(a)(4) of the Texas Government Code. Some of the information presented below is derived from the Programmatic Assessment. Persons interested in viewing the Programmatic Assessment prepared on behalf of the Authority may arrange to do so by contacting the Authority at the telephone number shown below.

In general, as will be discussed in detail below, portions of proposed Chapter 711, both by itself and in conjunction with proposed Chapters 707 and 709 which are considered for adoption concurrent with this proposed chapter, will have fiscal impacts on local governments, as well as on the Authority. These proposed rules will directly affect the budgets of local governments within the Authority's boundaries and other jurisdictions that rely on the Edwards Aquifer for water supplies. Local governments close to, but outside, the Authority's boundaries may experience secondary effects from changes in economic activity within the boundaries caused by these proposed rules. Such secondary effects are unlikely to be material to those political subdivisions. The total affected region consists of those counties wholly or partially lying within the Edwards Aquifer Authority's boundaries. The fiscal effects of these proposed rules fall primarily into two categories: (1) increased water supply costs for local governments; and (2) changes in tax revenues resulting from decreased irrigated farming.

The Authority anticipates, on the other hand, that the proposed rules will not have material fiscal impacts upon state government. The most notable impact may be oversight costs incurred by the state. The Act creates an Edwards Aquifer Legislative Oversight Committee which oversees and reviews the Authority's actions. In addition, the Texas Natural Resource Conservation Commission is likewise charged with certain responsibilities to monitor the Authority's activities. The proposed rules may lead to additional oversight expenses incurred by either of these two entities.

The fiscal effects of each subchapter are discussed in more detail below.

Mr. Ellis has determined that for each year of the first five years that the proposed rules will be in effect, there will be no estimated (1) additional costs to state or local governments, (2) reductions in costs to state or local governments, or (3) loss or increase in revenues to state or local governments expected as a result of enforcing or administering the proposed rules in subchapter A. In addition, enforcing or administering the proposed rules in subchapter A does not have foreseeable implications relating to cost or revenues of state or local governments. The basis for this determination is that the adoption of the proposed rules would impose no regulatory requirement or compliance obligations on actions of state or local government that might result in an impact on costs or revenues. The definitions, standing alone, do not impose regulatory requirements. Instead, the definitions are

applied through other rules within the chapter. Because the definitions, standing alone, do not impose regulatory requirements but, instead, the definitions are applied through other rules within the chapter which impose regulatory requirements, there are no direct costs expected as a result of adoption of this subchapter for state or local governments. The direct cost would be expected to derive from the substantive rule in which the definition may have been incorporated and will be considered at the appropriate subchapter below in this fiscal note.

Section 711.10 (relating to Purpose) merely provides for the purposes of the proposed chapter 711 rules. This section imposes no specific regulatory requirement or compliance obligation that might have a fiscal impact. Mr. Ellis anticipates that for each year of the first five years that this proposed rule will be in effect, there will be no (1) estimated additional costs to state or local governments, (2) reductions in costs to state or local governments, or (3) loss or increase in revenues to state or local governments expected as a result of enforcing or administering this proposed rule in subchapter B. In addition, enforcing or administering the proposed rule does not have foreseeable implications relating to cost or revenues of state or local governments. The basis for this determination is that the adoption of the proposed rule would impose no regulatory requirement or compliance obligations on actions of state or local government that might result in an impact on costs or revenues.

Subchapter B establishes general provisions that form the basis for the rest of the chapter. Section 711.12 identifies various activities that require a permit to be issued by the Authority prior to undertaking the activities. The activities include (1) groundwater withdrawals (such as initial regular permits), (2) construction, operation, maintenance and alteration of wells, and (3) recharge and storage projects. Under the common law, neither groundwater withdrawal permits, well construction permits, nor aquifer recharge or storage permits were generally required to be obtained by persons contemplating these activities. For groundwater withdrawals prior to the effective date of the Act, no local governments were known to have required groundwater withdrawal permits. While well construction is generally regulated under Chapter 32, Texas Water Code, and the rules issued pursuant thereto found in Chapter 76, 16 Texas Administrative Code, prior to passage of the Act a well construction permit was not generally required to be issued. Certain municipal corporations may have had ordinances requiring well construction permits within their jurisdiction. Well construction permits are also generally known to have been required to have been obtained from the Medina County Groundwater Conservation District for wells drilled within Medina County beginning in 1991. Aquifer recharge, storage and recovery projects wherein the source water supply is surface water have been regulated by the Texas Natural Resources Conservation Commission (TNRCC) since 1995. See generally Tex. Water Code Ann. §§11.153-.155 (Vernon Supp. 2000).

Thus, the new duty to obtain a groundwater withdrawal permit, the generally new duty to obtain a well construction permit, and the new duty to obtain a recharge, storage and recovery permit from the Authority (in addition to any other regulatory requirements) would generally create new potential costs for state governmental entities that might choose to engage in the activities regulated by §711.12. Section 711.12, due to its permit requirement, directly implicates the effects of proposed Chapter 709 which relates to procedures before the Authority including the processing of permit applications, and which is proposed concurrently with these proposed rules. The costs to state government associated with chapter 709 are discussed in the notice of proposed rules for that chapter.

No entity of state government is an applicant for a groundwater withdrawal permit, or is known to intend to become such an applicant. Indeed, no state agency is known to make groundwater withdrawals at this time from the Edwards Aquifer. State agencies requiring a water source for their activities within the jurisdiction of the Authority appear to either rely on surface water (over which the Authority has no jurisdiction), make withdrawals from other aquifers (over which the Authority has no jurisdiction), or are a retail or wholesale customer of a water utility. If the state agency is the customer of a water utility whose water source is not regulated by the Authority, then these proposed rules would have no potential cost impact on the state agency. If, however, the state agency is the customer of a water utility who withdraws groundwater from the Edwards Aquifer, then the Authority does not anticipate that the costs to the state agency as a customer would be different from the costs of any similarly situated customer of the water utility. General increased costs estimated for customers of water utilities making withdrawals from the Edwards Aquifer are discussed in section G of this fiscal note.

If an agency of state government sought to make groundwater withdrawals from the Edwards Aquifer, the Authority does not anticipate that the costs to the state agency to obtain such a permit would be different from the costs of any other similarly situated applicant for a groundwater withdrawal permit. The general costs estimated to obtain a groundwater withdrawal permit from the Authority is anticipated to range from several hundred to many thousands of dollars, depending upon whether the permit application proceeds to a contested case hearing, the complexity of the application, the underlying facts, and so on.

No entity of state government is known to be an applicant for a well construction permit. State agencies, such as the TNRCC or the Texas Water Development Board, may currently operate monitoring wells and may choose to alter existing monitoring wells or install new such wells in the future. If an agency of state government sought to construct or alter a well into or through the Edwards Aquifer, the Authority does not anticipate that the cost to obtain such a permit would be different from the costs of any other similarly situated applicant for a well construction permit. For a well construction application, there is a $25 construction fee and a $10 application fee. Additional costs, which cannot be accurately determined by the Authority, will be incurred by applicant for the time and effort of completing and submitting the application.

Relative to aquifer recharge, storage and recovery projects, no entity of state government is an applicant for a such a permit, or is known to intend to become such an applicant. If an agency of state government sought to develop an aquifer recharge project for the Edwards Aquifer, the Authority does not anticipate that the costs to the state agency to obtain such a permit would be different from the costs of any other similarly situated applicant for a recharge permit. The general costs to obtain an aquifer recharge or storage permit cannot yet be estimated for §711.12 at this time because the aquifer, storage and recovery project rules have not yet been proposed by the Authority. Those rules are anticipated to be located at subchapter J, of Chapter 711, and a fiscal note will be prepared for those rules when they are proposed by the Authority.

Section 711.14 identifies the types of wells for which a groundwater withdrawal permit is not required from the Authority: (1) wells that qualify for interim authorization status under §1.17 of the Act; and (2) wells which are exempt under §1.33 of the Act. No state agency or other entity of state government filed a declaration of historical use (also known as an application for an initial regular permit). Therefore, no state agency could have interim authorization status. Moreover, the Authority is not aware that any state agency owns a well for which the agency may claim exempt well status. In any event, the general costs that may be applicable to the interim authorization or the exempt well program rules of the Authority cannot be estimated for § 711.14 because those program rules have not yet been proposed by the Authority. Those rules are anticipated to be located at subchapters C and D, of Chapter 711, and a fiscal note will be prepared for those rules when they are proposed by the Authority.

Accordingly, Mr. Ellis has determined that for each year of the first five years that the proposed rule will be in effect, there will be no estimated additional costs to state governments expected as a result of enforcing or administering §711.12 for state agencies whose water source for their activities are surface water, who make withdrawals from aquifers other than the Edwards Aquifer, or are a retail or wholesale customers of a water utility whose raw water supply is a non-Edwards Aquifer source. If the state agency is the customer of a water utility whose water source is not regulated by the Authority, then these proposed rules would have no potential cost impact on the state agency. However, if the state agency is the customer of a water utility who withdraws groundwater from the Edwards Aquifer, then the Authority does not anticipate that the costs to the state agency as a customer would be different from the costs of any similarly situated customer of a water utility. The monthly water bills to the state agency would be expected to increase as the utility is forced to obtain additional water to replace any shortfall imposed by the permit ultimately issued to the utility pursuant to the Chapter 711 rules. It is anticipated that these monthly water bill increases will be in the range of between 30% and 93%, depending upon a variety of factors, including the amount of shortfall in water which the utility must make up for, and whether the replacement water is obtained from transfers of Edwards Aquifer water or from other water sources.

Relative to well construction permits, Mr. Ellis has determined that for each year of the first five years that the proposed rule will be in effect, there will be no estimated additional costs to state governments expected as a result of enforcing or administering §711.12 for state agencies who do not intend to construct wells within the boundaries of the Authority. However, if a state agency chooses to install a monitoring well, there is a $25 application fee. Additional costs, which cannot be accurately determined by the Authority, will be incurred by applicant for the time and effort of completing and submitting the application.

Relative to aquifer recharge, storage and recovery project permits, Mr. Ellis has determined that for each year of the first five years that the proposed rule will be in effect, there will be no estimated additional costs to state governments expected as a result of enforcing or administering §711.12 because the Authority does not anticipate that any state agency will be the project applicant for such a project. In addition, even if a state agency did undertake an aquifer recharge project, the general costs to obtain an aquifer recharge or storage permit cannot yet be estimated for §711.12 at this time because the aquifer, storage and recovery project rules have not yet been proposed by the Authority and can only be evaluated at that time when proposed

Relative to §711.14, Mr. Ellis has determined that for each year of the first five years that the proposed rule will be in effect, there will be no estimated additional costs to state governments expected as a result of enforcing or administering §711.14 because it creates an exemption from a permit requirement for wells that qualify for this status, and the section would result in no increases in cost. Moreover, no state agency is known to own a well that qualifies for interim authorization or exempt well status and therefore would not be able to avail itself of the "non-'permitted" status in any event. In addition, even if a state agency did obtain ownership of a well qualifying for interim authorization status through transfer of an application for an initial regular permit, or obtain ownership of an exempt well status by the transfer of land with an on-site exempt well, or install a new well otherwise qualifying for exempt well status within the next five years, the general costs of regulation would not be attributed to §711.14 because it creates a permit exemption, and instead, would fall under subchapters C and D relating to exempt well and interim authorization, respectively, and cannot yet be estimated at this time because these rules have not yet been proposed by the Authority.

As noted above, the Subchapter B rules impose a duty to obtain a permit for conducting activities which previously required no permit. This could impose costs on local governments. Also, §711.12 implicates the effects of proposed Chapter 709 which relates to procedures before the Authority. The costs to local government associated with Chapter 709 are discussed in the notice of proposed rules for that chapter.

Many local governments are applicants for a groundwater withdrawal permit from the Authority. New applications for groundwater withdrawal permits in the next five years are unlikely except by transfer of ownership of an application for an initial regular permit. Local governments are not likely to apply for emergency permits to satisfy their demands. Terms permits will be of very limited utility to local governments. Finally, unless there is groundwater that is not permitted under an initial regular permit, or if the groundwater available under the permitting "cap" under §1.14(b) and (c) of the Act is not increased, then the prospect of an additional regular permits being issued in the next five years is unlikely.

Local governments requiring a water source for their activities within the jurisdiction of the Authority may rely on surface water or other aquifers (over which the Authority has no jurisdiction), or are a retail or wholesale customer of water utility of a water utility. If the local government is the customer of a water utility whose water source is not regulated by the Authority, then these proposed rules would have no potential cost impact on the local government. However, if the local government is the customer of a water utility who withdraws groundwater from the Edwards Aquifer, then the Authority does not anticipate that the costs to the local government as a customer would be different from the costs of any similarly situated customer of a water utility. The monthly water bills to the local government would be expected to increase as the utility is forced to obtain additional water to replace any shortfall imposed by the permit ultimately issued to the utility pursuant to the Chapter 711 rules. It is anticipated that these monthly water bill increases will be in the range of between 30% and 93%, depending upon a variety of factors, including the amount of shortfall in water which the utility must make up for, and whether the replacement water is obtained from transfers of Edwards Aquifer water or from other water sources.

Local governments may be applicants for well construction permits. Local governments also operate monitoring wells and may

choose to alter existing monitoring wells or install new such wells in the future. If a local government sought to construct or alter a well into or through the Edwards Aquifer, the Authority does not anticipate that the cost to obtain such a permit would be different from the costs of any other similarly situated applicant for a well construction permit. For a well construction application, there is a $25 construction fee and a $10 application fee. Additional costs, which cannot be accurately determined by the Authority, will be incurred by applicant for the time and effort of completing and submitting the application.

Relative to aquifer recharge, storage and recovery projects, no local government is an applicant for a such a permit, however, §1.44 of the Act provides for local governments to develop recharge projects, and the Authority is aware that some local governments intend to become such applicants. If a local government sought to develop an aquifer recharge project for the Edwards Aquifer, the Authority does not anticipate that the costs to the local government to obtain such a permit would be different from the costs of any other similarly situated applicant for a recharge permit. The general costs to obtain an aquifer recharge or storage permit cannot yet be estimated for §711.12 at this time because the aquifer, storage and recovery project rules have not yet been proposed by the Authority. Those rules are anticipated to be located at Subchapter J, of Chapter 711, and a fiscal note will be prepared for those rules when they are proposed by the Authority.

As noted above, §711.14 states that wells qualifying for interim authorization status under §1.17 of the Act or qualifying as exempt under §1.33 of the Act do not require a permit. Many local governments have filed a declaration of historical use (also known as an application for an initial regular permit). Therefore, these local governments would have interim authorization status. However, the Authority is not aware that any local government owns a well for which the entity may claim exempt well status. In any event, the general costs that may be applicable to interim authorization or the exempt well program rules of the Authority cannot be estimated for § 711.14 because those program rules have not yet been proposed by the Authority. Those rules are anticipated to be located at subchapters C and D, of Chapter 711, and a fiscal note will be prepared for those rules when they are proposed by the Authority.

Relative to aquifer recharge, storage and recovery project permits, Mr. Ellis has determined that for each year of the first five years that the proposed rule will be in effect, there will be estimated additional costs to local government expected as a result of enforcing or administering §711.12. However, the primary costs can only be determined once this section is implemented by recharge program rules. The Authority cannot yet estimate the additional costs to obtain an aquifer recharge or storage permit because the aquifer, storage and recovery project rules have not yet been proposed by the Authority and can only be evaluated at that time when proposed

Relative to §711.14, Mr. Ellis has determined that for each year of the first five years that the proposed rule will be in effect, there will be no estimated additional costs to local governments expected as a result of enforcing or administering §711.14 because it creates an exemption from a permit requirement for wells that qualify for this status, and the section would result in no increases in cost. Moreover, no local government is known to own a well that qualifies for exempt well status and therefore would not be able to avail itself of the "non-'permitted" status in any event. In addition, the estimated additional costs of regulation would not be attributed to §711.14 because it creates a permit exemption, and instead, would fall under Subchapters C and D relating to exempt well and interim authorization, respectively, and cannot yet be estimated at this time because these rules have not yet been proposed by the Authority.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter B will be in effect, there will be no estimated reductions in costs to state or local governments expected as a result of enforcing or administering these proposed rules. The basis for this determination is that none of the proposed sections in subchapter B have the effect of eliminating or minimizing a regulatory requirement or compliance obligation applicable to state or local governments. Sections 711.10 and 711.14 may not impose new obligations creating new potential costs or may exempt certain activities from a permit requirement, but by themselves they are at best neutral as to cost to creating no new net increase in costs to state or local governments. This, however, cannot be interpreted as resulting in a reduction in costs to state or local governments.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in Subchapter B will be in effect, there will be no estimated increase in revenues to state and local governments expected as a result of enforcing or administering these proposed rules. The basis for this determination is that none of the proposed sections in Subchapter B contain any mechanism for the raising of revenues by state or local governments. In addition, with respect to state government, there are no secondary effects due to the operation of any of the proposed rules that affect any known current revenue streams of state government be they by taxation, assessments, fees, or otherwise. However, with respect to local government, a secondary effect of the operation of the proposed rules will be to provide a rational basis for the increase of retail or wholesale water rates by local governments in order to recover the costs of regulation by the Authority. It is assumed that local governments operating water utilities will simply pass on their increased costs to their customers. Thus, these rules are not expected to result in any net increase of revenues of local governments for each year of the first five years that the proposed rules are in effect.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in Subchapter B will be in effect, there will be no estimated loss in revenues to state or local government expected as a result of enforcing or administering these proposed rules. The basis for this determination is that none of the proposed sections in Subchapter B contain any mechanism for the diversion of or reduction in current revenue sources of state or local government. In addition, there are no secondary effects due to the operation of any of the proposed rules in Subchapter B that affect any known current revenue streams of state or local governments be they by taxation, assessments, fees, or otherwise.

Section 711.90 merely lists the names of the types of permits the Authority may issue. This section imposes no independent regulatory requirement or compliance obligation that might have a cost impact. The regulatory requirement is imposed by §711.12 and the effects thereof have been discussed above in the discussion for Subchapter B. Therefore, Mr. Ellis has determined that for each year of the first five years that this proposed rule will be in effect, there will be no (1) estimated additional costs to state or local governments, (2) reductions in costs to state or local governments, (3) loss in revenues to state or local governments, or (4) increase in revenue to state or local governments,

expected as a result of enforcing or administering the proposed rules in subchapter A. In addition, enforcing or administering this proposed rule does not have foreseeable implications relating to cost or revenues of state or local governments.

Section 711.92 merely lists the of the types uses for which aquifer water may be withdrawn. All of these uses were recognized in the common law and other statutory provisions in Chapter 36, Texas Water Code. Section 711.94 provides for the basic duty to place groundwater withdrawn from the Edwards Aquifer to beneficial use and ancillary rules concerning who is entitled to claim beneficial use for purposes of the Authority initial regular permit permitting program. Therefore, all legitimate and authorized use of groundwater from the Edwards Aquifer within the Authority would, under prior law and now under the Act, have had to be beneficially used, and including for irrigation , industrial, or municipal use. Likewise, for state and local governments who may be applicants for initial regular permits, the establishing of beneficial use rules will clarify the evidentiary showing that will be necessary for the chain of title relative to beneficial use by prior users of groundwater from the Edwards Aquifer during the historical period that may have subsequently conveyed the surface estate upon which the place of use is located to the state or local governmental entity applicant. Therefore, these sections impose no new regulatory requirement or compliance obligation that might have a cost impact than otherwise was required by prior law, whether common law or statutory. Mr. Ellis has determined that for each year of the first five years that these proposed rules will be in effect, there will be no (1) estimated additional costs to state or local governments, (2) reductions in costs to state or local governments, (3) loss in revenues to state or local governments, or (4) increase in revenue to state or local governments, expected as a result of enforcing or administering the proposed rules in subchapter E. In addition, enforcing or administering this proposed rule in subchapter E does not have foreseeable implications relating to cost or revenues of state or local governments.

Section 711.96 largely implements the jurisdictional limitation on the Authority imposed by §1.08(b) of the Act. Because groundwater in an aquifer other than the Edwards Aquifer is not within the authority of the Authority to regulate, the Authority may not issue a groundwater withdrawal permit for the withdrawal of such groundwater. If the non-Edwards Aquifer groundwater is within the jurisdiction of another groundwater conservation district, then costs to state or local governments for the permitting or withdrawals may be imposed, but they would be due to the action of the other groundwater conservation district, not due to the Authority or the effects of these proposed rules. The limitation on the Authority not to issue groundwater withdrawal permits for groundwater over which it has no jurisdiction can have to potential implications for state or local governments. Therefore, Mr. Ellis has determined that for each year of the first five years that this proposed rule will be in effect, there will be no (1) estimated additional costs to state or local governments, (2) reductions in costs to state or local governments, (3) loss in revenues to state or local governments, or (4) increase in revenue to state or local governments, expected as a result of enforcing or administering this proposed rule in subchapter E. In addition, enforcing or administering this proposed rule in subchapter E does not have foreseeable implications relating to cost or revenues of state or local governments.

Sections 711.104, 711.108, and 711.110, of Subchapter C establish and catalogue the incidents of ownership, attributes, and limitations on the categories of permits that may be issued by the Authority. For emergency permits under § 711.104, the most notable limitation is automatic expiration after the term of not more than 30 days expires. However, if the emergency is continuing then the permit may be renewed. For well construction permits under § 711.108, there are no limitations imposed that would affect their reliability for the purpose intended. This section does impose a 180 day time frame to construct a well, but this amount of time should be adequate to complete the well installation and testing. For monitoring well permits under §711.110, there are no limitations imposed that would affect their reliability for the purpose intended. Because there are no meaningful limitations in these rules that effectively limit the efficacy of these permits for their intended purposes, the mere cataloguing of these incidents of ownership does not have a potential cost effect on state or local governments. Additionally, state or local governments are not likely to apply for emergency or term permits to satisfy their demands. Finally, unless there is groundwater that is not permitted under an initial regular permit, or if the groundwater available under the permitting "cap" under §1.14(b) and (c) of the Act is not increased, then the prospect of an additional regular permit being issued in the next five years is unlikely. Therefore, Mr. Ellis has determined that for each year of the first five years that this proposed rule will be in effect, there will be no (1) estimated additional costs to state or local governments, (2) reductions in costs to state or local governments, (3) loss in revenues to state or local governments, or (4) increase in revenue to state or local governments, expected as a result of enforcing or administering these proposed rules in subchapter E. In addition, enforcing or administering these proposed rules in subchapter E does not have foreseeable implications relating to cost or revenues of state or local governments.

As discussed above, a cataloguing of the incidents of ownership, such as in §§711.98, 711.100 and 711.102, imposes no independent regulatory requirement or compliance obligation that might have a fiscal impact. Sections 711.98, 711.100, and 711.102 also contain limitations based on abandonment, cancellation, or suspensions which would all require the volitional conduct of the owner of the permit to trigger their application. The triggering of any of these events, because of the intentional or negligent nature of the conduct of the owner of the permit do not tend to make the permit less "firm" or reliable. Thus, these conditions would not require the owner of a permit with these permit conditions to seek a supplemental source of backup water to account for and offset these contingencies. Therefore, Mr. Ellis has determined that for each year of the first five years that these proposed rules will be in effect, there will be no (1) estimated additional costs to state or local governments, (2) reductions in costs to state or local governments, (3) loss in revenues to state or local governments, or (4) increase in revenue to state or local governments, expected as a result of enforcing or administering these aspects of the proposed rules in subchapter E. Other aspects of these rules may have fiscal impacts which are discussed below. In addition, enforcing or administering these proposed rules in subchapter E does not have foreseeable implications relating to cost or revenues of state or local governments. It should also be noted that the suspension program rules under Subchapter D of Chapter 715 (relating to Demand Management), and Subchapter D of Chapter 711 (relating to Groundwater Trust); the abandonment program rules under subchapter H of chapter 711 (relating to Abandonment and Cancellation); and the cancellation program rules under Subchapter H of Chapter 711 (relating to Abandonment and Cancellation) have not yet been proposed by the Authority. A fiscal note will be prepared for those rules when they are proposed by the Authority.

Sections 711.112, 711.116 and 711.118 catalogue the contents of groundwater withdrawal permits, well construction permits, and monitoring well permits. This sections impose no independent regulatory requirement or compliance obligation that might have a cost impact. The regulatory requirements incorporated into the permit based on this catalogue are put into operation and derived from other substantive sections of these rules. Therefore, Mr. Ellis has determined that for each year of the first five years that these proposed rules will be in effect, there will be no (1) estimated additional costs to state or local governments, (2) reductions in costs to state or local governments, (3) loss in revenues to state or local governments, or (4) increase in revenue to state or local governments, expected as a result of enforcing or administering these proposed rules in subchapter E. In addition, enforcing or administering this proposed rule in subchapter E does not have foreseeable implications relating to cost or revenues of state or local governments.

Portions of subchapter E establish the incidents of ownership, attributes of, and limitations on the categories of permits that may be issued by the Authority. For initial regular permits under §711.98, the permit limitations include: (1) proportional adjustment under Subchapter G of Chapter 711; (2) retirement under Subchapter G of Chapter 715 (relating to Springflow Maintenance Rules), and the equal percentage reduction rules to be in subchapter H of chapter 715 (relating to Withdrawal Reduction and Regular Permit Retirement Rules); (3) suspension under subchapter D of chapter 715 (relating to Demand Management), and subchapter N of chapter 711 (relating to Groundwater Trust); and (4) interruption under subchapter E of chapter 715 (relating to Drought Management Rules), critical period management under subchapter F of chapter 715 (relating to Critical Period Management Rules), and springflow maintenance under subchapter G of chapter 715 (relating to Springflows Maintenance Rules); and (5) abandonment and cancellation under subchapter H of chapter 711 (relating to Abandonment and Cancellation).

For additional regular permits under §711.100, the permit limitations include: (1) retirement under subchapter G of chapter 715, and the equal percentage reduction rules to be in subchapter H of chapter 715; (2) suspension under subchapter D of chapter 715, and subchapter N of chapter 711; and (3) interruption under subchapter E of chapter 715, critical period management under subchapter F of chapter 715, and springflow maintenance under subchapter G of chapter 715; and (4) abandonment and cancellation under subchapter H of chapter 711.

For term permits under §711.102, the limitations include: (1) interruption under subchapter E of chapter 715, critical period management under subchapter F of chapter 715, and springflow maintenance under subchapter G of chapter 715; and (2) automatic expiration after the term expires, not to exceed 10 years.

Of these permit limitations, the following are involuntary based on statutory requirements related to the amount of groundwater available for permitting, aquifer conditions, or permit terms: (1) proportional adjustments; (2) retirements; (3) interruptions; and (4) expiration. The effect of these possible contingencies is to make the permit less "firm" or reliable during times of shortage or for water uses requiring permanent or long-term commitment of resources. This effect of rendering the permit "infirm" could potentially lead to additional costs to obtain a supplemental source of water as back up water to offset the effects of these contingencies.

Section 711.98 places the procedural burden of proof on the applicant to establish by "convincing evidence" his maximum historical use of water without waste and average historical use of water throughout the 21-year historical period in order to obtain an initial regular permit. In short, this rules make permits both valuable and difficult to acquire, which, along with other rules contributes to the costs of the contested case hearing process found in the discussion of the fiscal effects of subchapter G of Chapter 707 which is considered for adoption concurrent with this proposed Chapter 711. The fiscal effects on state and local governments of the procedural rules is discussed in the fiscal note to proposed chapter 707.

No entity of state government is an applicant for a groundwater withdrawal permit, or is known to intend to become such an applicant. Indeed, no state agency is known to make groundwater withdrawals at this time from the Edwards Aquifer. As discussed above for subchapter B for state agencies, state agencies requiring a water source for their activities within the jurisdiction of the Authority appear to either rely on surface water or make withdrawals from other aquifers (over which the Authority has no jurisdiction), or are retail or wholesale customers of water utilities. As such, the state agencies would not have a groundwater withdrawal permit from the Authority and would not be affected by the contingency costs of supplemental water supplies. If a state agency is the customer of a water utility whose water source is not regulated by the Authority, then these proposed rules would have no potential cost impact on the state agency. However, if the state agency is the customer of a water utility who withdraws groundwater from the Edwards Aquifer, then the Authority does not anticipate that the costs to the state agency as a customer would be different from the costs of any similarly situated customer of a water utility. The monthly water bills to the state agency would be expected to increase as the utility is forced to obtain additional water to replace any shortfall imposed by the permit ultimately issued to the utility pursuant to the Chapter 711 rules. It is anticipated that these monthly water bill increases will be in the range of between 30% and 93%, depending upon a variety of factors, including the amount of shortfall in water which the utility must make up for, and whether the replacement water is obtained from transfers of Edwards Aquifer water or from other water sources.

If an agency of state government sought to make groundwater withdrawals from the Edwards Aquifer, the Authority does not anticipate that the costs to the state agency to obtain such a permit would be different from the costs of any other similarly situated applicant for a groundwater withdrawal permit. However, the general cost effects on state government due to the operation of proportional adjustment will be considered in the discussion under subchapter G of this chapter. It is not anticipated that state government would ever utilize term permits to meets its demands. For retirements and interruptions, the general cost effects on state government under these conditions cannot yet be estimated for §§711.98, 711.100, and 711.102 because the retirement and interruption rules have not yet been proposed by the Authority. A fiscal note will be prepared for those rules when they are proposed by the Authority.

As discussed above for state governments, §§711.98, 711.100 and 711.102 contain limitations on groundwater withdrawal permits. Of these permit limitations, some are triggered upon involuntary events based on statutory requirements related to the amount of groundwater available for permitting, aquifer conditions, or permit terms. The effect of these possible contingencies

is to make the permit less "firm" or reliable during time of shortage or for water uses requiring permanent or long-term commitment of resources. This effect of rendering the permit "infirm" could potentially lead to additional costs to obtain a supplemental source of water as back-up water to offset the effects of these contingencies.

Many local governments are applicants for groundwater withdrawal permits. Local governments may, in the future, acquire additional groundwater withdrawal permits. Some local governments requiring a water source for their activities within the jurisdiction of the Authority appear to either rely on surface water or make withdrawals from other aquifers (over which the Authority has no jurisdiction), or are retail or wholesale customers of water utilities. Such local governments would not have a groundwater withdrawal permit from the Authority and would not be affected by the contingency costs of supplemental water supply. If the local government is the customer of a water utility whose water source is not regulated by the Authority, then these proposed rules would have no potential cost impact on the local government. However, if the local government is the customer of a water utility who withdraws groundwater from the Edwards Aquifer, then the Authority does not anticipate that the costs to the local government as a customer would be different from the costs of any similarly situated customer of a water utility. The monthly water bills to the local government would be expected to increase as the utility is forced to obtain additional water to replace any shortfall imposed by the permit ultimately issued to the utility pursuant to the Chapter 711 rules. It is anticipated that these monthly water bill increases will be in the range of between 30% and 93%, depending upon a variety of factors, including the amount of shortfall in water which the utility must make up for, and whether the replacement water is obtained from transfers of Edwards Aquifer water or from other water sources.

If a local government sought to make groundwater withdrawals from the Edwards Aquifer, the Authority does not anticipate that the costs to the local government to obtain supplemental supply would be different from the costs of any other similarly situated holder of a groundwater withdrawal permit. However, the general cost effects on local governments due to the operation of proportional adjustment will be considered in the discussion under subchapter G of this chapter. It is not anticipated that local governments would ever utilize term permits to meets its base load demands. For retirements and interruptions, the general cost effects on local government under these conditions cannot yet be estimated for §§711.98, 711.100, and 711.102 because the retirement and interruption rules have not yet been proposed by the Authority. Those rules are anticipated to be located as indicated above, and a fiscal note will be prepared for those rules when they are proposed by the Authority.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter B will be in effect, there will be no estimated reductions in costs to state or local government expected as a result of enforcing or administering these proposed rules in subchapter E. The basis for this determination is that none of the proposed sections in subchapter E have the effect of eliminating or minimizing a regulatory requirement or compliance obligation applicable to state or local governments.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter E will be in effect, there will be no net increase in revenues to state or local governments expected as a result of enforcing or administering these proposed rules. The basis for this determination is that none of the proposed sections in subchapter E contain any mechanism for the raising of revenues by state or local governments. In addition, there are no secondary effects due to the operation of any of the proposed rules that affect any known current revenue streams of state government be they by taxation, assessments, fees, or otherwise. With respect to local governments, a secondary effect of the operation of the proposed rules is to provide a rational basis for the increase of retail or wholesale water rates by local governments in order to recover the costs of obtaining supplemental water supplies in order to mitigate the impact of the involuntary permit conditions that may be triggered by statutory requirements related to groundwater available for permitting, aquifer conditions, or permit term expiration. It is assumed that local governments operating water utilities will simply pass on their increased costs to their customers. Thus, these rules are not expected to result in any net increase of revenues of local governments for each year of the first five years that the proposed rules are in effect.

Mr. Ellis has determined that for each year of the first five years that the proposed rules in subchapter E will be in effect, there will be no estimated loss in revenues to state or local government expected as a result of enforcing or administering these proposed rules. The basis for this determination is that none of the proposed sections in subchapter E contain any mechanism for the diversion of or reduction in current revenues sources of state or local governments. In addition, there are no secondary effects due to the operation of any of the proposed rules in subchapter E that affect any known current revenue streams of state or local governments, be they by taxation, assessments, fees, or otherwise.

For certain permit limitations contained in §§711.98, 711.100, and 711.102, enforcing or administering the proposed rules in subchapter E does not have foreseeable implications relating to costs or revenues of state or local governments.

In general, this subchapter provides the public with a convenient list of permit terms found throughout other subchapters. The rules merely incorporate other substantive rules and requirements that operate as conditions to be incorporated into any groundwater withdrawal permit. Therefore, these rules do not themselves impose costs upon state and local governments. Any such costs would derive from the operation of the conditions imposed elsewhere, not from this subchapter. These conclusion are discussed in more detail below.

Section 711.130 merely states the purpose of the proposed subchapter F rules. Section 711.132 simply identifies the groundwater withdrawal permits to which this subsection applies. These sections imposes no specific regulatory requirement or compliance obligation that might have a fiscal impact. Therefore, Mr. Ellis has determined that for each year of the first five years that these rules will be in effect, there will be no (1) estimated additional costs to state or local governments, (2) reductions in costs to state or local governments, (3) loss in revenues to state or local governments, or (4) increase in revenue to state or local governments, expected as a result of enforcing or administering these rules. In addition, enforcing or administering this proposed rule does not have foreseeable implications relating to cost or revenues of state or local governments.

Section 711.134 is a catalogue all the conditions to which a groundwater withdrawal permit may be subject. These conditions are derived from the other substantive rules that are applicable to and affect the functioning of these permits. This section

imposes no independent regulatory requirement or compliance obligation that might have a fiscal impact. The regulatory requirements incorporated into the permit based on the list provided in §711.134 are put into operation and derived from other substantive rules of the Authority and the Act. Many of these other rules have not yet been proposed and the Authority is not yet able to determine the estimated fiscal impacts at this time. When these rules are proposed a fiscal note will be prepared.

Certain other permit conditions have been proposed by the Authority and their fiscal impacts are being assessed elsewhere in this fiscal note. The conditions listed in §711.134 include: (1) prohibitions against taking action that pollutes or contributes to the pollution of the aquifer; (2) prohibitions against the use of groundwater withdrawn from the aquifer at a place of use outside of the boundaries of the authority pursuant to §711.220 of this title (relating to Place of Use Outside of Authority Boundaries); and (3) proportional adjustment pursuant to subchapter G (relating to Groundwater Available for Permitting, Proportional Adjustment, Equal Percentage Reductions) of chapter 711. The fiscal effects on state and local governments of these conditions will be discussed in the part of this fiscal note addressing subchapters I and G.

Additionally, permits may be conditioned upon (1) not wasting groundwater within or withdrawn from the aquifer pursuant to subchapters E (relating to Permitted Wells) and I (relating to Prohibitions) of this chapter; and (2) the use of groundwater withdrawn from the aquifer only for an authorized beneficial use and without waste pursuant to subchapter E (relating to Permitted Wells) and I (relating to Prohibitions) of this chapter. The fiscal effects on state and local governments of these conditions has already been discussed in the discussion for subchapter E and will be additionally discussed in the subchapter I part of this fiscal note.

The fiscal effects on state and local governments of a permit condition requiring the payment of all registration, application, aquifer management, and retirement fees pursuant to chapter 709 (relating to Fees) of this title is discussed in the fiscal note for proposed chapter 709 which is contemporaneously proposed along with these rules. This also holds true relative to the provision of notice of changes in name and mailing address of the permitting pursuant to §707.105 of this title (relating to Change of Name, Address or Telephone Number) and will be discussed in the fiscal note for proposed chapter 707.

The permit conditions requiring compliance with the terms and conditions of the permit, compliance with the Act, and compliance with the rules of the Authority are generally restatements to capture all of the duties and obligations on holders of groundwater withdrawal permits derived from the Act and implemented by these rules. Thus, these conditions impose no independent regulatory requirement that otherwise is not reflected in an existing section of the Act or the rules of the Authority.

Finally, groundwater withdrawal permits are conditioned upon not engaging in any conduct that violates the Endangered Species Act, 16 U.S.C. §§ 1531-1544(1998), or applicable state law, relative to listed threatened or endangered species. This is a pre-existing legal requirement derived from other federal and state law that operates on persons making withdrawals from the Edwards Aquifer irrespective of the existence of the Act or these proposed rules. Accordingly, imposing this condition on a groundwater withdrawal permit can have no specific fiscal effects on state or local governments that were not already operative due to the independent existence of these pre-existing laws.

Therefore, Mr. Ellis has determined that for each year of the first five years that these proposed rules will be in effect, there will be no (1) estimated additional costs to state or local governments, (2) reductions in costs to state or local governments, (3) loss in revenues to state or local governments, or (4) increase in revenue to state or local governments expected as a result of enforcing or administering these proposed rules in subchapter F. In addition, enforcing or administering this proposed rule in subchapter F does not have foreseeable implications relating to cost or revenues of state or local governments.

Section 711.160 merely states the purposes of the proposed subchapter G rules. Section 711.162 similarly identifies the groundwater withdrawal permits to which the subchapter applies. These sections impose no specific regulatory requirement or compliance obligation that might have a fiscal impact. Therefore, Mr. Ellis has determined that for each year of the first five years that these proposed rules will be in effect, there will be no (1) estimated additional costs to state or local governments, (2) reductions in costs to state or local governments, (3) loss in revenues to state or local governments, or (4) increase in revenue to state or local governments, expected as a result of enforcing or administering these proposed rules. In addition, enforcing or administering these proposed rules does not have foreseeable implications relating to cost or revenues of state or local governments.

Proposed §§711.166, 711.168, and 711.170 identify the maximum aggregate quantity of groundwater that may be withdrawn pursuant to term, emergency and monitoring well permits. Actually, §711.166, authorizes the Authority to establish an aggregate amount in the future for term permits. The Authority assumes that term and emergency permits will generally not be considered suitable or attractive groundwater withdrawal permits for state and local governments to meet their water supply needs because of the interruptibility and short terms of the permits. In addition, pursuant to §711.170, in the event a state or a local government installs a monitoring well, the amount of groundwater allocated for such monitoring wells is set as that amount reasonably necessary to accomplish the monitoring function. Therefore, §711.170 should no present limitations on the quantity of groundwater that would be needed for the monitoring purpose. Therefore, Mr. Ellis has determined that for each year of the first five years that these proposed rules will be in effect, there will be no (1) estimated additional costs to state or local governments, (2) reductions in costs to state or local governments, (3) loss in revenues to state or local governments, or (4) increase in revenue to state or local governments, expected as a result of enforcing or administering these proposed rules. In addition, enforcing or administering these proposed rules does not have foreseeable implications relating to cost or revenues of state or local governments.

Proposed §711.174 provides for "equal percentage reductions" of initial regular permits pursuant to subchapter H of chapter 715 of Title 31 Texas Administrative Code (relating to Withdrawal Reductions and Regular Permit Retirement Rules). These chapter 715 rules have not yet been proposed and the Authority is not yet able to determine the estimated fiscal impacts at this time. When these rules are proposed a fiscal note will be prepared. In addition, this "equal percentage reduction" is not mandated by the Act to take place until January 1, 2008. This is outside of the first five years during which §711.174 is expected to be in effect

and, therefore, outside of the time frame requiring analysis under this fiscal note.

Proposed §711.180 authorizes the board to enter agreed orders for voluntary waivers of applications for initial regular permits. Such an agreed order could only occur based on the voluntary conduct of the owner of the application, which for purposes of this fiscal note could be a state or local government. While state and local governments may chose to abandon all or part of their applications, and in so doing, may incur transaction costs, these costs would have been voluntarily incurred. Given the anticipated future water needs for state and local governments in the region, the Authority considers any such voluntary waivers by state and local governments to be unlikely. Therefore, Mr. Ellis has determined that for each year of the first five years that this proposed rule will be in effect, there will be no (1) estimated additional costs to state or local governments, (2) reductions in costs to state or local governments, (3) loss in revenues to state or local governments, or (4) increase in revenue to state or local governments, expected as a result of enforcing or administering proposed §711.180. In addition, enforcing or administering this proposed rule does not have foreseeable implications relating to cost or revenues of state or local governments.

Proposed §711.164 creates a "cap" on aggregate withdrawals that may be permitted under initial and additional regular permits. Because the amount of groundwater that will be authorized for withdrawals in initial regular permits will most likely be equal to the 450,000 AFY cap for the period until December 31, 2007, it is unlikely that there will ever be additional groundwater left over for issuance of additional regular permits. No entity of state government is an applicant for a groundwater withdrawal permit, or is known to intend to become such an applicant. No state agency is known to make groundwater withdrawals at this time from the Edwards Aquifer. No branch of state government is an applicant for an initial regular permit and, therefore, could not be directly affected by the initial regular permit withdrawal caps. State governmental entities requiring a water source for their activities within the jurisdiction of the Authority appear to either rely on surface water or make withdrawals from other aquifers (over which the Authority has no jurisdiction), or are retail or wholesale customers of water utilities. If a state or local governmental entity is the customer of a water utility whose water source is not regulated by the Authority, then these proposed rules would have no potential cost impact on it. If, however, it is the customer of a water utility who withdraws groundwater from the Edwards Aquifer, and the utility has filed an application for an initial regular permit such that it would be subject to the withdrawal "caps," then the Authority does not anticipate that the costs to the state or governmental entity as a customer would be different from the costs of any similarly situated customer of the water utility. The general costs estimated for customers of water utilities making withdrawals from the Edwards Aquifer are discussed in this fiscal note.

If a state or local government sought to make groundwater withdrawals from the Edwards Aquifer and held an initial regular permit or obtained one by transfer, the Authority does not anticipate that the costs of these rules to the state or local government would be different from the costs of any other similarly situated applicant for a groundwater withdrawal permit.

Proposed §§711.172, 711.176, and 711.178 all apply to applicants for initial regular permits. No state agency is an applicant for an initial regular permit. The Authority does not anticipate that a state agency will become such an applicant in the next five years. Section 711.178, relating to withdrawal schedules, applies to initial and additional regular permits, as well as term permits. However, as noted above, additional regular permits are not likely to be issued by the Authority, and term permits are likely to be unsuitable as a basis for a water supply for a state or local government. Accordingly, Mr. Ellis has determined that for each year of the first five years that proposed §§711.172, 711.176, and 711.178 will be in effect, there will be no estimated additional costs to state or local governments expected as a result of enforcing or administering these section for entities whose water source for their activities are surface water, who make withdrawals from aquifers other than the Edwards Aquifer, or who are a retail or wholesale customers of a water utility whose raw water supply is a non-Edwards Aquifer source. If the governmental entity is the customer of a water utility whose water source is not regulated by the Authority, then these proposed rules would have no potential cost impact on it. However, if the entity is the customer of a water utility who withdraws groundwater from the Edwards Aquifer, then the costs to it are estimated to increase as would other similarly situated customer of the utility over the next five years as a result of the imposition of the "cap."

Subchapter G, implements the proportional adjustments to permitted withdrawals from the aquifer as required by §1.16(e) of the Act. The withdrawal amounts of initial regular permittees are determined by a series of calculations that consider maximum use, historical use, type of use, duration of use, and proportional adjustment factors . Subchapter G has both direct and indirect effects on the local governments in the Edwards Aquifer Authority region.

To avoid issuing more than 450,000 acre-feet of permits, the Authority is expected to purchase permit applications through a withdrawal reduction process more thoroughly discussed in the Public Benefit and Cost Note below. Purchasing these applications is assumed to cost the Authority $700 per acre-foot for 90,000 acre-feet of applications, for a total one-time cost of $63,000,000. Financed at 6% for 30 years, this would result in an annual cost to the Authority of approximately $4,576,881, probably beginning in the second year that the rules are in effect. The Authority will recover these withdrawal reduction costs through aquifer management fees, which in turn become costs, whether directly or indirectly, to local governments assessed in the fiscal note for Chapter 709.

Mr. Ellis has determined that for each year of the first five years that this proposed rule will be in effect, there will be no estimated reductions in costs to state government expected as a result of enforcing or administering the rule. The basis for this determination is that the rule do not have the effect of eliminating or minimizing a regulatory requirement or compliance obligation applicable to state government.

Limiting initial regular permits to 450,000 acre-feet per year is expected to result in higher average aquifer levels, which will reduce the cost to municipalities to lift the water. This is expected to save a municipality and its customers around $.05 per month per household during any year of the first five years of the rule's effect in which the regulatory program achieves the 450,000 acre-foot withdrawal cap. Mr. Ellis has determined that for each year of the first five years that proposed rules in subchapter G will be in effect, there will be no other estimated reductions in costs to local government expected as a result of enforcing or administering these proposed rules. The basis for this determination is that proposed subchapter G rules do not have the effect of eliminating

or minimizing a regulatory requirement or compliance obligation applicable to local government.

Mr. Ellis has determined that for each year of the first five years that the proposed subchapter G rules will be in effect, there will be no estimated increase in revenues to state government expected as a result of enforcing or administering these proposed rules. The basis for this determination is that rules do not contain any mechanism for the raising of revenues by state government. In addition, there are no secondary effects due to the operation of the proposed rules that affect any known current revenue streams of state government be they by taxation, assessments, fees, or otherwise.

In all cases, the increased costs to local governments are assumed to be financed by debt that is then recovered through the rate structure as debt service becomes due. Thus, the monthly cost per household estimates of $.46 can also be interpreted as estimates of increased revenue per household for a municipal utility. As an alternative to spreading increased costs over existing households, a local government could generate revenues from impact fees. Builders of new houses and commercial buildings would pay for the relatively high increases in system costs they cause through an impact fee assessed as part of a meter fee on a new house. For a local government that secures additional supplies from the aquifer, the fee would be about $500 per tap. For a local government that secures all of its additional supplies from non-Edwards sources, the fee would be about $3,000 per tap. Such a fee structure would reduce the additional monthly revenue requirements from existing households to less than $1.00 per household in the case of the Edwards supplies, and to less than $4.50 per household in the case of non-Edwards supplies. A local government could also use a combination of impact fees and increased charges to existing customers to generate the needed revenues. The impact of different water rates may affect the distribution of new development in the region. This would have indirect economic and fiscal effects that have not been evaluated in the programmatic assessment and cannot be predicted without in-depth knowledge of future ratemaking policies throughout the region.

Many current water users will experience increased water-supply costs due to the combined effect of the Authority's fees and the need to acquire new water resources to replace those lost during the permitting process. Since local governments operate most water utilities, most impacts on the cost of water, and resulting increases in water revenue under the proposed rules will be fiscal impacts.

Figure: 31 TAC, Part 20, Chapter 711 preamble-1

The Programmatic Assessment explains how aquifer users with different historical withdrawal patterns will fare under these rules. Table 711-B, above, is an excerpt that shows the different hypothetical cases pertinent to municipal users. These hypothetical cases cover the range of scenarios pertinent to utilities currently relying on the aquifer. Each case assumes a maximum historical use of 1,000 acre-feet.

Figure: 31 TAC, Part 20, Chapter 711 preamble-2

The model assumes that maximum historical beneficial use of groundwater without waste for all users of the aquifer will be proven through the administrative procedures of proposed Chapter 707 to be 625,000 acre-feet per year. Under this assumption, each of the hypothetical users described above would receive permit amounts shown in Table 711-C, above. The model further assumes that (1) Year 5 demand for the user will be 100 AFY higher than maximum historical use, and (2) the user's growth in demand by Year 25 will be an additional 400 acre-feet/year. The model projects the user in each hypothetical case will need to secure additional water supplies as a result of the permitting process implemented by Subchapter G.

The impact of the rules on different classes of local governments will vary according to their patterns of use during the historical period. The tables and ranges of estimates that follow cover the ranges represented by the hypothetical cases described above. Those with relatively higher needs for future additional supplies will fall at the high end of the range, while those with lower needs will fall at the low end.

Figure: 31 TAC, Part 20, Chapter 711 preamble-3

The proposed rules will assist in creating a marketplace that is expected to result in the net transfer of initial regular permits from agricultural to municipal use, and the net decrease in economic activity associated with agriculture. These land use changes, and any resulting changes in employment, spending, or population have the potential to change property and sales tax revenues to local governments. If population declines, costs for local public services will decline.

Chapter 711 will ultimately allow groundwater previously used in irrigation to be transferred to municipal or any other authorized use. Without these rules, municipalities would have to pursue non-Edwards supplies for amounts lost in the permitting process and, in some cases for growth. The cost of non-Edwards supplies has been estimated at between $1,580 and $2,000 per household or household equivalent, assuming that an acre-foot of water supplies 2.4 households per year. This compares to a range of estimates for Edwards Supplies of $250 to $320 per year.

Generally, a local government may (1) acquire additional Edwards supplies in the open market, (2) acquire supplies from other sources, or (3) a combination of both. Table 711-D, above, shows the estimated capital cost to acquire additional water supplies in total dollars per household. Table 711-E, above, shows the cost per household per month. These estimated costs assume amortization of the capital cost over 30 years, plus the local government's operating and maintenance expenses.

Most local governments will find it difficult to acquire non-Edwards water supplies during the first five years the rules are in effect. To that extent, the above analysis shows larger five-year financial impacts than most local governments will actually experience. Actual capital expenditure patterns will vary among local governments.

There may be no net fiscal impact to the local governments if the increased costs are recovered in increased fees. Except for the possibility of impact fees, the Authority assumes that local governments will pass through to their ratepayers all increased costs of obtaining water service. The Authority has estimated the resulting rate increases in household equivalents, assuming that all ratepayers will bear their proportionate share of the increased costs. Ratemaking decisions within each local government could result in increases to specific customers, with some sectors paying higher or lower rates than residential users.

Local government property tax revenues may increase if a leased interim authorization status or initial regular permit is determined to be taxable property.

There may be no net fiscal impact to the local government if the increased costs are recovered in increased fees. Unless explicitly stated, the Authority assumes that local governments will pass through to their ratepayers all increased costs of obtaining water. The Authority has estimated the resulting rate increases, assuming that all ratepayers will bear their proportionate share of the increased costs. Ratemaking decisions within each local government could result in increases to specific users, with some sectors paying higher or lower rates than residential users.

The proposed rules will assist in creating a marketplace that is expected to result in the net transfer of water rights from agricultural to municipal use, and the net decrease in economic activity associated with agriculture. These land-use changes, and any resulting changes in employment, spending, or population have the potential to change property and sales tax revenues to local governments. If population declines, costs for local public services will decline. Local government property tax revenues may increase if a leased initial regular permit is determined to be taxable property.

The Authority expects that a marketplace will develop with respect to Edwards Aquifer irrigation initial regular permits, or applications therefor, for at least two reasons:

(1) The Authority will issue initial regular permits that authorize no more than 450,000 AFY of withdrawals. Most local governments, some industries and a few irrigators will receive permits that authorize a smaller quantity of withdrawals than is needed to meet current needs. To offset these shortages in the short-term, affected permittees will seek to acquire and transfer irrigation applications or permits.

(2) The Authority's permitting process will likely recognize a quantity of groundwater eligible for initial regular permits that exceeds 450,000 AFY, although it will not issue permits in excess of that amount. The Authority itself will enter the marketplace and pay applicants to abandon some or all of their applications, so that in the end only 450,000 AFY of initial regular permits need to be issued. The Authority's program for compensating applicants to abandon their applications is termed a withdrawal reduction.

A further expectation is that all users of irrigation water who are eligible for an initial regular permit and who do not otherwise abandon all or part of their applications for an initial regular permit will be eligible for a withdrawal right of at least 2 acre-feet per acre of historically irrigated land (in shorthand, "2 AFY"). A small number of users may receive a larger permit, based on a larger demonstrated historical beneficial use of water.

The municipal demand for Edwards water may be set by policy rather than by market forces. The Authority assumes that major local governments have the policy to diversify their water supplies. The Authority assumes that local governments will purchase applications for initial regular permits or initial regular permits to make up pumping capacity lost through the permitting process, but they will not purchase additional applications for initial regular permits or initial regular permits to meet growth in water demand.

The Authority has developed a cost model that computes the difference in one-time and recurring net income for four different types of irrigators and three different local governments. The impact on the Authority is how the withdrawal reduction costs affect total money disbursed and then collected through fees. Since the Authority's function is to reallocate money from the remaining applicants to those who abandon their applications, there are no net fiscal impacts to the Authority.

Withdrawal rates in recent years provide a basis for an estimate of the demand for initial regular permits which are reproduced below as Table 711-A.

Figure: 31 TAC, Part 20, Chapter 711 preamble-4

The Authority estimates a total quantity before the withdrawal reduction of about 265,000 AFY of irrigation rights (2 AFY on 130,000 acres, plus some additional withdrawals on lands with a high historical use of water), 245,000 AFY of municipal permits, and 30,000 AFY of industrial permits. Additional information regarding the Authority's estimate is presented below.

The potential initial regular permits for irrigation withdrawals is more than twice the average actual pumping, and more than the maximum historical pumping amount. This is because only about 80,000 acres are currently irrigated, and the average water used on these acres is less than 1.2 AFY. Therefore, a substantial quantity of irrigation is associated with land not now irrigated with 2/AFY; and on many farms, the total quantity of initial regular permits for irrigation purposes will exceed demand. The Authority is aware of a small number of irrigators who use more than 2 AFY. Some of these irrigators may be in the market for additional initial regular permits; in the prior assessment the quantity of additional withdrawal amounts demanded by irrigation was estimated at 500 AFY.

The Authority assumes that most industrial rights are not in active use. At most a few industrial users may be in the market for a small quantity of additional initial regular permits, or applications therefor.

While total municipal pumping averages less than the estimated quantity of initial regular permits, most municipal users perceive the effect of proposed Subchapter G as creating a shortage of water. This is in part because only a few local governments actually have a clear surplus of anticipated groundwater withdrawal amounts that will recognized in initial regular permits. compared to current demand (principally local governments that have switched substantially to non-Edwards supplies); and in part because rapid growth is causing demand to increase. The EDSIM model used in the Programmatic Assessment simulated a net market for transfers from irrigation to municipal use of 56,300 acre-feet per year. That remains a reasonable estimate of the demand. Enough water appears to be available from inactive or under-utilized irrigation and industrial initial regular permits to satisfy this demand.

The total quantity of withdrawals that may be eligible for initial regular permits is now estimated at 540,000 AFY. If so, 90,000 AFY of applications must be abandoned through withdrawal reductions. The actual withdrawal reduction quantity could be different by plus or minus 30,000 AFY. For comparison, a withdrawal reduction of 50,000 AFY was assumed. However, most of the increase in prospective initial regular permit quantities reflects anticipated recognition of permits for applicants who are not actively using the water. Thus, while the new projections indicate a larger quantity of applications for initial regular permits that need to be abandoned, they also indicate a larger supply of currently unused water.

Future retirement of 50,000 AFY of initial regular permits to reach the 400,000 AFY cap in 2008 will occur through a market-based approach. Market expectations regarding the future retirements

will be reflected. Municipal and industrial users do not have to acquire additional applications or permits now.

Under any quantity of applications eligible for permitting considered, unused applications are sufficient to meet all withdrawal reductions requirements. Unused applications are also assumed to be available to meet all municipal and industrial requirements given the assumed policies of the larger local governments. No reduction in the number of irrigated acres or of farm output need occur.

Assumptions about larger quantities of applications eligible for permitting expand the size and the cost of the withdrawal reduction but do nothing to reduce current irrigation use, because more permits mean more unused irrigation water and, to some extent, more municipal use, thus reducing or at least maintaining the replacement demands.

As a result, most applications for initial regular permits transferred or subject to withdrawal reduction has a marginal productivity of zero. Its only value is the present value of what it might bring in a future sale. If the large local governments succeed in executing their presumed policies to obtain all growth in supplies from non-Edwards sources, then the only future demand for aquifer water, after assumed transfers, is the retirement of 50,000 AFY by 2008 to reach the 400,000 AFY cap and any further retirement of rights by 2012 to meet other mandates of the Act. Thus, a future sale may require a six-year or ten-year hold before the retirement occurs. Assuming alternative investments of similar risk can earn 10% to 12%, a holder of unused permits would have to expect a doubling of the market price in order for the hold to make sense. One who perceives the risk to be higher than the rates of return indicated here would need to expect more than a doubling of transfer prices.

The price of applications or permits should rise significantly only if municipal users fail to supply growth in demand with non-Edwards water. A larger withdrawal reduction should not result in a higher price since the greater demand is accompanied by a greater supply of unused applications or permits. Expectations will differ about how successful the larger users will be in meeting future requirements from non-Edwards sources and will therefore lead to differences in the perceived present value of transferrable applications or permits. Expectations of future demand and future prices will thus be a critical determinant of the present price of Edwards water.

Mr. Ellis has determined that for each year of the first five years that proposed rules in subchapter G will be in effect, there will be no estimated direct increase in revenues to local government expected as a result of enforcing or administering these proposed rules. The basis for this determination is that proposed subchapter G does not contain any mechanism for the raising of revenues by local government. However, a secondary effect of the operation of proposed subchapter G may be to provide a rational basis for the increase of retail or wholesale water rates by local governments to provide revenues to cover the increased costs associated with regulation of withdrawals from the Edwards Aquifer.

Mr. Ellis has determined that for each year of the first five years that the rules will be in effect, there will be no estimated loss in revenues to state government expected as a result of enforcing or administering subchapter G. The basis for this determination is that subchapter G does not contain any mechanism for the diversion of or reduction in current revenues sources of state government. In addition, there are no secondary effects due to the operation of any of the proposed subchapter G that affect any known current revenue streams of state government be they by taxation, assessments, fees, or otherwise.

Local property taxes may be affected by shifting land from irrigated cropland to dry farming or pasture. Local sales tax revenues and user fees could decline if population or economic activity declines.

Proposed §711.222(a) of subchapter I generally prohibits withdrawals from new wells drilled after June 1, 1993. This is a requirement not found in the common law or statutory law prior to the effective date of the Act. This prohibition works in concert to implement the groundwater withdrawal "cap" provisions in proposed §711.164 and 711.172 already discussed in this fiscal note for subchapter G. The fiscal effects on state and local governments of this proposed rule are not distinguishable from the effects already discussed for the subchapter G rules.

Section 711.222(b) provides the circumstances under which certain withdrawals may be made from post-June 1, 1993 wells. This rules works in concert with §§ 711.12 and 711.14 already discussed in this fiscal note for subchapter B. The fiscal effects on state and local governments of this proposed rule are not distinguishable from the effects already discussed for those proposed rules.

Section 711.224 creates prohibitions that implement the permit requirement in concert with section 711.12 already discussed in this fiscal note for subchapter B. The fiscal effects on state and local governments of this proposed rule are not distinguishable from the effects already discussed for that proposed rule.

Section 711.228 creates prohibitions that prevent conduct contrary to the Act, Authority rules, or permits. This rules works in concert with subchapter F of this chapter already discussed in this fiscal note. The prohibited conduct in §711.228 simply restates all of the duties and obligations on holders of groundwater withdrawal permits derived from the Act and implemented by these rules. Thus, this section imposes no independent regulatory requirements on state and local governments that otherwise is not reflected in an existing section of the Act or the rules of the Authority.

Sections 711.230, 711.232, and 711.234(1) and (3) prohibit waste of Edwards Aquifer groundwater and the prevention of pollution of the Aquifer. Waste and pollution prevention are rarely cost-free (even when they are cost-effective) so it is likely that these rules will have some impact on the costs to municipal water systems and other operations that might represent a waste or pollution risk. However, because existing law doctrines also proscribe the waste of water or pollution of the aquifer, the Authority anticipates that the costs imposed by these rules will not be material. These prohibitions have always been recognized in the common law that predates the passage of the Act and in other statutory law. Therefore, all legitimate and authorized use of groundwater from the Edwards Aquifer within the Authority by state and local governments would, prior to the passage of these rules, have to have been conducted such that waste and pollution did not occur. Therefore, these proposed sections impose no new regulatory requirement or compliance obligation on state and local governments that might have a material fiscal impact than otherwise was required by prior law, whether common law or statutory.

Section 711.226 creates a prohibition on withdrawals from unregistered exempt wells. The Authority is not aware that any state or local government has claimed exempt well status, or intends to claim such status in the next five years. If a state or

local government did make such a claim, there is a $10 fee for registering an exempt well.

Proposed §711.234(2) prohibits the operation of a well at a rate of production higher than what is approved for the well. This will likely be expressed in a groundwater withdrawal permit in terms of gallons per minute. The Authority will recognize the maximum rate of production that is physically possible from the well in light of the internal diameter of the well and the pump capacity. Therefore, assuming a state or local government has a groundwater withdrawal permit, and the Authority recognizes the maximum well production capacity, there is no potential for additional costs to a state or local government relative to this prohibition because the well could not be physically operated in excess of it production capacity. Therefore, there is no effective limitation imposed on the operation of well by a state or local government that may have cost impacts.

Accordingly, Mr. Ellis has determined that for each year of the first five years that these proposed rule will be in effect, there will be no (1) estimated additional costs to state or local governments, (2) reductions in costs to state or local governments, (3) loss in revenues to state or local governments, or (4) increase in revenue to state or local governments, expected as a result of enforcing or administering these proposed rules, or that the estimated fiscal effects on state or local governments has already been discussed for the other proposed rules mentioned above to which they are related. In addition, enforcing or administering this proposed rules does not have foreseeable implications relating to cost or revenues of state or local governments.

Section 711.220 of subchapter I prohibits the use of Edwards Aquifer groundwater outside of the boundaries of the Authority. This could potentially create costs by requiring a state or local governmental entity to secure a source of water for its purposes at a place of use outside of the Authority boundaries from another source when the Edwards Aquifer could have provided a proximate source of water for the same activity. The Authority is unaware that any state agency has a place of use for Edwards water that is located outside of the boundaries of the Authority. The Authority is aware of a least one local government that currently provides part of its service area with Edwards Aquifer groundwater that would be affected by this proposed section. No entity of state government is an applicant for a groundwater withdrawal permit, or is known to intend to become such an applicant. Indeed, no state agency is known to make groundwater withdrawals at this time from the Edwards Aquifer. Several local governments are applicants for groundwater withdrawal permits, and other local governments may become applicants by acquiring transfers of application for initial regular permits.

State and local governments requiring a water source for their activities outside of the jurisdiction of the Authority appear to primarily rely on surface water or withdrawals from other aquifers (over which the Authority has no jurisdiction), or are retail or wholesale customer of a water utility whose water source is not regulated by the Authority. This proposed rule should have no material fiscal impact on such entities. Also, local governments who, in the next five years, do not intend to expand their service areas to encompass places of use outside of the boundaries of the Authority would not have adversely fiscal affects.

If, however, a state or local governmental entity is the customer of a water utility who withdraws groundwater from the Edwards Aquifer, and has a place of use outside of the Authority's boundaries, then the Authority does not anticipate that the costs to the governmental entity as a utility customer would be different from the costs of any similarly situated customer of a water utility. The monthly water bills to the governmental entity would be expected to increase the utility would have additional costs associated with the acquisition of additional supplies to provide water to the place of use outside of the boundaries of the Authority. It is anticipated that these monthly water bill increases will be in the range of between 30% and 93%, depending upon a variety of factors, including the amount of shortfall in water which the utility must make up for, and whether the replacement water is obtained from transfers of Edwards Aquifer water or from other water sources.

Mr. Ellis has determined that for each year of the first five years that proposed §711.220 will be in effect, there will be no estimated reductions in costs to state or local governments expected as a result of enforcing or administering the proposed rule. The basis for this determination is that § 711.220 does not have the effect of eliminating or minimizing a regulatory requirement or compliance obligation applicable to state or local government.

Mr. Ellis has determined that for each year of the first five years that the proposed §711.220 will be in effect, there will be no estimated net increase in revenues to state government expected as a result of enforcing or administering these proposed rules. The basis for this determination is that proposed §711.220 does not contain any mechanism for the raising of revenues by state or local government. In addition, there are no secondary effects due to the operation of proposed §711.220 that affect any known current revenue streams of state government be they by taxation, assessments, fees, or otherwise. Similarly, there will be no estimated direct increase in revenues to local government expected as a result of enforcing or administering the rule. The basis for this determination is that proposed §711.220 does not contain any mechanism for the raising of revenues by local government. However, a secondary effect of the operation of §711.220 may be to provide a rational basis for the increase of retail or wholesale water rates by local governments with places of use outside of the boundaries of the Authority in order to recover the costs of providing the water service through non-Edwards Aquifer infrastructure. It is assumed that local governments operating water utilities will simply pass on their increased costs to their customers. Thus, these rules are not expected to result in any net increase of revenues of local governments for each year of the first five years that the proposed rules are in effect.

Mr. Ellis has determined that for each year of the first five years that the proposed §711.220 will be in effect, there will be no estimated loss in revenues to state or local government expected as a result of enforcing or administering this proposed rule. The basis for this determination is that proposed §711.220 does not contain any mechanism for the diversion of or reduction in current revenues sources of state or local government. In addition, there are no secondary effects due to the operation of any of the proposed §711.220 that affect any known current revenue streams of state or local government be they by taxation, assessments, fees, or otherwise.

Section 2001.024(a)(5) of the Texas Government Code requires the Authority to prepare a "public benefit and cost note" assessing the (1) public benefits expected as a result of adoption of the proposed rules, (2) and the probable economic costs to persons required to comply with a rule for each year of the first five years that the rule will be in effect.

Gregory M. Ellis, General Manager of the Authority, is responsible for preparing or approving this public benefit and cost note that was prepared in connection with these proposed rules. Mr.

Ellis has approved the following determinations for the first five years that the proposed rules will be in effect.

A Programmatic Assessment of the Authority's proposed rules, which addresses the combined effects of Chapters 707 (relating to procedures before the Authority), 709 (relating to fees), and 711 (relating to groundwater withdrawal permits) has been prepared on behalf of the Authority. The information presented below pertains particularly to the proposed Chapter 711 rules and, by itself, satisfies the requirements of §2001.024(a)(5) of the Texas Government Code. Some of the information presented below is derived from the Programmatic Assessment. Persons interested in viewing the Programmatic Assessment prepared on behalf of the Authority may arrange to do so by contacting the Authority at the telephone number shown below.

Generally, a person is required to comply with these proposed rules if he or she (1) withdraws groundwater from the Edwards Aquifer; (2) constructs, installs, drills, equips, completes, alters, operates, or maintains a well, or other works, designed for the withdrawal of groundwater from the Edwards Aquifer; (3) constructs, installs, drills, equips, completes, alters, operates, or maintains a well, or other works, designed for the monitoring of the water quality or level of the aquifer, (4) installs, equips, completes, alters, operates, or maintains a well pump installed on a well designed for the withdrawal of groundwater from the aquifer; (5) constructs, installs, drills, equips, completes or alters a well or other works designed to withdraw groundwater from an aquifer other than the Edwards Aquifer, but that intersects the Edwards Aquifer; (6) recharges water into the aquifer; or (7) stores water within the aquifer.

In general, as will be discussed in more detail below, Chapter 711, both by itself and in conjunction with proposed Chapters 707 and 709 which are considered for adoption concurrent with this proposed chapter, will have public benefits and economic costs to the regulated community. The benefits and costs of proposed Chapter 711 by itself are presented here. Proposed Chapters 707 and 709 create effects that would not be possible without Chapter 711, and to that extent they are also effects of Chapter 711. The public benefit and cost notes for those chapters are prepared as part of the concurrent proposal of those chapters.

Most of the public benefits and costs from the proposed rules for Chapters 707, 711, and 709 are the result of Chapter 711. Minor effects result from the proposed rules for Chapter 707, which specifies the Authority's administrative procedures for its permitting program. More significant effects result from the proposed rules for Chapter 709, which specify the procedures for establishing the Authority's fees. These effects are identified in separate assessments of the proposed rules for Chapters 707 and 709.

Chapter 711 generally contains proposed rules regarding the groundwater withdrawal permits the Authority may issue. Most of these proposed rules are ministerial requirements associated with the issuance, loss, regulation, or compliance of permits. The most significant public benefits and costs arise from the proportional adjustment process, specified in the proposed rules for Subchapter G, particularly §711.172. That subchapter sets forth how the Authority will proportionately adjust initial regular permit applications, based on historical maximum uses of water, so that the total withdrawals authorized by initial regular permits does not exceed 450,000 AFY.

An important public benefit of proposed rules for Chapter 711 is that adoption would be a concrete step toward complying with state law mandates in the Act that created the Authority. Such compliance yields at least two benefits. One benefit is that implementation of these rules would make aquifer management more effective. The second benefit is certainty. The lack of a management mechanism to resolve controversies over the Edwards Aquifer has led to uncertainty regarding the water future of the region. The proposed rules are a necessary step in achieving certainty, because before one can manage water usage, it is necessary to quantify the initial regular permits of existing users of the Edwards Aquifer.

For the vast majority of large users, including almost all local water utilities, the quantity of Edwards Aquifer initial regular permits will be inadequate to meet existing needs. For many utilities, the permitted quantity will become increasingly inadequate as population and water demand increase in the future. The water-short users can be expected to invest in new water supplies. Based on information now available, such supplies are physically available. The issue is one of cost that is discussed in the fiscal note of this chapter.

A primary near-term requirement of the Act, and consequently a focus of the proposed rules, is for the Authority to issue not more than 450,000 acre-feet per year (AFY) of initial regular permits to withdraw water from the Edwards Aquifer. This is less than the historic maximum rate of withdrawal from the aquifer, but greater than the average annual historical use.

Some of the principal potential public benefits of the proposed rules in chapter 711 may be summarized as follows: 1. Maintenance of or increases in spring flows at Comal and San Marcos Springs from limitations on withdrawals from the Edwards Aquifer; 2. Maintenance of or increases in downstream uses from limitations on withdrawals from the Edwards Aquifer; 3. Increased protection for federally listed threatened or endangered species; 4. Regional management of the aquifer; 5. Higher water levels in the aquifer; 6. Increased assurance that aquifer water quality is maintained; 7. Reduced frequency of initial regular permits being interrupted during droughts; 8. Replacement of a common law system of groundwater management with a statute and regulation-based permitting system; 9. Creation of a marketplace for transfer of groundwater withdrawal permits, with consequent income for willing sellers; 10. Incentives for more efficient water use and management; and 11. Notice to the regulated community of the rules to which the aquifer will be managed and the attendant impact on obtaining and exercising right under groundwater withdrawal permits.

Some of the principal costs to person required to comply with the proposed rules are as follows: 1. Some applications for initial regular permits may be denied; 2. Some applications for initial regular permits will be issued in amount that is less than the quantity of water needed for many applicants' current demand; 3. Regional economic losses may result from reduced irrigation.

The public benefits and costs for the proposed rules in chapter 711 are discussed in greater detail below on a subchapter-by-subchapter basis.

The expected public benefits of the definitions in proposed subchapter A are as follows: 1. Definitions in the Act are clarified to be consistent with the requirements of other substantive sections of the Act; 2. Definitions are provided for terms used in the Act that are not defined, but for which definitions would be useful; 3. The use of definitions promotes consistency among the various substantive sections in the rules of the Authority in which they may be employed; 4. The use of definitions allows

for "short-hand" to reduce the amount of cumbersome regulatory language necessary in other Authority rules; and 5. The definitions add clarity and fill in necessary gaps in the Act in order to properly implement the Act. 2. The Probable Economic Costs to Persons Required to Comply With the Proposed Rules in subchapter A

The Authority anticipates there will be no probable economic costs to persons required to comply with the proposed rules in subchapter A. The basis for this determination is that the adoption of the proposed rule would impose no regulatory requirement or compliance obligations on actions of persons required to comply with proposed subchapter A. The definitions, standing alone, do not impose regulatory requirements. Instead, the definitions are applied through other rules within the chapter. Because the definitions, standing alone, do not impose regulatory requirements but, instead, the definitions are applied through other rules within the chapter which impose regulatory requirements, there are no direct costs expected as a result of adoption of this subchapter. Any direct costs would be expected to derive from the substantive rule in which the definition may have been incorporated and will be considered at the appropriate subchapter below in this public benefit and note. Therefore, Mr. Ellis has determined that for each year of the first five years that this proposed rule will be in effect, there will be no estimated economic costs to persons required to comply with this proposed rule.

Section 711.10 sets out what are expected to be the general purposes of the proposed rules in chapter 711. While 711.10 does not by itself accomplish these purposes, all of the chapter 711 rules, if adopted, are expected to foster some of all of these public benefits in one level of degree or another. Additionally, some specific rules may have other public benefits not specifically identified in §711.10 and will be set out below in the appropriate discussion of particular rules. The public benefits listed immediately below should be considered to be incorporated into the discussion of each of the subchapters in this public benefit and cost note. The expected public benefits of these proposed chapter 711 rules are as follows: 1. The diverse economic and social interests dependent on the aquifer are expected to be sustained by implementation of the proposed rules; 2. The control strategies provided for in the proposed rules of the Edwards Aquifer are expected to be effective in protecting terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state and region; 3. The proposed rules are expected to provide for aquifer management through the application of management mechanisms consistent with law and appropriate to the aquifer system; 4. The proposed rules are expected to provide for the management, conservation, preservation and protection of the aquifer; 5. The proposed rules are expected to result in an increase in recharge to the Edwards Aquifer; 6. The proposed rules are expected to prevent the waste of groundwater in the aquifer; and 7. The proposed rules are expected to prevent water pollution in the aquifer.

Section 711.12 requires permits for certain activities that are important to the management of the aquifer, such as groundwater withdrawal, well construction and aquifer recharge and storage, has the following additional public benefits: 1. By requiring permits for groundwater withdrawals, the creation of a water market will be fostered; and 2. By requiring permits for these key activities, the Authority will be able to develop a database incorporating the results of the issuance of these permits to develop its water accounting records, well location and identification database, and ensuring that wells are properly constructed, operated and maintained in order to ensure that the wells do not become pathways for the waste or contamination of the Edwards Aquifer.

Section 711.14 has the following public benefits: 1. The waiving of the permit requirement during the interim authorization period provides for a smoother transition from the basic non-regulation of the Edwards Aquifer under the common law to a sophisticated statute-based permit system; and 2. The waiving of the permit requirement for exempt wells minimizes the administrative regulation of small uses for domestic and livestock use in relation to their likely overall impact on the management of the aquifer.

Section 711.10 merely provides for the purposes of the proposed chapter 711 rules. This section imposes no specific regulatory requirement or compliance obligation that might have a cost impact. Therefore, Mr. Ellis has determined that for each year of the first five years that this proposed rule will be in effect, there will be no estimated economic costs to persons required to comply with this proposed rule.

As discussed in the fiscal note above, Subchapter B establishes general provisions that form the basis for the rest of chapter 711. The comments relative to proposed §711.12 that are set forth in the fiscal note are incorporated herein. The duty to obtain a groundwater withdrawal permit, the generally new duty to obtain a well construction permit, and the new duty to obtain a recharge, storage or recovery permit from the Authority would generally create new potential costs for those persons required to comply with these proposed rules that might choose to engage in the activities regulated by § 711.12. Section 711.12, due to its permit requirement, directly implicates the effects of proposed chapter 709 which relates to procedures before the Authority, including the processing of permit applications and which is proposed concurrently with these proposed rules. The costs to persons required to comply with proposed §711.12 and thereby the proposed procedural rules in chapter 709 are discussed in the notice of proposed rules for that chapter.

Many persons required to comply with these rules are applicants for a groundwater withdrawal permits from the Authority. No valid new applications for initial regular permits will be filed in the next five years, except by transfer of ownership of an application for an initial regular permit, because the deadline for filing such applications was December 30, 1996. Persons are not likely to apply for term or emergency permits to satisfy their normal demands. Finally, unless there is groundwater that is not permitted under an initial regular permit, or the groundwater available for permitting under the "cap" in § 1.14(b) and (c) of the Act is increased, then the prospect of an additional regular permit being issued to persons in the next five years is unlikely.

Persons requiring a water source for their activities within the jurisdiction of the Authority may rely on surface water or make withdrawals from other aquifers (over which the Authority has no jurisdiction), or may be a retail or wholesale customers of a water utility. The proposed rules would impose no probable economic costs on such persons. However, if the person is a customer of a water utility who withdraws groundwater from the Edwards Aquifer, then the Authority anticipates that the monthly water bills to the person would be expected to increase as the utility is forced to obtain additional water to replace any shortfall imposed by the permit ultimately issued to the utility pursuant to the Chapter 711 rules. It is anticipated that these monthly water bill increases will be in the range of between 30% and 93%, depending upon a variety of factors, including the amount of shortfall in water which the utility must make up for, and whether the

replacement water is obtained from transfers of Edwards Aquifer water or from other water sources.

There are no current applicants for aquifer recharge, storage and recovery projects. The Authority is aware that some persons intend to become such applicants. The general costs to obtain an aquifer recharge or storage permit cannot yet be estimated for §711.12 at this time because the aquifer, storage and recovery project rules have not yet been proposed by the Authority. Those rules are anticipated to be located at subchapter J, of Chapter 711, and a public benefit and cost note will be prepared for those rules when they are proposed by the Authority.

Section 711.14 states that wells qualifying for interim authorization, or exempt well status do not require a permit. Those who have filed a declaration of historical use (also known as an application for an initial regular permit) generally qualify for interim authorization status. Also, many persons own wells for which they may claim exempt well status. The probable economic costs that may be applicable to the interim authorization or the exempt well program rules of the Authority cannot be estimated for §711.14 because those program rules have not yet been proposed by the Authority. Those rules are anticipated to be located at subchapters C and D, of Chapter 711, and a public benefit and note will be prepared for those rules when they are proposed by the Authority. The mere reference in §711.14 to the effect that withdrawals from these types of wells do not require a permit does not by itself impose probable economic costs on persons.

Proposed §§711.90 and 711.92 benefit by the public by providing a ready listing of, and therefore notice of, all permits that the Authority may issue as well as the beneficial uses applicable for withdrawals of groundwater.

Proposed §711.94 sets out the requirements of beneficial use of water without waste and thus encourages the public benefit of conservation of a scarce resource. Additionally, it provides the public benefit of clarifying evidentiary issues related to the prima facie case of an applicant for an initial regular permit and thereby potentially improves the efficiency of the permit decision-making process.

Proposed §711.96 provides the public benefit of ensuring the integrity of the jurisdictional limits on the regulatory authority and discourages regulatory entanglements between aquifers over which the Authority has no regulatory jurisdiction and those over which it does have jurisdiction. Additionally, it provides the public benefit of clarifying evidentiary issues related to the prima facie case of an applicant for an initial regular permit and thereby potentially improves the efficiency of the permit decision-making process.

Proposed §§711.98, 711.100, 711.102, 711.104, 711.108, and 711.110 establish and catalogue the incidents of ownership, attributes, and limitations of the categories of permits that may be issued by the Authority. By establishing, among other things, the transferability of, term of, and conditions related to permits, the nature of the permits can assessed, which permit-holders can value in considering whether to use the permit or market it to a third-party. Thus, these proposed rules provide the public benefit of providing basic ground rules for the functioning of a water market.

Proposed §711.98 also requires that the board issue permits based only upon a showing of "convincing evidence" by an applicant. This requirement provides the public benefit of ensuring the quality of the decision-making for the Authority's permit program. Under this evidentiary standard only applicants with evidence of relatively high reliability will obtain a permit. This also has the added benefit of assuring that applicants who engage in the expensive and time-consuming permitting process will have their application approved or denied based on the evidence.

Proposed §§711.112, 711.116, and 711.118 benefit by the public by providing a ready listing of, and therefore notice of, the contents of permits that the Authority may issue.

Section 711.90 merely lists the names of the types of permits the Authority may issue. This section imposes no independent regulatory requirement or compliance obligation that might have a cost impact. The regulatory requirement is imposed by §711.12 and the effects thereof have been discussed above in the discussion for subchapter B. Therefore, Mr. Ellis has determined that for each year of the first five years that this proposed rule will be in effect, there are no probable economic costs to persons required to comply with this proposed rule.

Section 711.92 merely lists the types of beneficial uses for which the Authority may issue permits. All of these uses were recognized in the common law and other statutory provisions in chapter 36, Texas Water Code. Section 711.94 imposes the basic duty to place groundwater withdrawn from the Edwards Aquifer to beneficial use and ancillary rules concerning who is entitled to claim beneficial use for purposes of the Authority initial regular permit permitting program. These are not new substantive requirements because prior common law and statutory water law doctrines required beneficial use of groundwater. These rules will clarify the evidentiary showing that will be necessary for the chain of title relative to beneficial use by prior users of groundwater from the Edwards Aquifer during the historical period that may have subsequently conveyed the surface estate upon which the place of use is located to the person who is an applicant. Therefore, these sections impose no new regulatory requirement or compliance obligation that might have a cost impact than otherwise was required by prior law, whether common law or statutory. Therefore, Mr. Ellis has determined that for each year of the first five years that these proposed rules will be in effect, there are no probable economic costs to persons required to comply with these proposed rules.

Section 711.96 largely implements the jurisdictional limitation on the Authority imposed by §1.08(b) of the Act. Because groundwater in an aquifer other than the Edwards Aquifer is not within the authority of the Authority to regulate, the Authority may not issue a groundwater withdrawal permit for the withdrawal of such groundwater. If the non-Edwards Aquifer groundwater is within the jurisdiction of another groundwater conservation district, then costs to persons for the permitting of withdrawals may be imposed, but they would be due to the action of the other groundwater conservation district, not the Authority or these proposed rules. Those persons who seek a permit from the Authority for a well that withdraws groundwater from the Edwards as well as other aquifers may incur additional costs in the permitting process in order to determine the amount of water which is withdrawn by the well from the Edwards Aquifer, as opposed to the amount drawn from other aquifers. The amount of this additional cost will vary from well to well depending upon the circumstances.

Sections 711.104, 711.108, and 711.110, of Subchapter C establish and catalogue the incidents of ownership, attributes, and limitations on certain types of permits that may be issued by the Authority. For emergency permits under § 711.104, the primary

limitation is automatic expiration after the term expires, not to exceed 30 days. However, if the emergency is continuing then the permit could be renewed. For well construction permits under §711.108, there are no limitations imposed that would affect their reliability for the purpose intended. This section does imposes a 180 time frame to construct a well, but this amount of time should be adequate to complete the well installation and testing. For monitoring well permits under §711.110, there are no limitations imposed that would affect their reliability for the purpose of monitoring water levels or quality. Because there are no meaningful limitations in these rules that effectively limit the efficacy of these permits for their intended purposes, the mere cataloguing of these incidents of ownership do not have a potential cost effect on the public. Finally, unless there is groundwater that is not permitted under an initial regular permit, or the groundwater available for permitting under the "cap" in §1.14(b) and (c) of the Act is increased, then the prospect of an additional regular permits being issued in the next five years is unlikely. Therefore, Mr. Ellis has determined that for each year of the first five years that this proposed rule will be in effect, there are no probable economic costs to persons required to comply with this proposed rule, other than the costs of applying for and obtaining the permits, which are estimated to range from several hundred to many thousands of dollars, depending upon whether the permit application proceeds to a contested case hearing, the complexity of the application, the underlying facts, and so on.

As discussed above, a cataloguing of the incidents of ownership in §§ 711.98, 711.100, and 711.102 for initial regular, additional regular, and term permits imposes no independent regulatory requirement or compliance obligation that might have a cost impact. Sections 711.98, 711.100, and 711.102 also contain limitations based on abandonment, cancellation, or suspensions which would all require the voluntary conduct of the owner of the permit to trigger their application. The triggering of any of these events, because of the conduct of the owner of the permit, do not tend to make the permit less "firm" or reliable. Thus, these conditions would not require the owner of a permit with these permit conditions to seek a supplemental source of backup water to account for and offset these contingencies. It should also be noted that the suspension program rules under subchapter D of chapter 715 (relating to Demand Management), and subchapter D of chapter 711 (relating to Groundwater Trust); the abandonment program rules under subchapter H of chapter 711 (relating to Abandonment and Cancellation); and the cancellation program rules under subchapter H of chapter 711 (relating to Abandonment and Cancellation) have not yet been proposed by the Authority. Those rules are anticipated to be located as indicated above, and a public benefit and cost note will be prepared for those rules when they are proposed by the Authority.

Sections 711.98, 711.100 and 711.102 also impose limitations on the permits issued by the Authority which can be involuntary based on statutory requirements related to the amount of groundwater available for permitting, aquifer conditions, or permit terms: (1) proportional adjustments; (2) retirements; (3) interruptions; and (4) expiration. The effect of these possible contingencies is to make the permit less "firm" or reliable during time of shortage or for water uses requiring permanent or long-term commitment of resources. This effect of rendering the permit "infirm" could potentially lead to additional costs to obtain a supplemental source of water as back up water to offset the effects of these contingencies.

Section 711.98 places the procedural burden of proof on the applicant to establish by "convincing evidence" his maximum historical use of water without waste and average historical use of water throughout the 21-year historical period in order to obtain an initial regular permit. In short, this rules make permits both valuable and difficult to acquire, which, along with other rules contributes to the costs of the contested case hearing process found in the discussion of the fiscal effects of subchapter G of Chapter 707 which is considered for adoption concurrent with this proposed Chapter 711. The probable economic costs on person required to comply with these procedural rules is discussed in the fiscal note to proposed chapter 707.

Persons requiring a water source for their activities within the jurisdiction of the Authority may rely on surface water or make withdrawals from other aquifers (over which the Authority has no jurisdiction), or may become retail or wholesale customers of water utilities. Such persons would not be required to comply with these proposed rules. However, if the person is a customer of a water utility who withdraws groundwater from the Edwards Aquifer, then the Authority anticipates that the monthly water bills to the person would be expected to increase as the utility is forced to obtain additional water to replace any shortfall imposed by the permit ultimately issued to the utility pursuant to the Chapter 711 rules. It is anticipated that these monthly water bill increases will be in the range of between 30% and 93%, depending upon a variety of factors, including the amount of shortfall in water which the utility must make up for, and whether the replacement water is obtained from transfers of Edwards Aquifer water or from other water sources.

The general cost effects on persons due to the operation of proportional adjustment will be considered in the discussion under subchapter G of this chapter. It is not anticipated that persons would ever utilize term permits to meets its normal demands. For retirements and interruptions, the general cost effects on state government under these conditions cannot yet be estimated for §§711.98, 711.100, and 711.102 at this time because these rules have not yet been proposed by the Authority. A public benefit and cost note will be prepared for those rules when they are proposed by the Authority.

Sections 711.112, 711.116, 711.118, catalogue the contents of groundwater withdrawal permits, well construction permits, and monitoring well permits. These sections impose no independent regulatory requirement or compliance obligation that might have a cost impact. The regulatory requirements incorporated into the permits based on this catalogue are put into operational and derived from other substantive sections of the Authority's rules. Therefore, Mr. Ellis has determined that for each year of the first five years that these proposed rules will be in effect, there are no probable economic costs to persons required to comply with them.

Proposed §§711.130, 711.132, and 711.134 set out the conditions subject to which groundwater withdrawal permits will be issued. These rules provide a public benefit by conveniently listing the permit conditions that are found throughout other subchapters of the Authority's rules. The rules merely incorporate other substantive rules and requirements that operate as conditions to be incorporated into any groundwater withdrawal permit. Any other benefits will also result from the operation of the conditions imposed elsewhere, not from this subchapter. These rules will promote the accomplishment of the following primary public benefits: 1. Protection of aquifer water quality; 2. Protection

of the quality of the surface streams to which the aquifer provides springflow; 3. Achievement of water conservation, and the maximization of the beneficial use of groundwater available for withdrawal from the aquifer; 4. Protection of aquatic and wildlife habitat, and the protection of species that have been listed as threatened or endangered under applicable federal or state law; 5. Providing for instream uses, bays, and estuaries; 6. Ensuring the accurate compilation of the Authority's permit records; 7. Ensuring the payment of all fees due the Authority; 8. Providing clear, identifiable time frames when an applicant may either be in interim authorization status, or will have converted into a permittee; 9. Ensuring the accuracy of the Authority's water accounting records by eliminating from those records abandoned or cancelled permits; 10. Providing for the restoration of potential permit withdrawal amounts to those who have the most legitimate historical claim to the use of the groundwater; 11. Fostering the functioning of the water market; 12. Allocating the supply of groundwater from the Edwards Aquifer to support the regional economy; 13. Providing for compliance with the Act, the Authority's rules and permits, in support of the Authority's enforcement program.

Section 711.130 merely states the purpose of the proposed subchapter F rules. Section 711.132 simply identifies the groundwater withdrawal permits to which this subsection applies. These sections impose no specific regulatory requirement or compliance obligation that might have a cost impact. Therefore, Mr. Ellis has determined that for each year of the first five years that these proposed rules will be in effect, there will be no probable economic costs to person required to comply with these proposed rules.

Section 711.134 is a catalogue all the conditions that a groundwater withdrawal permit may be subject. These conditions are derived from the other substantive rules that are applicable to and affect the functioning of these permits. This section imposes no independent regulatory requirement or compliance obligation that might have a cost impact. The regulatory requirements incorporated into the permit based on the list provided in §711.134 are put into operation and derived from other substantive rules of the Authority and the Act. Many of these other rules have not yet been proposed and the Authority is not yet able to determine the estimated public costs at this time. When these rules are proposed, a public benefits and costs note will be prepared.

Certain other permit conditions listed in §711.134 include: (1) prohibitions against taking action that pollutes or contributes to the pollution of the aquifer; (2) the prohibition against the use of groundwater withdrawn from the aquifer at a place of use outside of the boundaries of the authority pursuant to §711.220 of this chapter (relating to Place of Use Outside of Authority Boundaries); and (3) proportional adjustment pursuant to subchapter G (relating to Groundwater Available for Permitting, Proportional Adjustment, Equal Percentage Reductions) of chapter 711. The probable economic costs to persons required to comply with those rules will be discussed in the part of this public benefit and cost note addressing subchapters I and G.

Additionally, a permit may be conditioned upon (1) not wasting groundwater within or withdrawn from the aquifer pursuant to subchapters E (relating to Permitted Wells) and I (relating to Prohibitions) of this chapter; and (2) the use of groundwater withdrawn from the aquifer only for an authorized beneficial use and without waste pursuant to subchapter E (relating to Permitted Wells) and I (relating to Prohibitions) of this chapter. The probable economic costs on persons required to comply with these rules has already been discussed in the discussion for subchapter E and will be additionally discussed in the subchapter I part of this public benefit and cost note.

The costs to persons required to comply with these rules for a permit condition requiring the payment of all registration, application, aquifer management, and retirement fees pursuant to chapter 709 (relating to Fees) of this title is discussed in the public benefit and cost note for proposed chapter 709 which is contemporaneously proposed along with these rules. This also holds for the provision of notice of changes in name and mailing address of the permitting pursuant to §707.105 of chapter 707 of this title (relating to Change of Name, Address or Telephone Number) and will be discussed in the fiscal note for proposed chapter 707.

The permit conditions requiring compliance with the terms and conditions of the permit, compliance with the Act, and compliance with the rules of the Authority are generally restatements to capture all of the duties and obligations on holders of groundwater withdrawal permits derived from the Act and implemented by these rules. Thus, these conditions impose no independent regulatory requirement that otherwise is not reflected in an existing section of the Act or the rules of the Authority.

Finally, groundwater withdrawal permits are conditioned upon not engaging in any conduct that violates the Endangered Species Act, 16 U.S.C. §§ 1531-1544(1998), or applicable state law, relative to listed threatened or endangered species. This is a pre-existing legal requirement derived from other federal and state law that operates on persons making withdrawals from the Edwards Aquifer irrespective of the existence of the Act or these proposed rules. Accordingly, imposing this condition on a groundwater withdrawal permit can have no probable economic costs on persons required to comply with these laws that were not already operative due to the independent existence of these pre-existing laws.

Therefore, Mr. Ellis has determined that for each year of the first five years that proposed §711.134 will be in effect, there will be no separate and distinct probable economic costs to persons required to comply with this proposed section because the cost impacts are derivative of other substantive rules yet to be proposed and will be discussed at that time, derivative of other substantive rules proposed in this notice of proposed rules and discussed elsewhere herein, derivative of other substantive rules proposed in other contemporaneously proposed notice of proposed rules and discussed elsewhere therein, or are merely reflective and incorporative of other pre-existing legal duties derived from other sources of law.

Proposed §§711.160 and 711.162, by providing the purpose and applicability of the proposed subchapter G rules, have the public benefit of clarifying the scope of subchapter.

Proposed §§711.164, 711.166, 711.168, and 711.170 relate to the maximum aggregate quantity of groundwater that may be withdrawn pursuant to initial and additional regular, term, emergency and monitoring well permits, respectively. Proposed §711.178 requires applicants to forecast their groundwater withdrawals for the upcoming year and make the withdrawals pursuant to a withdrawal schedule. Proposed §§711.172 and 711.176 relate to the proportional adjustment process, and the process's impact on the issuance of initial regular permits, respectively. The withdrawal amounts of initial regular permits are determined by a series of calculations that consider maximum use, historical use, type of use, the duration of use, and proportional adjustment factors. These two proposed sections

set forth how the Authority will ensure that the total aggregate groundwater withdrawal amounts recognized in initial regular permits do not exceed 450,000 AFY.

These sections collectively have the following public benefits: 1. Limit and control the anticipated ever-growing increases in the demand for groundwater from the aquifer, thereby mitigating the potentially severe impacts of a drought on the diverse economic and social interests that depend water supplied from the Edwards Aquifer; 2. Promote the conservation, preservation, and management of the state's natural resources; 3. Promote the legislative preference of protecting historical users of groundwater over future users; 4. Eliminate the prospect of landowners rushing to establish the right to an initial regular permit through future drilling after the passage of the Act; 5. Promote the management and regulation of the Edwards Aquifer by eliminating the prospect of the Authority having to issue initial regular permits to innumerable new wells; 6. Maintain or increase the spring flows at Comal and San Marcos Springs; 7. Maintain downstream uses; 8. Increase protection for federally listed threatened or endangered species; 9. Ensure regional management of the aquifer; 10. Raise water levels in the aquifer; 11. Increase assurance that aquifer water quality is maintained; 12. Reduce frequency of initial regular permits being interrupted during droughts; 13. Replace common law system of groundwater management with a statutory-based permitting system; 14. Create a marketplace for transfer of groundwater withdrawal permits, thereby ensuring that water goes to its highest and best use, with consequent income for willing sellers; 15. Create incentives for more efficient water use and management; and 16. Simplify the maximum historical use evidentiary requirements for irrigators who are faced with documenting their volume of maximum historical use; and 17. Provide notice to the regulated community of the rules by which the aquifer will be managed and the attendant impact on obtaining and exercising groundwater withdrawal permits.

Spring flows and downstream uses. The Act was motivated in substantial part by the federal Endangered Species Act and by provisional evaluations of the U.S. Fish and Wildlife Service regarding the need to maintain spring flows at Comal Springs and San Marcos Springs above specified levels. The effects on spring flow of proposed §§711.164, 711.172, 711.176 and 711.178 in particular, and the entire proposed rules in chapter 711 in general, were estimated using a computer model known as GWSIM, which provides results that are approximate and best interpreted in relative terms (that is, in terms of spring-flow differences between different regulatory scenarios, rather than in terms of absolute estimates of flow).

Although more than 800,000 AFY of declarations have been filed with the Authority, and there have been historic years when withdrawals from the Edwards Aquifer exceeded 500,000 AFY, the current rate of withdrawals generally does not appear to exceed 450,000 AFY. For example, during the 10 years ending in 1998, which represent the period of largest population in the record, the withdrawals from wells of the type that may receive initial regular permits averaged just over 400,000 AFY. Consequently, adoption of proposed §§ 711.164, 711.172, 711.176, and 711.178 and enforcement of a withdrawal limit may cause little or no net change in spring flow in the short term. A conservative analysis has been made assuming that, during the next five years, in the absence of the proposed rules, withdrawals might reach 485,000 AFY. Under these assumptions, the spring-flow benefit of proposed §§711.164, 711.172, 711.176, and 711.178 is estimated as follows. Spring flows at Comal Springs would average 30 cubic feet per second (cfs) greater with these rules than without regulation. This is a difference of more than 20,000 AFY. The effect at San Marcos springs is much smaller, about 3.5 cfs, or about 2,500 AFY. The effects also are seen under extreme flow conditions. One comparison is how often Comal Springs stays above 200 cfs if a 450,000 AFY "cap" is in place, compared to withdrawals at 485,000 AFY. The model which was run to assess the rules' effects projected flows would stay above 200cfs an additional 63 months of the 780-month simulation period, or eight percent more often. At the higher pumping rate of 485,000 AFY, Comal Springs would be dry 70 months more often, a difference of about nine percent. The minimum spring-flow at San Marcos would be about 10 cfs less with the higher withdrawal rate than with the 450,000 AFY limit. A much more substantial benefit will occur after the five-year period or under much higher withdrawal scenarios for the next five years. When compared to a hypothetical future in which there would be no regulations, and withdrawals from the aquifer would be allowed to grow without limit, the effect of the proposed rules would be substantial. The following findings, that are more fully documented in the Programmatic Assessment, are based upon assumptions of unregulated withdrawals in excess of 600,000 AFY compared to withdrawals under these proposed rules. An unconstrained future would drop average Comal Spring flows to less than 30 cfs. This is nearly 120 cfs less than what would occur with a "cap" in place. The difference is more than 85,000 AFY. The effect of unregulated withdrawals at San Marcos Springs would be to drop average spring flows about 20 cfs. Comal Springs would be dry more than 67% of the time. The Authority's modeling probably underestimates this effect. This compares to the springs going dry 10% of the time with the cap in place. (Neither estimate considers the effect of critical periods, demand management, drought management, or spring-flow maintenance restrictions.) During a repeat of the drought of record, Comal Springs would be dry continuously, or almost continuously, for about 30 years. In the most severe drought, San Marcos Springs would be dry at the unregulated withdrawal rate. "

In the absence of these proposed rules, Comal Springs eventually would be effectively eliminated as an important source of water and habitat, and San Marcos Springs would be severely affected. Avoiding this impact is a primary benefit of proposed §§711.164, 711.172, 711.176, and 711.178, albeit one that will become increasingly important beyond the five-year assessment period.

The downstream impacts of proposed §§711.164, 711.172, 711.176, and 711.178 have been quantified in the Assessment Report of the South Central Texas Water Advisory Committee. The report indicates that a withdrawal limit of 450,000 AFY improves downstream conditions compared to a future in which there is no regulation. These proposed rules do not fully protect downstream water needs, especially on the Comal River, with the greatest impacts occurring during a drought similar to the drought of record. The simulations also indicate that increases in spring flow resulting from a 450,000 AFY "cap" will have only a small impact on Guadalupe River flows compared to the overall water budget of the river system as it discharges into Guadalupe Bay. Thus, withdrawal limits imposed by the proposed rules will yield relatively small benefits to the coastal fish harvest and the bay and estuary ecosystems.

Proposed §711.174, providing for "equal percentage reductions" of initial regular permits to be performed pursuant to subchapter H of chapter 715 of Title 31 Texas Administrative Code (relating to Withdrawal Reductions and Regular Permit Retirement Rules)

provides the public benefit of cross-referencing and correlating the proportional adjustment process to attain the 450,000 AFY "cap" with the equal percentage reduction process to attain the 400,000 AFY "cap."

Proposed §711.180, by authorizing the board to enter into agreed orders for voluntary waivers of applications for initial regular permits, has the public benefit of potentially mitigating the impact of parts of the mandatory implementation of the proportional adjustment process in favor of a voluntary system which would place certain impacts primarily on those who are willing to accept the added affects of the phase-2 proportional adjustment process and thereby benefit the remainder of the applicants for initial regular permits who choose not to participate in the voluntary program authorized in §711.180.

Section 711.160 merely provides for the purpose of the proposed subchapter G, chapter 711 rules. Section 711.162 simply identifies the groundwater withdrawal permits to which this subchapter applies. These sections impose no specific regulatory requirement or compliance obligation that might have a cost impact. Therefore, Mr. Ellis has determined that for each year of the first five years that these proposed rules will be in effect, there will be no probable economic costs to person required to comply with these proposed rules.

Proposed §§711.166, 711.168, and 711.170 relate to the maximum aggregate quantity of groundwater that may be withdrawn pursuant to term, emergency and monitoring well permits. Actually, §711.166 authorizes the Authority to establish an aggregate amount in the future. The Authority assumes that, but for certain aquifer storage and recovery projects by persons, term and emergency permits are not generally suitable groundwater withdrawal permit for a person to accomplish his or her water supply objectives because of the interruptibility of the permits and their short terms. In addition, the amount of groundwater allocated for monitoring wells in the event the person installs a monitoring well is intended to be sufficient to accomplish the monitoring function, and therefore, should not present limitations on the quantity of groundwater that would be needed for this purpose. Therefore, Mr. Ellis has determined that for each year of the first five years that this proposed rule will be in effect, there will be no probable economic costs to person required to comply with these proposed rules, other than the costs associated with obtaining the permits. With respect to emergency and monitoring well permits, the costs for obtaining such permits are anticipated to be in the range of several hundred to several thousand dollars, depending upon the complexity of the application, the underlying facts, and so on. In the case of term permits, the cost of obtaining such a permit is anticipated to be in the range of several hundred to several tens of thousands of dollars, depending upon whether the permit application proceeds to a contested case hearing, the complexity of the application, the underlying facts, and so on.

Proposed §711.174 provides for "equal percentage reductions" of initial regular permits pursuant to subchapter H of chapter 715 of Title 31 Texas Administrative Code (relating to Withdrawal Reductions and Regular Permit Retirement Rules). These rules have not yet been proposed and the Authority is not yet able to determine the estimated fiscal impacts at this time. When these rules are proposed a fiscal note will be prepared. Therefore, because of its derivative nature based on rules yet to be proposed, Mr. Ellis has determined that for each year of the first five years that this proposed rule will be in effect, there will be no probable economic costs to person required to comply with this proposed rule.

Proposed §711.180 authorizes the board to enter agreed orders for voluntary waivers of applications for initial regular permits. Such agreed orders could only occur based on the voluntary conduct of the owner of the application. While the person may chose to abandon all or part of its application, and in so doing, may incur professional service transaction costs, these costs would have been voluntarily incurred. Therefore, Mr. Ellis has determined that for each year of the first five years that this proposed rule will be in effect, there will no be probable economic costs to person required to comply with these proposed rules.

Proposed §711.164 creates a "cap" on aggregate withdrawal that may be permitted under initial and additional regular permits. Because the amount of groundwater that will be authorized for withdrawal in initial regular permits will most likely be equal to the 450,000 AFY cap for the period until December 31, 2007, it is unlikely that there will ever be additional groundwater left over for permitting for additional regular permits. Current initial regular permit applicants (i.e., "existing users" of the aquifer) as well as those who may wish to apply for additional regular permits in the future could be affected by the initial regular permit withdrawal cap because the cap has the potential to leave such people unable to withdraw as much water as they could otherwise in the absence of regulation. The Authority anticipates that the costs to obtain additional Edwards Aquifer water or other water supplies in the marketplace could range as high as between $1,100 and $6,687 per acre foot, depending upon factors such as the source of the water, the type of project designed to secure the water, and so on.

Sections 711.172 and 711.176 of Subchapter G implement the proportional adjustments in permitted withdrawals from the aquifer as required by § 1.16(e) of the Act. The withdrawal amounts of initial regular permits are determined by a series of calculations that consider, among other things, maximum use, historical use, type of use, the duration of use, and proportional adjustment factors. Subchapter G has both direct and indirect effects on applicants for an initial regular permits. The procedures set forth in Subchapter G are based on amounts of Edwards Aquifer water that each permit applicant can demonstrate was used beneficially during the historic period, which is the 21-year period from June 1, 1972, through May 31, 1993. The procedure includes the following components:

Applications filed for initial regular permits will be recognized in the maximum water withdrawn from the Edwards Aquifer and beneficially used on an annual basis during the historic period (maximum beneficial use). For irrigation users only, no less than two acre-feet per acre per year for the largest acreage irrigated with Edwards Aquifer water during the historic period may be deemed to be the maximum beneficial use.

A proportional adjustment will be made to each applicant's maximum historical use. The size of the adjustment will depend on the outcome of the entire set of applications. The net result will be that an amount not to exceed 450,000 AFY of initial regular permits will be issued. For example, if the total of all maximum historical uses recognized is 625,000 AFY, then the proportional adjustment factor will be 28%, so that permits will be issued at about 72% of the historic maximum use. The Authority currently projects that the proportional adjustment factor will be in the range 25 to 30%.

Applicants guaranteed a "minimum" amount by the Act will then receive what is known as a "step-up amount." This amount will be the difference between the proportionally adjusted amount and the minimum, if any. The minimums are: (a) for applicants

who operated a well in three or more years during the historical period, the average quantity of water withdrawn from the Edwards Aquifer and beneficially used on an annual basis during the time a well was in existence during the historic period; and (b) for irrigation users only, two-acre-feet per acre per year for the largest acreage irrigated with Edwards Aquifer water during the historic period. Non-irrigation applicants whose minimum was less than the proportionally adjusted amount will not receive a step-up amount. Applicants who operated for less than three years during the historic period are not eligible for a step-up amount, regardless of their average use.

The proposed rules calculate the proportional adjustment percentage by considering the cumulative total of maximum historical use that is recognized for all applicants. This value will only be known when every contested case has been finalized (including appeals, if any), and the historic maximum use for each applicant is determined. Initial regular permits will be conditioned to allow a final adjustment once all permits have been issued. Because of the step-up, the procedure will result in prospective initial regular permits totaling more than 450,000 AFY of withdrawal amounts. To avoid issuing permits in an amount that exceeds 450,000 AFY in total, the Authority intends to use a voluntary withdrawal reduction process. Specifically, applicants will be offered compensation to waive some or all of their applications. The Authority expects this voluntary program to be successful and assumes that about 50,000 acre-feet of applications will be purchased and waived to meet the 450,000 AFY cap in the Act.

The proposed rules contain a mandatory compensation procedure for the Phase II proportionally adjusted amounts to be used only if enough voluntary withdrawal reductions cannot be made to reach 450,000 AFY. Mandatory compensation is not assessed here because: (a) it is not expected to be necessary; and (b) if it does prove to be necessary, the Authority can implement it only after adopting rules under Subchapter H of Chapter 715 (relating to Comprehensive Water Management Plan implementation). Mandatory compensation can and will be assessed as part of the assessment of that subchapter.

Thus, initial regular permits will be issued with a final determination of each applicant's historical maximum use and statutory minimum. Current projections indicate that, ultimately, each permit will likely authorize a withdrawal of about 72% of the applicant's maximum historical use. Where applicable, each permit will acknowledge a step-up amount that will be authorized for withdrawal unless subject to Phase II proportional adjustments. This step-up amount will be authorized for withdrawal if the voluntary withdrawal reduction succeeds. The Authority expects the voluntary withdrawal reduction to succeed for reasons that include the following.

Large quantities of irrigation water will be eligible for permitting. These privately held applications or permits would likely be readily exchanged under marketplace incentives.

In accordance with the Act, irrigators cannot sell the base irrigation groundwater of each irrigator minimum in the regular marketplace. The primary market value for this prospective application or permit would be for the applicant to abandon it if sufficiently compensated by the Authority.

Where an application is contested, applicants may accept compensation for all or part of the application, thus saving the cost of proving up the application.

The Authority believes it can be competitive in price in the voluntary marketplace. "

As a first approximation, this procedure will result ultimately in issuance of initial regular permits authorizing approximately 150,000 to 200,000 AFY of irrigation use and 250,000 to 300,000 AFY of municipal and industrial use. Overall, these allocations will likely exceed the amount of water that has been withdrawn for irrigation in recent years, but will be less than current municipal and industrial demands. Without a withdrawal reduction mechanism, the total quantity of permits would total approximately 500,000. The outcome of the adjustment for each applicant will depend on case-specific facts that establish the claim for the applicant.

The principal public cost of this proportional adjustment process under the Subchapter G rules will be the issuance of initial regular permits that will be for less than the quantity of water needed for some applicants, or for less than historically used by some applicants.

Many current water users will experience increased water-supply costs due to the combined effect of the Authority's fees and the need to acquire new water resources to replace those lost during the permitting process. Most impacts on the cost of water, and resulting increases in water revenue under the proposed rules will be economic impacts. The Authority assumes that water utilities will generally pass through to their ratepayers all increased costs of obtaining water. The Authority has estimated the resulting rate increases in household equivalents, assuming that all ratepayers will bear their proportionate share of the increased costs. Ratemaking decisions within each municipality could result in increases to specific users, with some sectors paying higher or lower rates than residential users.

As an alternative to spreading increased costs over existing households, a municipal utility could generate revenues from impact fees. Builders of new houses and commercial buildings would pay for the relatively high increases in system costs they cause through an impact fee assessed as part of a meter fee on a new house. For a municipal utility that secures additional supplies from the aquifer, the fee would be about $500 per tap. For a municipal utility that secures all of its supplies from non-Edwards sources, the fee would be about $3,000 per tap. Such a fee structure would reduce the additional monthly revenue requirements from existing households to less than $1.00 per household in the case of the Edwards supplies, and to less than $4.50 per household in the case of non-Edwards supplies. A utility could also use a combination of impact fees and increased charges to existing customers to generate the needed revenues. The impact of different water rates may affect the distribution of new development in the region. This would have indirect economic and fiscal effects that have not been evaluated in the programmatic assessment and cannot be predicted without in-depth knowledge of future ratemaking policies throughout the region.

The Programmatic Assessment explains how aquifer users with different historical withdrawal patterns will fare under these rules. Table 711-B is an excerpt that shows the different hypothetical cases pertinent to certain users. These hypothetical cases cover the range of scenarios pertinent to utilities currently relying on the aquifer. Each case assumes a maximum historical use of 1,000 acre-feet.

Figure: 31 TAC, Part 20, Chapter 711, preamble-5

Figure: 31 TAC, Part 20, Chapter 711, preamble-6

The impact of the rules on different classes of users will vary according to their patterns of use during the historical period.

The tables and ranges of estimates that follow cover the ranges represented by the hypothetical cases described above. Those with relatively higher needs for future additional supplies will fall at the high end of the range, while those with lower needs will fall at the low end.

Generally, an aquifer user may (1) acquire additional Edwards supplies in the open market, (2) acquire supplies from other sources, or (3) a combination of both. Table 711-D shows the estimated capital cost to acquire additional water supplies in total dollars per household. Table 711-E shows the cost per household per month. These estimated costs assume amortization of the capital cost over 30 years, plus the utility's operating and maintenance expenses.

Figure: 31 TAC, Part 20, Chapter 711, preamble-7

Figure: 31 TAC, Part 20, Chapter 711, preamble-8

Most utilities will find it difficult to acquire non-Edwards water supplies during the first five years the rules are in effect. To that extent, the above analysis shows larger five-year financial impacts than most users will actually experience. Actual capital expenditure patterns will vary among utilities.

To avoid issuing more than 450,000 acre-feet of initial and additional regular permits, the Authority is expected to purchase permit applications through a withdrawal reduction process. Purchasing these applications is assumed to cost the Authority $700 per acre-foot for 90,000 acre-feet of applications, for a total one-time cost of $63,000,000. Financed at 6% for 30 years, this would result in an annual cost to the Authority of approximately $4,576,881, probably beginning in the second year that the rules are in effect. The Authority will recover these withdrawal reduction costs through aquifer management fees charged to permit holders and applicants.

The proposed rules will assist in creating a marketplace that is expected to result in the net transfer of water rights from agricultural to municipal use. These land-use changes, and any resulting changes in employment, spending, or population have the potential to affect local economies and industries dependent upon agriculture. However, the Authority anticipates little or no direct loss of income in the agricultural sector as a result of the application of the Subchapter G rules. The Authority has concluded that these rules will likely have no adverse effect on overall agricultural income. However, the more conservative results of the programmatic assessment, which do predict some losses in agricultural income, are included here. The estimates are based on a model called EDSIM, which produces an estimate of irrigation water sales that were somewhat higher than the most-likely scenario. IMPLAN, an input-output model, was then used to calculate the change in employment, regional output and other key economic variables as if all of the effects occurred in Medina County. These results were then used as inputs in a model called SAFE (Small Area Fiscal Effects), which was first applied in the programmatic assessment. SAFE calculates the expected change in government revenue for a given change in economic activity. By assuming all of the effects occur in Medina County, the results on a percentage basis are a conservative estimate of what the impact might be to Uvalde County or any other county. Because the results of an artificial concentration of effects in a small county failed to show a significant impact, it was not necessary to further assess a proportionate share of the total share of impacts on the other counties.

Chapter 711 will ultimately allow groundwater previously used in irrigation to be transferred to municipal or any other authorized use. Without these rules, municipalities would have to pursue non-Edwards supplies for amounts lost in the permitting process and, in some cases for growth. The cost of non-Edwards supplies has been estimated at between $1,580 and $2,000 per household or household equivalent, assuming that an acre-foot of water supplies 2.4 households per year. This compares to a range of estimates for Edwards supplies of $250 to $320 per year.

Proposed §711.220 has the general public benefit of protecting the supply of groundwater from the Edwards Aquifer to support the regional economy that is currently dependent upon it.

Proposed §711.222, by preventing withdrawals of groundwater from the aquifer from new wells from which withdrawals are not based on interim authorization status, exempt well status or a transfer, has the following public benefits: 1. Limits and controls the anticipated ever-increasing demand for aquifer water, thereby mitigating the potentially severe impacts of a drought on the diverse economic and social interest that depend water supplied from the aquifer; 2. Promotes the conservation, preservation, and management of the state's natural resources; 3. Promotes the legislative preference of protecting historical users of groundwater over future users; 4. Eliminates the prospect of landowners rushing to establish the right to an initial regular permit through future drilling after the passage of the Act; and 5. Promotes the management and regulation of the Edwards Aquifer by eliminating the prospect of the Authority having to issue initial regular permits to innumerable new wells.

Proposed §§711.224, 711.226, 711.228, 711.230, 711.232, and 711.234 generally prohibit certain activities without a permit or approved registration from the Authority and prohibits waste of water and pollution of the aquifer. As such, they provide the public benefits of fostering the management of the Edwards Aquifer by preventing unregulated withdrawals from, or waste or contamination of a valuable natural resource within the state.

Proposed §711.222(a) of subchapter I prohibits withdrawals from new wells drilled after June 1, 1993. This is a new requirement not found in the common law or statutory law prior to the effective date of the Act. This prohibition helps implement the groundwater withdrawal "cap" provisions in proposed § 711.164 (relating to Groundwater Available for Permitted Withdrawals fort Initial and Additional Regular Permits) and 711.172 (relating to Proportional Adjustment of Initial Regular Permits). The probable economic costs to persons required to comply with this proposed rule are not distinguishable from the effects already discussed for those proposed rules.

Section 711.222(b) provides the circumstances under which withdrawals may be made from post-June 1, 1993 wells. This rule works in concert with §§ 711.12 and 711.14. The probable economic costs to persons required to comply with this proposed rule are not distinguishable from the costs already discussed for those proposed rules.

Section 711.224 creates prohibitions that implement the permit requirement in concert with §711.12. The probable economic costs to persons required to comply with this proposed rule are not distinguishable from the effects already discussed for §711.12.

Section 711.228 creates prohibitions that prevent conduct contrary to the Act, Authority rules, or permits. This rules works in concert with subchapter F. The prohibited conduct in §711.228 simply generally restates all of the duties and obligations on holders of groundwater withdrawal permits derived from the Act and

implemented by these rules. Thus, this section imposes no independent regulatory requirements on persons required to comply with this proposed rule that otherwise is not reflected in an existing section of the proposed rules of the Authority. The probable economic costs to persons required to comply with this proposed rule are not distinguishable from the effects already discussed for those other applicable rules.

Proposed §§711.230, 711.232, and 711.234(1) and (3) prohibit waste of Edwards Aquifer groundwater and the prevention of pollution of the Aquifer. Waste and pollution prevention are rarely cost-free (even when they are cost-effective) so it is likely that these rules will have some impact on the costs to aquifer users. However, because existing law doctrines also proscribe the waste of water or pollution of groundwater, the Authority anticipates that the costs imposed by these rules will not be material. These prohibitions have always been recognized in the common law and in other statutory law that predates the passage of the Act. Therefore, all legitimate and authorized use of groundwater from the Edwards Aquifer by persons required to comply with these rules would, prior to the passage of these rules, have to have been conducted such that waste and pollution did not occur. Therefore, these proposed sections impose no new regulatory requirement or compliance obligation on persons required to comply therewith that might have a probable economic cost than otherwise was required by prior law, whether common law or statutory.

Proposed §711.226 creates a prohibition on withdrawals from unregistered exempt wells. There is a $10 charge for registering an exempt well.

Proposed §711.234(2) prohibits the operation of a well at a rate of production higher than what is approved for the well. This will likely be expressed in a groundwater withdrawal permit in terms of gallons permit minute. The Authority will recognize the maximum rate of production that is physically possible from the well in light of the internal diameter of the well and the pump capacity. Therefore, assuming a person has a groundwater withdrawal permit, and the Authority recognizes the maximum well production capacity, there are no probable economic costs to person required to comply with this section because the well could not be physically operated in excess of it production capacity. Therefore, there is no effective limitation imposed on the operation of well by a person that may have cost impacts.

Section 711.220 of subchapter I prohibits the use for Edwards Aquifer groundwater outside of the boundaries of the Authority. This section could potentially create costs by requiring a person to secure a source of water for use at a place of use outside of the Authority's boundaries from another source, when the Edwards Aquifer could have provided a proximate source of water for the same activity.

Section 2001.022 of the Texas Government Code requires agencies to request that the Texas Workforce Commission2 prepare a "local employment impact statement" in connection with certain proposed rules. Under the appropriate circumstances, the Commission is then to prepare, within 25 days, an impact statement which includes a description of the probable effects of the rule on employment in each geographic area affected by the rules for each year of the first five years that the rules will be in effect. On April 21, 2000, after having determined that the proposed Chapter 711 rules may affect a local economy, the Authority submitted to the Commission a copy of the proposed Chapter 711 rules and other supporting and initial information, including information that the Commission requires on a form prescribed by the Commission. On April 28, 2000, the Authority provided to the Commission certain supplemental information relating to the rules.

In a letter to Gregory M. Ellis, dated May 19, 2000, Mark Hughes, the Commission stated, in regard to the "Authority's Draft Proposed Rules 31 TAC . . . 711 concerning . . . Groundwater Withdrawal Permits" as follows:

After reviewing the information provided to our Department, there is no apparent basis to refute the proposed employment impacts outlined in the information submitted on behalf of the Authority. Our data will not confirm nor deny the potential lost jobs nor the newly created jobs based upon the impact of these proposed rules.

This letter from the Commission does not constitute a local employment impact statement because it does not meet the criteria identified in § 2001.022(a) of the Texas Government Code. Because the Commission did not prepare and deliver to the Authority a local employment impact statement within 25 days after the date on which the Commission received the proposed rules, the proposed rules are presumed not to affect local employment pursuant to § 2001.022(e) of the Texas Government Code. On June 28, 2000, the Authority provided to the Commission a supplemental submission with certain amendments to the rules submitted on April 21, 2000. On July 6, 2000, the Commission advised the Authority that, after review of the supplemental information, it did not intend to change its finding in its May 19, 2000 letter or otherwise prepare a local employment impact statement. As such, there exists no local employment impact statement which could be required by §2001.024(a)(6) to be included in this Notice of Proposed Rule.

Interested persons may submit written comments on the proposed rules. Comments must be submitted in writing to Brenda Davis, Docket Clerk, Edwards Aquifer Authority, P. O. Box 15830,1615 N. St. Mary's St., San Antonio, Texas 78212-9030, within 30 days of the publication of this notice in the *Texas Register*. The written comments should be filed on 8 1/2 x 11 inch paper and be typed or legibly written. Written comments must indicate whether the comments are generally directed at all of the proposed rules, or whether they are directed at specific proposed rules. If directed at specific proposed rules, the number of the proposed rule must be identified and followed by the comments thereon.

The Authority has scheduled the following public hearings on this proposed rule: Wednesday, August 9, 2000, 6:00 p.m., Conference Center Edwards Aquifer Authority, 1615 N. St. Mary's San Antonio, Texas 78215, (210) 222-2204; Tuesday, August 15, 2000, 6:00 p.m., New Braunfels Civic Center, 380 S. Seguin Avenue New Braunfels, Texas 78130, (830) 625-2385; Thursday, August 17, 2000, 6:00 p.m., St. Paul's Lutheran Church, 1303 Avenue M Hondo, Texas 78861,(830) 426-3222; Tuesday, August 22, 2000, 6:00 p.m., Sgt. Willie DeLeon Civic Center, 300 E. Main Street Uvalde, Texas 78801, (830) 278-9922; Thursday, August 24, 2000, 6:00 p.m., San Marcos Activity Center, 501 E. Hopkins San Marcos, Texas 78666, (512) 393-8280.

Section 1.03(4) of the Act defines "beneficial use" to mean the use of water that is economically necessary for a purpose authorized by law when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. The concept of beneficial use is incorporated into the permitting rules of Chapter 711.

Section 1.03(9) of the Act defines "domestic or livestock use." This concept is incorporated into the exempt well rules found within Chapter 711.

Section 1.03(10) of the Act defines "existing user" as a person who has withdrawn and beneficially used underground water from the aquifer on or before June 1, 1993. This concept is incorporated into the Chapter 711 rules, while also accounting for the beneficial use requirement and including the successors in interest of existing users within the definition.

Section 1.03(11) of the Act defines "industrial use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(12) of the Act defines "irrigation use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(13) of the Act defines "livestock." The Chapter 711 rules incorporate this concept when determining whether a well qualifies as "exempt" from permitting requirements.

Section 1.03(14) of the Act defines "municipal use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(21) of the Act defines "waste." This concept is incorporated into the Chapter 711 rules, while also including other practices which are considered waste under the Act or under the long-standing water law concept of beneficial use.

Section 1.07 of the Act provides, in part, that the actions taken by the Authority pursuant to the Act may not be construed as depriving or divesting owners of their ownership rights as landowners in underground water, subject to rules adopted by the Authority.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer.

Section 1.10(i)(1) and (2) of the Act provide that the South Central Texas Water Advisory Committee (SCTWAC) shall assist the Authority in developing and implementing a demand management plan. The Chapter 711 rules clarify that aquifer withdrawals will be subject to that demand management plan.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under Article 1 of the Act, including rule governing procedures of the board and the authority." This section provides broad rulemaking authority to implement the various substantive and procedures programs set forth in the Act related to the Edwards Aquifer, including the permitting program.

Section 1.11(b) of the Act requires the Authority to "ensure compliance with permitting, metering, and reporting requirements and . . . regulate permits." This section, in conjunction with §1.11(a) and (h) of the Act, and § 2001.004(1) of the APA, requires the Authority to adopt and enforce the Chapter 711 rules.

Section 1.11(d)(2) of the Act empowers the Authority to enter into contracts. Pursuant to this section, the Authority may enter into contracts with well owners concerning meters and reimbursement for same under Subchapter M of the Chapter 711 rules.

Section 1.11(d)(8) of the Act provides that the Authority may close abandoned, wasteful or dangerous wells. The Authority's rules relating to the requirement of beneficial use and the prohibition of waste, as well as the closure of abandoned wells derive in part from this statutory authority.

Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 of the Texas Water Code and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) Chapter 32 imposes certain duties upon drillers of water wells and the owners of those wells. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711derive in part from this statutory authority.

Section 1.11(d)(11) of the Act provides that the Authority may require to be furnished with copies of the water well drillers' logs that are required by Chapter 32 of the Texas Water Code.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. This section essentially provides that the Authority is required to comply with the APA for its rulemaking, even though the Authority is a political subdivision and not a state agency that would generally be subject to APA requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures."

Section 1.14(a) of the Act provides that authorizations to withdraw aquifer water shall be limited in order to: protect water quality of the aquifer and surface streams to which the aquifer contributes springflow; achieve water conservation; maximize beneficial use of water from the aquifer; protect aquatic and wildlife habitat as well as federally or state-designated threatened or endangered species; and provide for instream uses, bays and estuaries. The Chapter 711 rules are adopted, in large part, pursuant to these statutory mandates.

Section 1.14(b) of the Act imposes, subject to certain limitations, an initial aquifer withdrawal "cap" for permitted withdrawals of 450,000 acre-feet per year, until December 31, 2007. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(c) of the Act imposes, subject to certain limitations, an aquifer withdrawal "cap" for permitted withdrawals of 400,000 acre-feet per year, beginning January 1, 2008. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(d) of the Act provides that either of the caps listed above may be raised by the Authority if, through studies and implementation of certain strategies, the authority, in consultation with state and federal agencies, determines the caps may be raised. Subchapter K of the Chapter 711 rules sets out this process.

Section 1.14(e) of the Act requires the Authority to prohibit withdrawals from new wells drilled after the effective date of the Act unless the "caps" are raised and then only on an interruptible basis. The Chapter 711 rules incorporate this prohibition.

Section 1.14(f) of the Act entitles the Authority to allow (or not allow) permitted withdrawals on an uninterruptible basis when

certain index wells are at or above the following measurements: for the San Antonio pool, when well J-17 is at or above 650 mean sea level (msl); and for the Uvalde Pool, when well J-27 is at or above 865 msl. The section also imposes the duty on the Authority to limit additional withdrawals to ensure that springflows are not affected during critical drought conditions. The Chapter 711 rules incorporate these concepts by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.14(h) of the Act provides that the Authority generally must ensure, by December 31, 2012, that continuous minimum springflows of Comal and San Marcos Springs are maintained to protect threatened and endangered species to the extent required by federal law. The Chapter 711 rules incorporate this requirement by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.15(a) of the Act directs the Authority to manage withdrawals from the aquifer and manage all withdrawal points from the aquifer as provided by the Act. This section is implemented through the Chapter 711 rules.

Section 1.15(b) of the Act states that "except as provided by §§ 1.17 and 1.33 of this article, a person may not withdraw water from the aquifer or begin construction of a well or other works designed for the withdrawal of water from the aquifer without obtaining a permit from the authority." This section is implemented through the Chapter 711 rules.

Section 1.15(c) of the Act allows the Authority to issue regular permits, term permits, and emergency permits. This section is implemented through the Chapter 711 rules.

Section 1.15(d) of the Act provides that each permit issued by the Authority must specify the maximum rate and total volume of water that the user may withdraw annually. This section is implemented through the Chapter 711 rules.

Section 1.16(a) of the Act allows an existing user to apply for an initial regular permit by filing a declaration of historical use documenting use of aquifer water during the period from June 1, 1972 through May 31, 1993. The initial regular permits issued pursuant to the Chapter 711 rules will be based upon such.

Section 1.16(c) of the Act provides that an owner of a well from which the water will be used exclusively for domestic use or watering livestock and that is exempt under §1.33 of the Act is not required to file a declaration of historical use.

Section 1.16(d) of the Act requires the Board to grant an initial regular permit to an existing user who: (1) files a declaration and pays fees as required by this section; and (2) establishes by convincing evidence beneficial use of underground water from the aquifer. This requirement is incorporated into the Chapter 711 rules.

Section 1.116(e) of the Act explains the quantity of water to be permitted under an initial regular permit. Pursuant to this section, if enough water is available, each existing user shall be permitted for an amount equal to the user's maximum beneficial use during the historical period. If there is not enough water available, then this section requires the Authority to "proportionately adjust" permit amounts downward in order to meet the withdrawals "caps" discussed above. However, this section also creates certain "permit minimums" for existing irrigation users and for those existing users who have operated a well for three or more years during the historical period. This section also requires the Authority to extrapolate water use on an annual basis for those existing users who do not have a full year's use during the historical period. These concepts are incorporated into Chapter 711, primarily in Subchapter G.

Section 1.16(f) requires the Authority to equitably treat persons whose historic use was affected by participation in a federal program, such as agricultural subsidy programs. This concept is incorporated in the Chapter 711 rules.

Section 1.16(g) of the Act provides that initial regular permits do not have a term and remain in effect until abandoned, cancelled or retired. These concepts are incorporated in the Chapter 711 rules.

Section 1.16(h) of the Act requires the Authority to notify each permit holder of the limitations to which the permit is subject. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter F.

Section 1.17(a) of the Act provides that a person who, on the effective date of this article, owns a producing well that withdraws water from the aquifer may continue to withdraw and beneficially use water without waste until final action on permits by the Authority, if: (1) the well is in compliance with all statutes and rules relating to well construction, approval, location, spacing, and operation; and (2) by March 1, 1994, the person files a declaration of historical use on a form as required by the Authority.

Section 1.17(b) of the Act specifies that use under "interim authorization" may not exceed on an annual basis the historical, maximum, beneficial use of water without waste during any one calendar year as evidenced by the person's declaration of historical use.

Section 1.17(c) of the Act specifies that use under "interim authorization" is subject to the Authority's comprehensive management plan and rules. This concept is incorporated into the Chapter 711 rules, primarily in Subchapters D and F.

Section 1.17(d) of the Act specifies when use under "interim authorization" ends for a given well.

Section 1.18 of the Act allows the Authority, in certain circumstances, to issue additional regular permits. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.19 of the Act allows the Authority to issue term permits and places certain limitations and conditions on the right to withdraw water under such a permit. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.20 of the Act allows the Authority to issue emergency permits under certain circumstances and subject to certain conditions. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.21 of the Act sets out a process by which the Authority is to implement a plan for reducing the withdrawal "cap" from 450,000 to 400,000 acre-feet per year by January 1, 2008. The plan must be enforceable and include various water conservation, reuse, retirement, and other management measures. If, on or after January 1, 2008, total permitted withdrawals still exceed the 400,000 acre-feet cap, then the Authority must implement "equal percentage reductions" of all permits in order to reach the cap. This concept is implemented in Chapter 711, primarily in Subchapter G.

Section 1.22(a)(1) - (4) of the Act provides that the Authority may acquire permitted aquifer rights to be used for: holding in trust for sale or transfer to other users; holding in trust as a means of managing aquifer demand; holding for resale or retirement as a means of achieving pumping reductions required by the Act; or retiring the rights. These concepts are implemented in part in Chapter 711.

Section 1.23(a) of the Act provides that the Authority may require certain permittees to submit and implement water conservation plans and water reuse plans. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.25 of the Act requires the Authority to develop and implement a comprehensive water management plan and, in conjunction with the SCTWAC and other water districts, to develop and implement a plan for providing alternative water supplies, with oversight by state agencies and the Edwards Aquifer Legislative Oversight Committee. The alternative supplies plan shall consider alternative technologies, financing issues, costs and benefits, and environmental issues. These concepts are implemented, in part, in Chapter 711, primarily through Subchapter F.

Section 1.26 of the Act requires the Authority to prepare and coordinate implementation of a critical period management plan which meets certain, enumerated criteria. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.28(b) of the Act, in part, generally prohibits the transport of groundwater out of Uvalde County or Medina County. This concept is implemented in part in Chapter 711, primarily through Subchapter L.

Section 1.29 of the Act authorizes the imposition of various types of fees on various types of permits. The Chapter 711 rules acknowledge this fee provision, primarily in Subchapter E.

Section 1.31 of the Act provides that nonexempt well owners must install and maintain meters or alternative measuring devices to measure the flow rate and cumulative amount of water withdrawn from each well. The section further provides that the Authority must pay for such meters on irrigation wells in existence on the effective date of the Act. These concepts are implemented in the Chapter 711 rules, primarily in Subchapter M.

Section 1.32 of the Act requires permittees to submit annual water use reports to the Authority. This section is implemented in Subchapter M.

Section 1.33 of the Act provides the criteria for exempt wells -- i.e., wells that produce no more than 25,000 gallons of water per day for domestic and livestock use and that are not within or serving a subdivision requiring platting. The section explains that such wells are exempt from metering requirements. However, such wells must be registered with the Authority. These concepts are implemented in Chapter 711, primarily in Subchapters C and M.

Section 1.34 of the Act imposes certain limitations upon the ways in which aquifer water and/or water rights may be transferred (alienated). First, aquifer water must be used within the Authority's boundaries. Second, the section allows the Authority to establish rules by which a person may install water conservation equipment and sell the water conserved. Third, the section further provides that a holder of a permit for irrigation use may not transfer more than 50 percent of the irrigation rights initially permitted and that the user's remaining irrigation water rights must be used in accordance with the original permit and must pass with transfer of the irrigated land. These concepts are implemented in Chapter 711, primarily in Subchapter L.

Section 1.35 of the Act prohibits: withdrawing aquifer water except as authorized by a permit; violating permit terms or conditions; wasting aquifer water; polluting or contributing to the pollution of the aquifer; or violating the Act or an Authority rule. These concepts are implemented in Chapter 711.

Section 1.36 of the Act empowers the Authority to enter orders enforcing the terms and conditions of permits, orders, or rules, and to draft rules suspending permits for failure to pay required fees or violations of permits, orders or rules. These concepts are implemented in part in Chapter 711.

Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures." This proposed rulemaking is in furtherance of this legislative mandate.

Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711derive in part from this statutory authority and implement this chapter and the supporting rules.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.101(a) empowers the Authority to make and enforce rules to provide for conserving, preserving, protecting, and recharging of the groundwater in order to, among other things, prevent waste and carry out the duties provided elsewhere in Chapter 36. This requirement is implemented, in large part, through Chapter 711.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.111 requires the Authority to require aquifer users to keep and maintain reports of drilling, equipping, and completing water wells and the production and uses of groundwater. Chapter 711 implements these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.113 empowers districts such as the Authority to require permits for drilling, equipping, or completing wells or for altering the size of wells or well pumps. The section further specifies the permitted format and contents of permit applications, and lays out criteria for the district to consider when ruling on a permit application. The section also provides that permits may be issued subject to the district's rules and other restrictions. The Chapter 711 rules incorporate these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.1131 specifies what may be included as elements of a permit issued by a district.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.119(a) decrees that drilling a well without a required permit or operating a well at a higher rate of production than the rate approved for the well is declared to be illegal, wasteful per se, and a nuisance. This concept is incorporated into Chapter 711, primarily in the definition of waste found in §711.1.

Chapter 49 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 49.211(a) endows districts such as the Authority with the "functions, powers, authority, rights, and duties that will permit accomplishment of the purposes for which it was created or the purposes authorized by the constitution, this code, or any other law." This broad delegation of powers is incorporated into the Chapter 711 rules.

Chapter 49 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 49.221 empowers representatives of the Authority to enter land and perform tests and other inspections. This authority is incorporated into Chapter 711, primarily in §711.416.

16 Texas Administrative CODE, Chapter 76. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation (TDLR).) The TDLR's rules implementing Chapter 32 are found at 16 TEXAS ADMINISTRATIVE CODE, Chapter 76. These rules impose numerous duties upon well drillers and well owners related to well construction, operation, and plugging. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 implement, in part, the rules found in 16 TAC, Chapter 76.

SUBCHAPTER A. DEFINITIONS

31 TAC §711.1

The Subchapter A rules in the proposed Chapter 711 rules are proposed pursuant to §§1.03(4), (10) and (21), 1.08(a), 1.11(a), (b) and (h), 1.14(b) and (c), 1.15(a), 1.16(a), 1.17(a) and 1.34 of the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634 (the "Act")); § 2001.004(1) of the APA; and §36.119(a) of the Texas Water Code.

The articles or sections of the Act or any other code that are affected by the proposed rule are: §§1.03(4), (9) - (14), (21), 1.07, 1.08(a), 1.10(i)(1), (2), 1.11(a), (b), (d)(2), (8), (10), (11), (h), 1.14(a) - (f), (h), 1.15(a) - (d), 1.16(a), (c) - (h), 1.17(a) - (d), 1.18, 1.19, 1.20, 1.21, 1.22(a)(1)-(4), 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.31, 1.32, 1.33, 1.34, 1.35, 1.36 of the Act; §2001.004(1) of the APA; Chapter 32 and §§ 36.101(a), 36.111, 36.113, 36.1131, 36.119(a), 49.211(a), and 49.221 of the Texas Water Code; §§212.004, 212.0046, 232.001, and 232.0015 of the Texas Local Government Code; and 16 Texas Administrative Code, Chapter 76. The sections of Chapter 31, Texas Administrative Code that would be affected are §§31 TAC 711.1, 711.10, 711.12, 711.14, 711.90, 711.92, 711.94, 711.96, 711.98, 711.100, 711.102, 711.104, 711.108, 711.110, 711.112, 711.116, 711.118, 711.130, 711.132, 711.134, 711.160, 711.162, 711.164, 711.166, 711.168, 711.170, 711.172, 711.174, 711.176, 711.178, 711.180, 711.220, 711.222, 711.224, 711.226, 711.228, 711.230, 711.232, and 711.234.

§711.1. Definitions.

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

(1) Contract user--A person who:

(A) withdrew or purchased groundwater from the aquifer during the historical period pursuant to a contract or other legal right obtained from a prior user or an existing user, from an existing well owned by the prior user or an existing user; and

(B) placed the groundwater to beneficial use.

(2) Existing user--A person or the successor in interest of a such a person, who, on June 1, 1993, owned an existing well from which groundwater from the aquifer had been withdrawn and placed to beneficial use during the historical period,

(3) Historical use--The lawful withdrawing and placing to beneficial use of groundwater from the aquifer during the historical period.

(4) Prior user--A person who owned an existing well during the historical period and withdrew groundwater from the aquifer from the well and placed it to beneficial use during the historical period, and during the historical period conveyed the ownership interest in the well to another person.

(5) Producing well--A well from which groundwater from the aquifer is withdrawn for a beneficial use.

(6) Waste --

(A) Withdrawal of groundwater from the aquifer at a rate and amount that causes or threatens to cause intrusion into the reservoir of water unsuitable for agricultural, gardening, domestic or stock-raising purposes;

(B) The flowing or producing of wells from the aquifer if the water produced is not used for a beneficial purpose;

(C) Escape of groundwater from the aquifer to any other reservoir that does not contain groundwater;

(D) Pollution or harmful alteration of groundwater in the aquifer by salt water or other deleterious matter admitted from another stratum or from the surface of the ground;

(E) Willfully or negligently causing, suffering or permitting groundwater from the aquifer to escape into any river, creek, natural watercourse, depression, lake, reservoir, drain, sewer, street, highway, road, or road ditch, or onto any land other than that of the owner of the well, unless:

(i) such discharge is authorized by permit, rule, or order issued by the commission under Chapter 26, Water Code; and

(ii) after discharge, the groundwater from the aquifer is beneficially used by the existing user, applicant or permittee making the discharge;

(F) Groundwater pumped from the aquifer for irrigation that escapes as irrigation tailwater onto land, other than that of the well owner, unless permission has been granted by the occupant of the land receiving the discharge;

(G) For water produced from an artesian well, "waste" has the meaning assigned by the Water Code, §11.205;

(H) Constructing, installing, drilling, equipping, completing, altering, operating, maintaining, or making withdrawals from a well without a required permit;

(I) Withdrawal of water that is substantially in excess of the volume or rate reasonably required for a beneficial use; or

(J) Irrigation use of groundwater from the aquifer in a volume per irrigated acre that is so insufficient that a crop could not have been reasonably cultivated and produced.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005258
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Earliest possible date of adoption: September 10, 2000
For further information, please call: (210) 222-2204

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SUBCHAPTER B. GENERAL PROVISIONS

31 TAC §§711.10, 711.12, 711.14

The Subchapter B rules in the proposed Chapter 711 rules are proposed pursuant to §§1.08(a), 1.11(a), (b) and (h), 1.14, and 1.15(a) and (b) of the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634 (the "Act")); §2001.004(1) of the APA; and §§36.113, 36.1131, and 49.211(a) of the Texas Water Code.

The articles or sections of the Act or any other code that are affected by the proposed rule are: §§1.03(4), (9) - (14), (21), 1.07, 1.08(a), 1.10(i)(1), (2), 1.11(a), (b), (d)(2), (8), (10), (11), (h), 1.14(a) - (f), (h), 1.15(a) - (d), 1.16(a), (c) - (h), 1.17(a) - (d), 1.18, 1.19, 1.20, 1.21, 1.22(a)(1)-(4), 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.31, 1.32, 1.33, 1.34, 1.35, 1.36 of the Act; §2001.004(1) of the APA; Chapter 32 and §§36.101(a), 36.111, 36.113, 36.1131, 36.119(a), 49.211(a), and 49.221 of the Texas Water Code; §§212.004, 212.0046, 232.001, and 232.0015 of the Texas Local Government Code; and 16 Texas Administrative Code, Chapter 76. The sections of Chapter 31, Texas Administrative Code that would be affected are §§31 TAC 711.1, 711.10, 711.12, 711.14, 711.90, 711.92, 711.94, 711.96, 711.98, 711.100, 711.102, 711.104, 711.108, 711.110, 711.112, 711.116, 711.118, 711.130, 711.132, 711.134, 711.160, 711.162, 711.164, 711.166, 711.168, 711.170, 711.172, 711.174, 711.176, 711.178, 711.180, 711.220, 711.222, 711.224, 711.226, 711.228, 711.230, 711.232, and 711.234.

§711.10. Purpose.

The purpose of this chapter is to:

(1) sustain the diverse economic and social interests dependent on the aquifer;

(2) effectively control the aquifer to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries and the economic development of the state and region;

(3) provide for aquifer management through the application of management mechanisms consistent with law and appropriate to the aquifer system;

(4) manage, conserve, preserve and protect the aquifer;

(5) increase aquifer recharge;

(6) prevent waste of groundwater in the aquifer; and

(7) prevent water pollution in the aquifer.

§711.12. Activities Requiring a Permit.

(a) Except as provided in §711.14 of this title (relating to Withdrawals Not Requiring a Groundwater Withdrawal Permit) and subsection (b) of this section, a person desiring to engage in any of the following activities is required to obtain a permit from the Authority before the commencement of the activity:

(1) withdraw groundwater from the aquifer;

(2) construct, install, drill, equip, complete, alter, operate, or maintain a well, or other works, designed for the withdrawal of groundwater from the aquifer;

(3) construct, install, drill, equip, complete, alter, operate, or maintain a well, or other works, designed for the monitoring of the water quality or level of the aquifer,

(4) install, equip, complete, alter, operate, or maintain a well pump installed or to be installed on a well designed for the withdrawal of groundwater from the aquifer;

(5) construct, install, drill, equip, complete or alter a well or other works designed to withdraw groundwater from an aquifer other than the Edwards Aquifer, but that intersects the Edwards Aquifer;

(6) recharge water into the aquifer; or

(7) store water within the aquifer.

(b) The requirement to obtain a well construction permit under subsection (a)(2)-(4) of this section does not apply to the performance of routine operation and maintenance after construction and installation of a well if the well is:

(1) an existing non-exempt well that qualifies for interim authorization status under the Act, §1.17, and Subchapter D of this chapter (relating to Interim Authorization);

(2) an existing non-exempt well for which a groundwater withdrawal permit has been issued by the board; or

(3) an existing exempt well.

§711.14. Withdrawals Not Requiring a Groundwater Withdrawal Permit.

Withdrawals of groundwater from the aquifer from the following wells do not require a groundwater withdrawal permit issued by the Authority:

(1) wells qualifying for interim authorization status under the Act, §1.17, and Subchapter D of this chapter (relating to Interim Authorization); or

(2) exempt wells.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005259

Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Earliest possible date of adoption: September 10, 2000
For further information, please call: (210) 222-2204

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SUBCHAPTER E. PERMITTED WELLS

31 TAC §§711.90, 711.92, 711.94, 711.96, 711.98, 711.100, 711.102, 711.104, 711.108, 711.110, 711.112, 711.116, 711.118

The Subchapter E rules in the proposed Chapter 711 rules are proposed pursuant to §§1.03(9), (11), (12), (13) and (14), 1.08(a), 1.11(a), (b), (f) and (h), 1.14(e) and (f), 1.15(a), (b), (c) and (d), 1.16(c), (d), (g) and (h), 1.18, 1.19, 1.20, 1.33(a), (b) and (c) and 1.44(a) of the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634 (the "Act")); and § 2001.004(1) of the APA.

The articles or sections of the Act or any other code that are affected by the proposed rule are: §§1.03(4), (9) - (14), (21), 1.07, 1.08(a), 1.10(i)(1), (2), 1.11(a), (b), (d)(2), (8), (10), (11), (h), 1.14(a) - (f), (h), 1.15(a) - (d), 1.16(a), (c) - (h), 1.17(a) - (d), 1.18, 1.19, 1.20, 1.21, 1.22(a)(1)-(4), 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.31, 1.32, 1.33, 1.34, 1.35, 1.36 of the Act; §2001.004(1) of the APA; Chapter 32 and §§ 36.101(a), 36.111, 36.113, 36.1131, 36.119(a), 49.211(a), and 49.221 of the Texas Water Code; §§212.004, 212.0046, 232.001, and 232.0015 of the Texas Local Government Code; and 16 Texas Administrative Code, Chapter 76. The sections of Chapter 31, Texas Administrative Code that would be affected are §§31 TAC 711.1, 711.10, 711.12, 711.14, 711.90, 711.92, 711.94, 711.96, 711.98, 711.100, 711.102, 711.104, 711.108, 711.110, 711.112, 711.116, 711.118, 711.130, 711.132, 711.134, 711.160, 711.162, 711.164, 711.166, 711.168, 711.170, 711.172, 711.174, 711.176, 711.178, 711.180, 711.220, 711.222, 711.224, 711.226, 711.228, 711.230, 711.232, and 711.234.

§711.90. Permit Categories.

The Authority may issue the following permits:

(1) initial regular permits;

(2) additional regular permits;

(3) term permits;

(4) emergency permits;

(5) aquifer recharge and storage permits;

(6) recharge recovery permits;

(7) well construction permits; and

(8) monitoring well permits.

§711.92. Authorized Uses.

As specifically designated in a groundwater withdrawal permit, a person may beneficially use groundwater withdrawn from the aquifer for the following purposes of use:

(1) irrigation use;

(2) municipal use; or

(3) industrial use.

§711.94. Beneficial Use.

(a) Groundwater withdrawn from the aquifer must:

(1) have been placed to beneficial use without waste during the historical period; or

(2) be placed to beneficial use without waste after the historical period.

(b) Unless otherwise provided by contract, the beneficial use of groundwater by a contract user inures to the benefit of a prior user or an existing user from whose well the contract user made withdrawals.

(c) Unless otherwise provided by contract, the beneficial use of groundwater by a contract user may be claimed by a prior user or existing user in support of a declaration.

(d) Irrigation use of groundwater from the aquifer in the volume of two acre-feet of per irrigated acre is rebuttably presumed to constitute beneficial use without waste.

(e) The irrigation of multiple or successive crops is a beneficial use to the extent it does not constitute waste.

(f) For a prior user or an existing user whose historic use has been affected by a requirement of, or participation in, a federal program, a beneficial use credit shall be given for the amount that would have been withdrawn and beneficially used during the historical period by such prior user or existing user but for the operation of the federal program. If the use was for irrigation purposes, the credit is based on irrigation use on comparable acres on a similarly situated farm that is not in the federal program. If the use was for non-irrigation purposes, the credit is based upon the use of a comparable and similarly situated user whose uses were not affected by participation in a federal program.

(g) Unless otherwise provided by contract, the beneficial use of groundwater during the historical period on the same place of use by multiple existing users each owning different wells is shared pro rata based on the number of existing users who irrigated the place of use during the historical period with the sum total of each existing user's pro rata share not exceeding two acre-feet per irrigated acre.

§711.96. Non-Aquifer Groundwater.

(a) The Authority may not issue to an applicant a groundwater withdrawal permit to withdraw groundwater from an aquifer other than the Edwards Aquifer.

(b) An application for a groundwater withdrawal permit for a well that withdraws groundwater from multiple aquifers, including the Edwards Aquifer, may be granted by the board in an amount that does not exceed:

(1) for irrigation use, the pro rata share of the number of acres beneficially irrigated with the volume of aquifer water withdrawn from the well based on the percentage of aquifer water produced from the well, multiplied by two acre-feet per acre; or

(2) for non-irrigation use, the actual amount of groundwater from the aquifer.

§711.98. Initial Regular Permits.

(a) An existing user may apply for an initial regular permit.

(b) Initial regular permits are transferable pursuant to Subchapter L of this chapter (relating to Transfers).

(c) The term of an initial regular permit is perpetual.

(d) If in effect, initial regular permits may be proportionally adjusted in accordance with the proportional adjustment rules pursuant to Subchapter G of this chapter (relating to Groundwater Available for Permitting; Proportional Adjustment; and Equal Percentage Reduction).

(e) If in effect, initial regular permits may be retired in accordance with the following rules:

(1) the springflow maintenance rules pursuant to Chapter 715, Subchapter G of this title (relating to Springflow Maintenance Rules; Comprehensive Water Management Plan Implementation);

(2) the equal percentage reduction rules pursuant to Subchapter G of this chapter (relating to Groundwater Available for Permitting, Proportional Adjustment, Equal Percentage Reduction); or

(3) the regular permit retirement rules pursuant to Chapter 715, Subchapter H of this title (relating to Withdrawal Reductions and Regular Permit Retirement Rules; Comprehensive Water Management Plan Implementation).

(f) If in effect, initial regular permits may be suspended in accordance with the following rules:

(1) the demand management rules pursuant to Chapter 715, Subchapter D of this title (relating to Demand Management; Comprehensive Water Management Plan Implementation); or

(2) the groundwater trust pursuant to Subchapter N of this chapter (relating to Groundwater Trust).

(g) If in effect, initial regular permits may be interrupted in accordance with the following rules:

(1) the drought management rules pursuant to Chapter 715, Subchapter E of this title (relating to Drought Management Rules; Comprehensive Water Management Plan Implementation);

(2) the critical period management rules pursuant to Chapter 715, Subchapter F of this title (relating to Critical Period Management Rules; Comprehensive Water Management Plan Implementation); or

(3) the springflow maintenance rules pursuant to Chapter 715, Subchapter G of this title (relating to Springflow Maintenance Rules; Comprehensive Water Management Plan Implementation).

(h) Initial regular permits may be abandoned pursuant to Subchapter H of this chapter (relating to Abandonment and Cancellation).

(i) Initial regular permits may be canceled pursuant to Subchapter H of this chapter (relating to Abandonment and Cancellation).

(j) Subject to the duty of the board to determine the amount of groundwater that may be withdrawn under an initial regular permit, the board shall grant an application for an initial regular permit if the following elements are established by convincing evidence:

(1) the applicant filed a declaration on or before December 30, 1996;

(2) the applicant paid the application fee on or before December 30, 1996;

(3) the application identifies an existing well(s);

(4) on June 1, 1993, the applicant, or a prior user who is the applicant's predecessor or in interest, owned the well;

(5) the well head is physically located within the boundaries of the authority;

(6) the well is a withdrawal point for groundwater;

(7) the groundwater withdrawn from the well immediately prior to its intake into the well casing was physically located within and discharged directly from the aquifer;

(8) at the time of the withdrawals, the well was operated by:

(A) the applicant;

(B) a prior user who is the applicant's predecessor in interest to the ownership of the well; or

(C) a contract user;

(9) the withdrawals were made during the historical period;

(10) the place of use at which the withdrawals were beneficially used is physically located within the boundaries of the authority;

(11) the withdrawals were placed to a beneficial use for irrigation, municipal, or industrial use;

(12) the well(s) does not qualify for exempt well status;

(13) the application is in compliance with the Act; and

(14) the application is in compliance with the rules of the Authority.

(k) The board shall issue withdrawal amounts to an applicant for an initial regular permit pursuant to §711.176 of this title (relating to Groundwater Withdrawal Amount for Initial Regular Permits; Compensation for Phase-2 Proportionally Adjusted Amounts).

§711.100. Additional Regular Permits.

(a) Any person owning a well, or proposing to construct a well, may apply for an additional regular permit if:

(1) final determinations have been made by the board on all applications for initial regular permits filed with the authority on or before December 30, 1996; and

(2) the board has issued an order stating that the authority is accepting for filing applications for additional regular permits.

(b) Unless the board has issued the order authorizing applications for additional regular permits to be filed with the authority, the general manager may not process any application received and must return the application to the applicant along with any application fee submitted. When the general manager is authorized to accept for filing applications for additional regular permits, they shall be processed in the order in which they are received according to the official date and time stamp of the authority on the application.

(c) Additional regular permits are transferable pursuant to Subchapter L of this chapter (relating to Transfers).

(d) The term of an additional regular permit is perpetual.

(e) If in effect, additional regular permits may be retired in accordance with the following rules:

(1) the springflow maintenance rules pursuant to Chapter 715, Subchapter G of this title (relating to Springflow Maintenance Rules; Comprehensive Water Management Plan Implementation);

(2) the equal percentage reduction rules pursuant to Subchapter G of this chapter (relating to Groundwater Available for Permitting; Proportional Adjustment; Equal Percentage Reduction); or

(3) the regular permit retirement rules pursuant to Chapter 715, Subchapter H of this title (relating to Withdrawal Reductions and Regular Permit Retirement Rules; Comprehensive Water Management Plan Implementation).

(f) If in effect, additional regular permits may be suspended in accordance with the following rules:

(1) the demand management rules pursuant to Chapter 715, Subchapter D of this title (relating to Demand Management; Comprehensive Water Management Plan Implementation); or

(2) the groundwater trust pursuant to Subchapter N of this chapter (relating to Groundwater Trust).

(g) If in effect, additional regular permits may be interrupted in accordance with the following rules:

(1) the drought management rules pursuant to Chapter 715, Subchapter E of this title (relating to Drought Management Rules; Comprehensive Water Management Plan Implementation);

(2) the critical period management rules pursuant to Chapter 715, Subchapter F of this title (relating to Critical Period Management Rules; Comprehensive Water Management Plan Implementation); or

(3) the springflow maintenance rules pursuant to Chapter 715, Subchapter G of this title (relating to Springflow Maintenance Rules; Comprehensive Water Management Plan Implementation).

(h) Additional regular permits may be abandoned pursuant to Subchapter H of this chapter (relating to Abandonment and Cancellation).

(i) Additional regular permits may be canceled pursuant to Subchapter H of this chapter (relating to Abandonment and Cancellation).

(j) Subject to the duty of the board to determine the amount of groundwater that may be withdrawn under an additional regular permit, the board shall grant an application for an additional regular permit if the following elements are established by convincing evidence:

(1) the applicant paid the application fee;

(2) the application identifies an existing or proposed well(s);

(3) the well head is physically located within the boundaries of the authority;

(4) the well is a withdrawal point for groundwater;

(5) the groundwater proposed to be withdrawn from the well immediately prior to its intake into the well casing will be physically located within and discharged directly from the aquifer;

(6) the place of use at which the withdrawals are proposed to be beneficially used is physically located within the boundaries of the authority;

(7) the withdrawals are proposed to be placed to a beneficial use for irrigation, municipal, or industrial use;

(8) there remains water available for permitting after the board has made final determinations on:

(A) all applications for initial regular permits;

(B) any restorations of proportional adjustments or equal percentage reductions pursuant to §711.304 of this title (relating to Allocation of Additional Groundwater Supplies); and

(C) all prior applications for additional regular permits;

(9) the well does not qualify for exempt well status;

(10) the proposed withdrawal of groundwater is consistent with Chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(11) the applicant has no other reasonable source of water from a municipal distribution system;

(12) the application is in compliance with the Act; and

(13) the application is in compliance with the rules of the Authority.

(k) The board shall issue a groundwater withdrawal amount to an applicant for an additional regular permit in an amount that is consistent with Chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation).

§711.102. Term Permits.

(a) Any person owning a well, or proposing to construct a well, may apply for a term permit.

(b) Unless the board has issued an order authorizing applications for term permits to be filed with the authority, the general manager may not process any application received and must return the application to the applicant along with any application fee submitted. When the general manager is authorized to accept for filing applications for term permits, they shall be processed in the order in which they are received according to the official date and time stamp of the authority on the application.

(c) Term permits are transferable pursuant to Subchapter L of this chapter (relating to Transfers).

(d) If in effect, term permits shall be interrupted in accordance with the following rules:

(1) for wells completed in the San Antonio pool within a county other than Atascosa and Medina counties, the level of the aquifer for the San Antonio pool is equal to or less than 665 feet above mean sea level as measured at well J-17;

(2) for wells completed in the San Antonio pool and within Atascosa and Medina counties, well TD 69-47-306 is greater than 685 feet above mean sea level;

(3) for wells completed in the Uvalde pool, the level of the aquifer for the Uvalde pool is equal to or less than 865 feet above mean sea level as measured at well J-27;

(4) the drought management rules pursuant to Chapter 715, Subchapter E of this title (relating to Drought Management Rules; Comprehensive Water Management Plan Implementation);

(5) the critical period management rules pursuant to Chapter 715, Subchapter F of this title (relating to Critical Period Management Rules; Comprehensive Water Management Plan Implementation); or

(6) the springflow maintenance rules pursuant to Chapter 715, Subchapter G of this title (relating to Springflow Maintenance Rules; Comprehensive Water Management Plan Implementation).

(e) A term permit may be issued for any period the Authority considers feasible not to exceed ten years. Upon expiration of the term, the permit automatically expires and is canceled.

(f) Subject to the duty of the board to determine the amount of groundwater that may be withdrawn under a term permit, the board shall grant an application for a term permit if the following elements are established by convincing evidence:

(1) the applicant paid the application fee;

(2) the application identifies an existing or proposed well(s);

(3) the well head is physically located within the boundaries of the authority;

(4) the well is a withdrawal point for groundwater;

(5) the groundwater proposed to be withdrawn from the well immediately prior to its intake into the well casing will be physically located within and discharged directly from the aquifer;

(6) the withdrawals are proposed to be placed to a beneficial use;

(7) the place of use at which the withdrawals are proposed to be beneficially used is physically located within the boundaries of the authority;

(8) groundwater is available for permitting from the San Antonio or Uvalde pools, as appropriate;

(9) the well does not qualify for exempt well status;

(10) the applicant is in compliance with other groundwater withdrawal permits, if any;

(11) the proposed withdrawal of groundwater under the term permit, if granted, would not unreasonably negatively affect other permittees;

(12) the proposed withdrawal of groundwater is consistent with chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(13) the proposed use of groundwater is economically feasible in relation to the proposed length of the term;

(14) if applicable, the applicant has or will have an approved existing on-site sewer systems, or has been granted an application to construct such a system by the appropriate regulatory agency;

(15) the applicant will take all reasonable measures to ensure conservation of water withdrawn;

(16) the applicant has no other source of water from a municipal distribution system;

(17) the application is in compliance with the Act; and

(18) the application is in compliance with the rules of the Authority.

(g) The board shall issue a groundwater withdrawal amount to an applicant for an term permit in the amount that is consistent with Chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation).

(h) By January 15 of each year, the board by order shall determine the total quantity of groundwater that may be withdrawn from each pool of the aquifer for that calendar year pursuant to term permits. At any time by order of the Board this determination may be revised as appropriate based upon actual aquifer conditions to be consistent with Chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation).

§711.104. Emergency Permits.

(a) Any person owning a well may apply for an emergency permit.

(b) Emergency permits are not transferable pursuant to Subchapter L of this chapter (relating to Transfers).

(c) Emergency permits are not interruptible.

(d) An emergency permit may be issued for a term not to exceed 30 days. Upon expiration of the term, the permit automatically expires and is canceled.

(e) Subject to the duty of the board to determine the amount of groundwater that may be withdrawn under an emergency permit, the board shall grant an application for an emergency permit if the following elements are established by convincing evidence:

(1) the applicant paid the application fee;

(2) the application identifies an existing or proposed well(s);

(3) the well head is physically located within the boundaries of the authority;

(4) the well is a withdrawal point for groundwater;

(5) the groundwater proposed to be withdrawn from the well immediately prior to its intake into the well casing will be physically located within and discharged directly from the aquifer;

(6) the withdrawals are proposed to be placed to a beneficial use for irrigation, municipal, or industrial use;

(7) the place of use at which the withdrawals are proposed to be beneficial used is physically located within the boundaries of the authority;

(8) the well does not qualify for exempt well status;

(9) the applicant is in compliance with other groundwater withdrawal permits, if any;

(10) the applicant will take all reasonable measures to ensure conservation of water withdrawn;

(11) the applicant has no other source of water from a municipal distribution system;

(12) issuance of the permit is necessary to prevent the loss of life or to prevent severe, imminent threats to the public health or safety;

(13) the withdrawal amounts authorized in all other groundwater withdrawal permits issued to the applicant by the Authority have been exhausted;

(14) the application is in compliance with the Act; and

(15) the application is in compliance with the rules of the Authority.

(f) The board shall issue groundwater withdrawal amounts to an applicant for an emergency permit in the amount that is necessary to prevent the loss of life or to prevent severe, imminent threats to the public health or safety demonstrated in the application.

(g) An emergency permit is renewable pursuant to the rules of the Authority and the conditions of the permit.

§711.108. Well Construction Permits.

(a) Any person proposing to perform any of activities set forth in §711.12(a)(2)-(5) of this title (relating to Activities Requiring a Permit) shall apply for a well construction permit.

(b) Well construction permits are not transferable pursuant to subchapter L (relating to Transfers) of this chapter.

(c) A well constructed pursuant to a well construction permit must be completed within 180 days of issuance of the permit. The permit expires if the well has not been constructed within 180 days of

permit issuance. Upon expiration of the term, the permit automatically expires and is canceled.

(d) The general manager shall grant an application for a well construction permit if the following elements are established by convincing evidence:

(1) the applicant paid the application fee;

(2) the application identifies a proposed or an existing well(s);

(3) the well head is or will be physically located within the boundaries of the authority;

(4) the well is a withdrawal point for groundwater;

(5) the groundwater proposed to be withdrawn from the well immediately prior to its intake into the well casing will be physically located within and discharged directly from the aquifer;

(6) the withdrawals are proposed to be placed to a beneficial use for domestic, livestock, irrigation, municipal, or industrial use;

(7) the place of use at which the withdrawals are proposed to be beneficial used is physically located within the boundaries of the authority;

(8) the applicant has a legal right to make withdrawals from the well;

(9) the quantity of groundwater the well would be capable of producing, if constructed, is consistent with the quantity of groundwater the applicant proposes to produce pursuant to exempt well status or pursuant to a groundwater withdrawal permit;

(10) the applicant is in compliance with other permits the applicant holds from the Authority;

(11) the proposed well construction and operation would not unreasonably negatively affect the aquifer or other permittees;

(12) the well will be constructed, operated and maintained consistent with all applicable local, state, and federal well construction, operation, and maintenance law;

(13) the well will be constructed, operated and maintained consistent with Chapter 713 this title (relating to Water Quality);

(14) the application is in compliance with the Act; and

(15) the application is in compliance with the rules of the Authority.

§711.110. Monitoring Well Permits.

(a) Any person proposing to construct a monitoring well may apply for a monitoring well permit.

(b) Monitoring wells permits are transferable pursuant to Subchapter L of this chapter (relating to Transfers).

(c) Monitoring well permits are not interruptible.

(d) A monitoring well permit is perpetual in term.

(e) The board shall grant an application for a monitoring well permit if the following elements are established by convincing evidence:

(1) the applicant paid the application fee;

(2) the application identifies an existing or proposed well(s);

(3) the well head is physically located within the boundaries of the authority;

(4) the well is a monitoring well;

(5) the groundwater proposed to be monitored by the well immediately prior to its intake into the well casing will be physically located within and discharged directly from the aquifer;

(6) the applicant will take all reasonable measures to ensure conservation of water withdrawn;

(7) the application is in compliance with the Act; and

(8) the application is in compliance with the rules of the Authority.

§711.112. Contents of Groundwater Withdrawal Permits.

Groundwater withdrawal permits issued by the Authority shall contain the following:

(1) name, address and telephone number of the owner of the permit;

(2) name, address and telephone number of an authorized representative, if any, of the owner;

(3) permit category;

(4) permit term;

(5) purpose of use;

(6) maximum rate of withdrawal in gallons per minute;

(7) maximum volume of withdrawals by purpose in acre-feet on an annual basis;

(8) maximum historical use as defined in §711.172(b)(3) of this title (relating to Proportionally Adjustment of Initial Regular Permits).

(9) historical average or irrigator minimum as defined in §711.172(b)(1) and (2), respectively, of this title (relating to Proportionally Adjustment of Initial Regular Permits).

(10) Phase-1 proportionally adjusted amount as calculated pursuant to §711.172(g)(5) of this title (relating to Proportionally Adjustment of Initial Regular Permits);

(11) Step-up amount as calculated pursuant to §711.172(g)(6) of this title (relating to Proportionally Adjustment of Initial Regular Permits);

(12) Phase-2 proportionally adjusted amount as calculated pursuant to §711.172(g)(8) of this title (relating to Proportionally Adjustment of Initial Regular Permits);

(13) The equal percentage reduction amount as calculated pursuant to §711.174 of this title (relating to Equal Percentage Reduction of Initial Regular Permits) and subchapter H (relating to Withdrawal Reductions) and Regular Permit Retirement Rules of Chapter 715 of this title (relating to Comprehensive Management Plan Implementation of this title); the amount that may be subject to restoration pursuant to §711.172(h) of this title (relating to Proportionally Adjustment of Initial Regular Permits) and § 711.304 of the title (relating to Allocation of Additional Groundwater Supplies);

(14) location of the point(s) of withdrawal;

(15) place of use;

(16) source of groundwater;

(17) metering or alternative measuring method;

(18) conditions for retirement of permits;

(19) conditions for suspension of withdrawals;

(20) conditions for interruption of withdrawals;

(21) conditions for renewal;

(22) reporting requirements;

(23) notice that the permit is subject to the limitations provided in the Act and these rules;

(24) the standard groundwater withdrawal conditions set forth in Subchapter F of this chapter (relating to Standard Groundwater Withdrawal Conditions);

(25) any other appropriate conditions on the withdrawal of groundwater from the aquifer as determined by the Authority; and

(26) any other information required by the board to implement the Act or the Authority's rules.

§711.116. Contents of Well Construction Permits.

Well construction permits issued by the Authority shall contain the following:

(1) name, address and telephone number of the owner of the permit;

(2) name, address and telephone number of an authorized representative, if any, of the owner;

(3) permit category;

(4) permit term;

(5) purpose of use of the well;

(6) maximum rate of withdrawal in gallons per minute;

(7) maximum monthly rate of withdrawal in acre-feet;

(8) maximum volume of withdrawals by purpose in acre-feet on an annual basis;

(9) legal description of the location of the well, including:

(A) county;

(B) section, block and survey;

(C) labor and league;

(D) number of feet to the two nearest non-parallel property lines (legal survey lines); and

(E) other adequate legal description, as may be required by the Authority;

(10) identification of the specific legal authority of the applicant to make withdrawals of groundwater from the aquifer from the well;

(11) the source of groundwater;

(12) size of the pump, pumping rate, pumping method, and other construction specifications for metering or alternative measuring method;

(13) internal diameter, total well depth, depth of cement casing, size, and other well construction specifications as appropriate;

(14) reporting requirements;

(15) notice that the permit is subject to the limitations provided in the Act and these rules;

(16) any other appropriate conditions on the construction well as determined by the Authority; and

(17) any other information required by the board to implement the Act or the Authority's rules.

§711.118. Contents of Monitoring Well Permits.

Monitoring well permits issued by the Authority shall contain the following:

(1) name, address and telephone number of the owner of the permit;

(2) name, address and telephone number of an authorized representative, if any, of the owner;

(3) permit category;

(4) permit term;

(5) purpose of use of the well;

(6) maximum rate of withdrawal in gallons per minute;

(7) maximum monthly rate of withdrawal in acre-feet;

(8) maximum volume of withdrawals by purpose in acre-feet on an annual basis;

(9) legal description of the location of the well, including:

(A) county;

(B) section, block and survey;

(C) labor and league;

(D) number of feet to the two nearest non-parallel property lines (legal survey lines); and

(E) other adequate legal description, as may be required by the Authority;

(10) purpose of the monitoring activity;

(11) the source of groundwater;

(12) size of the pump, pumping rate, pumping method, and other construction specifications for metering or alternative measuring method;

(13) internal diameter, total well depth, depth of cement casing, size, and other well construction specifications as appropriate;

(14) construction specification for other monitoring equipment to be installed in and associated with the well;

(15) reporting requirements;

(16) notice that the permit is subject to the limitations provided in the Edwards Aquifer Act and these rules;

(17) any other appropriate conditions on the construction well as determined by the Authority; and

(18) any other information required by the board to implement the Act or the Authority's rules.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

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Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Earliest possible date of adoption: September 10, 2000
For further information, please call: (210) 222-2204

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SUBCHAPTER F. STANDARD GROUNDWATER WITHDRAWAL CONDITIONS

31 TAC §§711.130, 711.132, 711.134

The Subchapter F rules in the proposed Chapter 711 rules are proposed pursuant to §§1.07, 1.08(a), 1.10(i)(1) and (2), 1.11(a), (b), (d)(8), (d)(10), (d)(11), and (h), 1.14(a), (d), (f) and (h), 1.15(a), 1.16(e), (g) and (h), 1.17(c), 1.21(a), (b) and (c), 1.22(a)(1), (a)(2), (a)(3), and (a)(4), 1.23(a), 1.25(a) and (b), 1.26, 1.28(b), 1.29(a), (b), (c), (e) and (g), 1.30(b) and (c)(1), 1.31(a), 1.32, 1.34, 1.35(b), and 1.36(a) and (b) of the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634 (the "Act")); § 2001.004(1) of the APA; Chapter 32 of the Texas Water Code; §§36.104, 36.113(a), (d) and (e), 36.1131, 49.2261(1) of the Texas Water Code; and 16 TAC Chapter 76.

The articles or sections of the Act or any other code that are affected by the proposed rule are: §§1.03(4), (9) - (14), (21), 1.07, 1.08(a), 1.10(i)(1), (2), 1.11(a), (b), (d)(2), (8), (10), (11), (h), 1.14(a) - (f), (h), 1.15(a) - (d), 1.16(a), (c) - (h), 1.17(a) - (d), 1.18, 1.19, 1.20, 1.21, 1.22(a)(1)-(4), 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.31, 1.32, 1.33, 1.34, 1.35, 1.36 of the Act; §2001.004(1) of the APA; Chapter 32 and §§ 36.101(a), 36.111, 36.113, 36.1131, 36.119(a), 49.211(a), and 49.221 of the Texas Water Code; §§212.004, 212.0046, 232.001, and 232.0015 of the Texas Local Government Code; and 16 Texas Administrative Code, Chapter 76. The sections of Chapter 31, Texas Administrative Code that would be affected are §§31 TAC 711.1, 711.10, 711.12, 711.14, 711.90, 711.92, 711.94, 711.96, 711.98, 711.100, 711.102, 711.104, 711.108, 711.110, 711.112, 711.116, 711.118, 711.130, 711.132, 711.134, 711.160, 711.162, 711.164, 711.166, 711.168, 711.170, 711.172, 711.174, 711.176, 711.178, 711.180, 711.220, 711.222, 711.224, 711.226, 711.228, 711.230, 711.232, and 711.234.

§711.130. Purpose.

The purpose of this subchapter is to establish the standard conditions required to be contained in a groundwater withdrawal permit issued by the authority.

§711.132. Applicability.

This subchapter applies to all groundwater withdrawal permits.

§711.134. Standard Conditions.

Any groundwater withdrawal permit issued by the authority is subject to the following conditions:

(1) the protection of the water quality of the native groundwater of the aquifer by:

(A) the construction, operation and maintenance of wells pursuant to Chapter 713, Subchapter C of this title (relating to Well Construction, Operation and Maintenance; Water Quality);

(B) the abandonment and closure of wells pursuant to Chapter 713, Subchapter D of this title (relating to Abandoned Wells; Well Closures; Water Quality);

(C) the spacing of wells pursuant to Chapter 713, Subchapter E of this title (relating to Well Spacing; Water Quality);

(D) the installation, operation and maintenance of well fields pursuant to Chapter 713, Subchapter F of this title (relating to Well Head Protection; Water Quality);

(E) the recharge of the aquifer pursuant to Subchapter J of this chapter (relating to Aquifer Recharge, Storage and Recovery Project); and

(F) taking no action that pollutes or contributes to the pollution of the aquifer;

(2) the protection of the water quality of the surface streams to which the aquifer provides springflow by:

(A) the construction, operation and maintenance of wells pursuant to Chapter 713, Subchapter C of this title (relating to Well Construction, Operation and Maintenance; Water Quality);

(B) the abandonment and closure of wells pursuant to Chapter 713, Subchapter D of this title (relating to Abandoned Wells; Well Closures; Water Quality);

(C) the spacing of wells pursuant to Chapter 713, Subchapter E of this title (relating to Well Spacing; Water Quality);

(D) the installation, operation and maintenance of well fields pursuant to Chapter 713, Subchapter F of this title (relating to Well Head Protection; Water Quality);

(E) taking no action that pollutes or contributes to the pollution of the aquifer; and

(F) the beneficial use and utilization of groundwater withdrawn from the aquifer that is reused pursuant to Chapter 715, Subchapter I of this title (relating to Reuse Rules; Comprehensive Water Management Plan Implementation);

(3) the achievement of water conservation, and the maximization of the beneficial use of groundwater available for withdrawal from the aquifer by:

(A) not wasting groundwater within or withdrawn from the aquifer pursuant to Subchapters E and I of this chapter (relating to Permitted Wells; Prohibitions);

(B) the beneficial use and utilization of groundwater withdrawn from the aquifer pursuant to Chapter 715, Subchapter C of this title (relating to Groundwater Conservation Rules; Comprehensive Water Management Plan Implementation);

(C) the beneficial use and utilization of groundwater withdrawn from the aquifer pursuant to Chapter 715, Subchapter D of this title (relating to Demand Management Rules; Comprehensive Water Management Plan Implementation);

(D) the interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to Chapter 715, Subchapter E of this title (relating to Drought Management Rules; Comprehensive Water Management Plan Implementation);

(E) the interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to Chapter 715, Subchapter F of this title (relating to Critical Period Management Rules; Comprehensive Water Management Plan Implementation);

(F) the beneficial use and utilization of groundwater withdrawn from the aquifer that is reused pursuant to Chapter 715, Subchapter I of this title (relating to Reuse Rules; Comprehensive Water Management Plan Implementation);

(G) the installation, operation and maintenance of meters and alternative measuring methods pursuant to Subchapter M of

this chapter (relating to Meters; Alternative Measuring Methods; and Reporting);

(H) the keeping and filing of reports pursuant to Subchapter M of this chapter (relating to Meters; Alternative Measuring Methods; and Reporting), and any other applicable law or rule; and

(I) the use of groundwater withdrawn from the aquifer only for an authorized beneficial use and without waste pursuant to Subchapter E of chapter (relating to Permitted Wells) and Subchapter I of this chapter (relating to Prohibitions);

(4) the protection of aquatic and wildlife habitat, and the protection of species that have been listed as threatened or endangered under applicable federal or state law by:

(A) the beneficial use and utilization of groundwater withdrawn from the aquifer pursuant to Chapter 715, Subchapter C of this title (relating to Groundwater Conservation Rules; Comprehensive Water Management);

(B) the beneficial use and utilization of groundwater withdrawn from the aquifer pursuant to Chapter 715, Subchapter D of this title (relating to Demand Management Rules; Comprehensive Water Management Plan Implementation);

(C) the interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to Chapter 715, Subchapter E of this title (relating to Drought Management Rules; Comprehensive Water Management Plan Implementation);

(D) the interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to Chapter 715, Subchapter F of this title (relating to Critical Period Management Rules; Comprehensive Water Management Plan Implementation);

(E) the retirement or interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to Chapter 715, Subchapter G of this title (relating to Springflow Maintenance Rules; Comprehensive Water Management Plan Implementation);

(F) proportional adjustment pursuant to Chapter 711, Subchapter G of this title (relating to Groundwater Available for Permitting, Proportional Adjustment, Equal Percentage Reductions; Groundwater Withdrawal Permits);

(G) retirement by equal percentage reductions pursuant to Chapter 711, Subchapter G of this title (relating to Groundwater Available for Permitting, Proportional Adjustment, Equal Percentage Reductions; Groundwater Withdrawal Permits); and

(H) retirement pursuant to Chapter 715, Subchapter H of this title (relating to Withdrawal Reductions and Regular Permit Retirement Rules; Comprehensive Water Management Plan Implementation);

(I) the acquisition of additional water supplies pursuant to Chapter 715, Subchapter J of this title (relating to Alternative Water Supply Rules; Comprehensive Water Management Plan Implementation);

(J) engaging in no conduct that violates the Endangered Species Act, 16 U.S.C. §§1531-1544(1998), or applicable state law, relative to listed threatened or endangered species;

(5) the providing for instream uses, bays, and estuaries by:

(A) the beneficial use and utilization of groundwater withdrawn from the aquifer pursuant to Chapter 715, Subchapter C of this title (relating to Groundwater Conservation Rules; Comprehensive Water Management);

(B) the beneficial use and utilization of groundwater withdrawn from the aquifer pursuant to Chapter 715, Subchapter D of this title (relating to Demand Management Rules; Comprehensive Water Management Plan Implementation);

(C) the interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to Chapter 715, Subchapter E of this title (relating to Drought Management Rules; Comprehensive Water Management Plan Implementation);

(D) the interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to Chapter 715, Subchapter F of this title (relating to Critical Period Management Rules; Comprehensive Water Management Plan Implementation);

(E) the retirement or interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to Chapter 715, Subchapter G of this title (relating to Springflow Maintenance Rules; Comprehensive Water Management Plan Implementation);

(F) proportional adjustment pursuant to subchapter G (relating to Groundwater Available for Permitting, Proportional Adjustment, Equal Percentage Reductions) of chapter 711 (relating to Groundwater Withdrawal Permits) of this title;

(G) retirement by equal percentage reductions pursuant to Chapter 711, Subchapter G of this title (relating to Groundwater Available for Permitting, Proportional Adjustment, Equal Percentage Reductions; Groundwater Withdrawal Permits); and

(H) retirement pursuant to Chapter 715, Subchapter H of this title (relating to Regular Permit Retirement Rules; Comprehensive Water Management Plan Implementation);

(6) the provision of notice of changes in name and mailing address of the permitting pursuant to §707.105 of this title (relating to Change of Name, Address or Telephone Number);

(7) the payment of all registration, application, aquifer management, and retirement fees pursuant to Chapter 709 of this title (relating to Fees);

(8) the cessation of withdrawals under interim authorization status pursuant to Chapter 711, Subchapter D of this title (relating to Interim Authorization; Groundwater Withdrawal Permits);

(9) abandonment pursuant to Chapter 711, Subchapter H of this title (relating to Abandonment and Cancellation; Groundwater Withdrawal Permits);

(10) cancellation pursuant to Chapter 711, Subchapter H of this title (relating to Abandonment and Cancellation; Groundwater Withdrawal Permits);

(11) the restoration of equally proportionally reduced amounts pursuant to Chapter 711, Subchapter K of this title (relating to Additional Groundwater Supplies; Groundwater Withdrawal Permits);

(12) the transfer of the permit pursuant to Chapter 711, Subchapter L of this title (relating to Transfers; Groundwater Withdrawal Permits);

(13) the prohibition on the use of groundwater withdrawn from the aquifer at a place of use outside of the boundaries of the authority pursuant to §711.220 of this title (relating to Place of Use Outside of Authority Boundaries);

(14) compliance with the terms and condition of the permit;

(15) compliance with the act;

(16) compliance with the rules of the authority; and

(17) any other condition as may, in the discretion of the board be reasonable and appropriate.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

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Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Earliest possible date of adoption: September 10, 2000
For further information, please call: (210) 222-2204

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SUBCHAPTER G. GROUNDWATER AVAILABLE FOR PERMITTING; PROPORTIONAL ADJUSTMENT; EQUAL PERCENTAGE REDUCTION

31 TAC §§711.160, 711.162, 711.164, 711.166, 711.168, 711.170, 711.172, 711.174, 711.176, 711.178, 711.180

The Subchapter G rules in the proposed Chapter 711 rules are proposed pursuant to §§1.08(a), 1.11(a), (b) and (h), 1.14(b) and (c), 1.15(a) and (b), 1.16(e) 1.18(a), 1.19(b) and (c), 1.20(d), 1.21(a) and (c), and 1.44(d) of the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634 (the "Act")).

The articles or sections of the Act or any other code that are affected by the proposed rule are: §§1.03(4), (9) - (14), (21), 1.07, 1.08(a), 1.10(i)(1), (2), 1.11(a), (b), (d)(2), (8), (10), (11), (h), 1.14(a) - (f), (h), 1.15(a) - (d), 1.16(a), (c) - (h), 1.17(a) - (d), 1.18, 1.19, 1.20, 1.21, 1.22(a)(1)-(4), 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.31, 1.32, 1.33, 1.34, 1.35, 1.36 of the Act; §2001.004(1) of the APA; Chapter 32 and §§ 36.101(a), 36.111, 36.113, 36.1131, 36.119(a), 49.211(a), and 49.221 of the Texas Water Code; §§212.004, 212.0046, 232.001, and 232.0015 of the Texas Local Government Code; and 16 Texas Administrative Code, Chapter 76. The sections of Chapter 31, Texas Administrative Code that would be affected are §§31 TAC 711.1, 711.10, 711.12, 711.14, 711.90, 711.92, 711.94, 711.96, 711.98, 711.100, 711.102, 711.104, 711.108, 711.110, 711.112, 711.116, 711.118, 711.130, 711.132, 711.134, 711.160, 711.162, 711.164, 711.166, 711.168, 711.170, 711.172, 711.174, 711.176, 711.178, 711.180, 711.220, 711.222, 711.224, 711.226, 711.228, 711.230, 711.232, and 711.234.

§711.160. Purpose.

The purpose of this subchapter is to:

(1) establish the amount of groundwater available for permitting for each category of groundwater withdrawal permit that may be issued by the authority;

(2) establish the procedures for implementing proportional adjustments under §1.16(e) of the act; and

(3) establish the procedures for implementing equal percentage reductions under §1.21(c) of the act.

§711.162. Applicability.

This subchapter applies only to the groundwater withdrawal permits as specifically identified in each section herein.

§711.164. Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits.

(a) Unless increased pursuant to §1.14(d) of the act and Subchapter K of this chapter (relating to Additional Water Supplies), the amount of groundwater from the aquifer that the board may permit to be withdrawn pursuant to initial regular permits, and additional regular permits for the period from the effective date of these rules through December 31, 2007, shall not exceed 450,000 acre-feet for each calendar year.

(b) Unless increased pursuant to §1.14(d) of the act and Subchapter K of this chapter (relating to Additional Water Supplies), the amount of groundwater from the aquifer that the board may permit to be withdrawn pursuant to initial and additional regular permits for the period beginning January 1, 2008, and continuing thereafter, shall not exceed 400,000 acre-feet for each calendar year.

§711.166. Groundwater Available for Permitting for Term Permits.

(a) The amount of groundwater authorized to be withdrawn from the aquifer pursuant to term permits is not subject to the maximum total permitted withdrawals provided for in §711.164(a) and (b) of this title (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits).

(b) The amount of groundwater from the aquifer that the board may permit to be withdrawn pursuant to term permits shall not exceed the number of acre-feet for each calendar year established by the board in its order issued under §711.102 of this title (relating to Term Permits) authorizing the filing of applications for term permits when the following index wells are measuring at the following groundwater levels:

(1) for wells within the San Antonio pool and within a county other than Atascosa and Medina counties, well J-17 is greater than 665 feet above mean sea level;

(2) for wells within the San Antonio pool and within Atascosa or Medina counties, well TD 69-47-306 is greater than 685 feet above mean sea level; or .

(3) for wells within the Uvalde pool, well J-27 is greater than 865 feet above mean sea level.

§711.168. Groundwater Available for Permitting for Emergency Permits.

(a) The amount of groundwater authorized to be withdrawn from the aquifer pursuant to emergency permits is not subject to the maximum total permitted withdrawals provided for in §711.164(a) and (b) of this title (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits).

(b) Irrespective of the groundwater levels of wells J-17, TD 69-47-306, or J-27, the amount of groundwater from the aquifer that the board may permit to be withdrawn pursuant to emergency permits shall not exceed the amount necessary to prevent the loss of life or to prevent severe, imminent threats to the public health or safety for each calendar year.

§711.170. Groundwater Available for Permitting for Monitoring Well Permits.

(a) The amount of groundwater authorized to be withdrawn from the aquifer pursuant to monitoring well permits is not subject to the maximum total permitted withdrawals provided for in §711.164(a) and (b) of this title (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits).

(b) Irrespective of the groundwater levels of wells J-17, TD 69-47-306, or J-27, the amount of groundwater from the aquifer that the board may permit to be withdrawn pursuant to monitoring well permits shall not exceed the amount reasonably necessary to properly collect water quality samples from the aquifer for each calendar year.

§711.172. Proportional Adjustment of Initial Regular Permits.

(a) Applicability. This section applies only to initial regular permits.

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

(1) Historical average minimum-the minimum amount of groundwater from the aquifer, as determined by the authority, that an applicant, who operated a well in three or more years during the historical period, shall be authorized to withdraw in an initial regular permit equal to the average amount of groundwater withdrawn annually during the historical period calculated as follows:
Figure: 31 TAC §711.172(b)(1)

(2) Irrigator minimum-the minimum amount of groundwater from the aquifer, as determined by the authority, that an applicant for irrigation use shall be authorized to withdraw in an initial regular permit equal to two acre-feet times each acre of land the applicant, or his contract user, prior user, or former existing user actually irrigated in any one calendar year during the historical period if the applicant, or his contract user, prior user, or former existing user:

(A) owned, leased, or otherwise had a legal right to irrigate the land during the historical period; and

(B) owned the well from which the land was irrigated .

(3) Maximum historical use (MHU)-the amount of groundwater from the aquifer as determined by the authority that, unless proportionally adjusted, an applicant for an initial regular permit is authorized to withdraw equal to the greater of the following, as may be applicable:

(A) an applicant's irrigator minimum;

(B) for an applicant who has beneficial use without waste during the historical period for a full calendar year, the applicant's actual maximum beneficial use of groundwater from the aquifer without waste during any one full calendar year of the historical period; or

(C) for an applicant who has beneficial use without waste during the historical period, but, due to the applicant's activities not having been commenced and in operation for a full calendar year, the applicant does not have beneficial use for a full calendar year, the applicant's extrapolated maximum beneficial use calculated as follows: the amount of groundwater that would normally have been placed to beneficial use without waste by the applicant for a full calendar year during the historical period for the applied for purpose had the applicant's activities been commenced and in operation for a full calendar year during the historical period.

(4) Operate a well-the withdrawal of groundwater from a well for a beneficial use.

(5) Step-up amount (SUA)-the amount of groundwater from the aquifer as determined by the authority that an applicant for an initial regular permit is authorized to withdraw equal to the difference between an applicant's irrigator or historical average minimum, if any, and the applicant's PA-1 amount as determined in subsection (g)(5) of this section.

(c) Purpose of Proportional Adjustment. The purpose of proportional adjustment is to adjust the aggregate maximum historical use of all initial regular permits to attain the amount of groundwater available for permitting in §711.164(a) of this title (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits).

(d) Proportionality. An adjustment is proportional when the adjustment of the maximum historical use of an initial regular permit maintains a constant ratio in relation to the adjustment of the maximum historical use of all other permits.

(e) Duty to Proportionally Adjust. If the total aggregate maximum historical use of all initial regular permits exceeds the amount of groundwater available for permitting in §711.164(a) of this title (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits), the board shall, pursuant to this section, proportionally adjust the maximum historical use of each permit.

(f) Proportional Adjustment Orders. The board shall implement and effectuate proportional adjustment by order of the board. Proportional adjustment orders may be provisional for a fixed period of time, or may be final.

(g) Proportional Adjustment Procedure. Proportional adjustment of initial regular permits, if required, shall be performed as follows:

(1) For each applicant who is to be issued an initial regular permit, the board shall determine and assign a maximum historical use.

(2) For each applicant for irrigation use who is to be issued an initial regular permit, the board shall determine and assign an irrigator minimum, if any.

(3) For each applicant who operated a well for three or more years during the historical period and who is to be issued an initial regular permit, the board shall determine and assign a historical average minimum, if any.

(4) Phase-1Proportional Adjustment Factor. If the total of all maximum historical uses of all applicants for initial regular permits to whom the board will issue an initial regular permit exceeds 450,000 acre feet per annum, then the board shall calculate a Phase-1 proportional adjustment factor ("PA-1 Factor") as follows:
Figure: 31 TAC §711.172(g)(4)

(5) Phase-1 Proportionally Adjusted Amount. The board shall then calculate a proportionally adjusted amount ("PA-1 amount") for each applicant to be issued an initial regular permit as follows:
Figure: 31 TAC §711.172(g)(5)

(6) Step-up Amount. For each applicant assigned an historical average or irrigator minimum and whose PA-1 amount is less than the applicant's irrigator or historical average minimum, the board shall determine and assign a step-up amount. An applicant whose PA-1 amount is equal to or greater than its irrigator or historical average minimum shall not receive a step-up amount.

(7) Phase- 2 Proportional Adjustment Factor. If the total of all PA-1 amounts plus all step-up amounts remaining after the Board has issued agreed orders pursuant to §711.180 of this title (relating to Voluntary Waiver of Applications for Initial Regular Permits) exceeds 450,000 acre feet per annum, then the board shall calculate a Phase-2 proportional adjustment factor ("PA- 2 Factor") as follows:

Figure: 31 TAC §711.172(g)(7)

(8) Phase-2 Proportionally Adjusted Amount. The board shall then calculate a Phase-2 proportionally adjusted amount ("PA-2 amount") for each applicant issued an initial regular permit as follows:

(A) For all applicants eligible to receive a step-up amount:
Figure: 31 TAC §711.172(g)(8)(A)

(B) For all applicants not eligible to receive a step-up amount:
Figure: 31 TAC §711.172(g)(8)(B)

(9) The board shall issue a final initial regular permit to each eligible applicant establishing a groundwater withdrawal amount authorized to be withdrawn as provided in §711.176(c) of this title (relating to Groundwater Withdrawal Amount for Initial Regular Permits; Compensation for Phase-2 Proportionally Adjusted Amounts).

(h) If the board issues a proportional adjustment order, then the board shall account for all groundwater proportionally adjusted from each initial regular permit. If additional groundwater becomes available for permitting pursuant to §1.14(d) of the act and Subchapter K of this chapter (relating to Additional Groundwater Supplies), then the proportionally adjusted amounts shall be restored through the inverse application of subsection (g) of this section in accordance with §711.304(3) of this title (relating to Allocation of Additional Groundwater Supplies).

§711.174. Equal Percentage Reduction of Initial Regular Permits.

(a) This section applies only to initial regular permits.

(b) Equal percentage reduction pursuant to §1.21(c) of the act is the retirement of initial regular permits and shall be implemented in accordance with Chapter 715, Subchapter H of this title (relating to Withdrawal Reductions and Regular Permit Retirement Rules; Comprehensive Management Plan Implementation).

§711.176. Groundwater Withdrawal Amounts for Initial Regular Permits; Compensation for Phase-2 Proportionally Adjusted Amounts.

(a) If the aggregate maximum historical use of all applicants for initial regular permits does not exceed the amount of groundwater available for permitting in §711.164(a) of this title (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits), then an applicant shall receive an initial regular permit authorizing the withdrawal of groundwater from the aquifer in the amount of the maximum historical use.

(b) If the aggregate maximum historical use of all applicants for initial regular permits exceeds the amount of groundwater available for permitting in §711.164(a) of this title (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits), then an applicant shall receive an initial regular permit authorizing the withdrawal of groundwater from the aquifer in the following amounts:

(1) If the application is for irrigation use, then in an amount not less than the irrigator minimum; or

(2) If the application is for a well that has operated in three or more years during the historical period, then in an amount not less than the historical average minimum.

(c) If the irrigator or historical average minimum is greater than the PA-1 amount as calculated in §711.172(g)(5) of this title (relating to Proportional Adjustment of Initial Regular Permits), then the groundwater withdrawal amount in a final initial regular permit shall be issued by the board at the irrigator or historical average minimum as follows:

(1) the PA-1 amount shall be authorized to be withdrawn as a permitted withdrawal pursuant to the groundwater withdrawal schedule required by §711.178 of this title (relating to Groundwater Withdrawal Schedules); and

(2) to the extent necessary, in order to satisfy groundwater available for permitted withdrawals under §711.164(a) of this title (relating to Groundwater Available for Groundwater for Initial and Regular Permits), the step-up amount as calculated in §711.172(b)(5) and (g)(6) of this title (relating to Proportional Adjustment of Initial Regular Permits) may not be withdrawn; and

(3) the amount that is proportionally adjusted pursuant to §711.172(g)(7) and (8) of this title (relating to Proportional Adjustment of Initial Regular Permits) may not be withdrawn, but instead the authority shall provide compensation for this amount at the fair market value as that term is defined in §11.0275, TEXAS WATER CODE, (relating to Fair Market Value).

§711.178. Groundwater Withdrawal Schedules.

(a) This section applies to initial regular permits, additional regular permits, and term permits.

(b) No later than November 1st of the first year after a groundwater withdrawal permit has been issued to a permittee and continuing each year thereafter, a permittee shall file with the authority, a groundwater withdrawal schedule on a form approved by the authority containing the following information:

(1) for an initial regular permit, the amount planned to be withdrawn in the succeeding year by month;

(2) for additional regular and term permits, the amount of groundwater from the aquifer planned to be withdrawn in the succeeding year by month; and

(3) any other information as determined by the board or the general manager.

(c) Within fifteen days of receipt of the schedule, the general manager shall review the schedule and determine if the schedule:

(1) is consistent with the permittee's groundwater withdrawal permit; and

(2) is consistent with Chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation).

(d) If the general manager determines that the schedule is not consistent with subsection (b) of this section, then the general manager shall return the schedule and advise the permittee of the specific reasons for his determination.

(e) No permittee may withdraw groundwater from the aquifer during any month in excess of 110% of the scheduled monthly amount.

(f) Scheduled monthly groundwater withdrawal amounts not withdrawn during the scheduled month may be carried forward to following months in the same calendar year by giving notice to the authority of the carry forward amount on a form approved by the authority.

§711.180. Voluntary Waiver of Applications for Initial Regular Permits.

At any time the board may enter an agreed order for declaration of waiver of all or part of an applicant's maximum historical use, PA amount, step up amount, base irrigation groundwater or unrestricted irrigation groundwater claimed in or proposed for an application for an initial regular permit.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005262
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Earliest possible date of adoption: September 10, 2000
For further information, please call: (210) 222-2204

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SUBCHAPTER I. GENERAL PROHIBITIONS

31 TAC §§711.220, 711.222, 711.224, 711.226, 711.228, 711.230, 711.232, 711.234

The Subchapter I rules in the proposed Chapter 711 rules are proposed pursuant to §§1.08(a), 1.11(a), (b) and (h), 1.14(e), 1.15(a), 1.34(a), and 1.35 of the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634 (the "Act")); and §§36.101(a), and 36.119(a) of the Texas Water Code.

The articles or sections of the Act or any other code that are affected by the proposed rule are: §§1.03(4), (9) - (14), (21), 1.07, 1.08(a), 1.10(i)(1), (2), 1.11(a), (b), (d)(2), (8), (10), (11), (h), 1.14(a) - (f), (h), 1.15(a) - (d), 1.16(a), (c) - (h), 1.17(a) - (d), 1.18, 1.19, 1.20, 1.21, 1.22(a)(1)-(4), 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.31, 1.32, 1.33, 1.34, 1.35, 1.36 of the Act; §2001.004(1) of the APA; Chapter 32 and §§36.101(a), 36.111, 36.113, 36.1131, 36.119(a), 49.211(a), and 49.221 of the Texas Water Code; §§212.004, 212.0046, 232.001, and 232.0015 of the Texas Local Government Code; and 16 Texas Administrative Code, Chapter 76. The sections of Chapter 31, Texas Administrative Code that would be affected are §§31 TAC 711.1, 711.10, 711.12, 711.14, 711.90, 711.92, 711.94, 711.96, 711.98, 711.100, 711.102, 711.104, 711.108, 711.110, 711.112, 711.116, 711.118, 711.130, 711.132, 711.134, 711.160, 711.162, 711.164, 711.166, 711.168, 711.170, 711.172, 711.174, 711.176, 711.178, 711.180, 711.220, 711.222, 711.224, 711.226, 711.228, 711.230, 711.232, and 711.234.

§711.220. Place of Use Outside Authority Boundaries.

(a) Groundwater withdrawn from the aquifer must be used within the Authority boundaries.

(b) The place of use for groundwater withdrawn from the aquifer that is processed into or used to produce a commodity is the plant site where the commodity is produced.

§711.222. Withdrawals from New Wells.

(a) Except as provided in subsection (b) of this section, a person may not make a withdrawal of groundwater from the aquifer through new wells.

(b) A person may withdraw groundwater from the aquifer from a new well only if the withdrawal is made from one of the following wells:

(1) an exempt well;

(2) a well for which a groundwater withdrawal permit has been issued by the Authority; or

(3) a well identified as a point of withdrawal in an approved transfer of interim authorization status or groundwater withdrawal permit.

§711.224. Unauthorized Activities.

(a) Except as provided in the Edwards Aquifer Act, §§1.15(b), 1.16(c), 1.17(a) and 1.33(a) and (c) and §711.14 of this title (relating to Withdrawals Not Requiring a Groundwater Withdrawal Permit), a person may not withdraw groundwater from the aquifer unless authorized pursuant to a groundwater withdrawal permit issued by the Authority.

(b) A person may not construct, install, drill, equip, complete, alter, operate, or maintain a new well unless authorized pursuant to a well construction permit issued by the Authority.

(c) A person may not operate a well at a higher rate of production than the rate approved for the well in a groundwater withdrawal permit.

§711.226. Unregistered Exempt Wells.

A person may not make withdrawals from an existing exempt well unless an approved registration form is on file with the Authority.

§711.228. Compliance with Law.

A person may not violate the Act, the Authority's rules, or the terms or conditions of a permit.

§711.230. Waste Prevention.

A person may not waste groundwater within or water withdrawn from the aquifer.

§711.232. Pollution of the Aquifer.

A person may not pollute or contribute to the pollution of the aquifer.

§711.234. Nuisances.

The following are declared to be nuisances:

(1) the wasting of groundwater within or water withdrawn from the aquifer;

(2) the operation of a well at a higher rate of production than the rate approved for the well; and

(3) the pollution or contribution to the pollution of the aquifer.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005263
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Earliest possible date of adoption: September 10, 2000
For further information, please call: (210) 222-2204

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER L. MOTOR FUEL TAX

34 TAC §3.171

The Comptroller of Public Accounts proposes an amendment to §3.171, concerning records required; information required. The 76th Legislature, 1999, in Senate Bill 1547, amended Tax Code, Chapter 153, regarding records required by sellers and users of motor fuel. The amendment provides for two new bonded diesel fuel user permits and requires common and contract carriers transporting gasoline or diesel fuel by truck in Texas to register with the comptroller and maintain records. The amendment also requires anyone wanting to use a signed statement to purchase tax-free diesel fuel to register with the comptroller. Subsections are being amended to provide a record keeping requirement for sellers or users claiming that gasoline and diesel fuel was stolen.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas 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 in providing taxpayers with a more efficient means of obtaining tax information. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§153.003, 153.018, 153.117. 153.219, 153.302, and 153.309.

§3.171. Records Required; Information Required.

(a) Records required.

(1) A distributor of gasoline or a supplier of diesel fuel, as those terms are defined in [~~the~~] Tax Code, §153.001, shall keep the shipping document that relates to each receipt for distribution of gasoline or diesel fuel, and shall also keep records that show[~~showing~~] the number of gallons of:

(A) all gasoline or diesel fuel inventories on hand on the first day of each month;

(B) all gasoline or diesel fuel[~~,~~] that the distributor or supplier refined, compounded, or blended;

(C) all gasoline or diesel fuel that the distributor or supplier purchased or received, showing the name and location of the seller, the date of each purchase or receipt, and the amount of motor fuels tax paid or if no tax was paid, the basis for the nonpayment of the motor fuels tax;

(D) all gasoline or diesel fuel that the distributor or supplier sold, distributed, or used, showing the name and location of the purchaser, the date of each sale, distribution, or use, and the amount of motor fuels tax assessed, or if no tax was assessed, the basis for not assessing the motor fuels tax; [~~and~~]

(E) all diesel fuel that the distributor or supplier sold tax free, separately identifying sales of dyed and undyed fuel, showing the purchaser's aviation fuel dealer permit number, dyed diesel fuel bonded user permit number, agricultural bonded user permit number, or, when sold by signed statement, end user number or agricultural user exemption number;

(F) all gasoline and diesel fuel that the distributor or supplier exported from Texas including the destination state or country for each load;

(G) all gasoline and diesel fuel that the distributor or supplier imported into Texas including the origin state or country for each load; and

(H) [~~(E)~~] all gasoline or diesel fuel that the distributor or supplier lost by fire, theft, or [~~other~~] accident;[~~.~~]

(2) A dealer, as that term is defined in the Tax Code, §153.001, shall keep the shipping document that relates to each receipt or distribution of gasoline or diesel fuel and shall also keep records that show[~~showing~~] the number of gallons of:

(A) all gasoline or diesel fuel inventories on hand on the first day of each month;

(B) all gasoline or diesel fuel that the dealer purchased or received, showing the name and location of the seller, the date of each purchase or receipt, the amount of motor fuels tax paid, or if no tax was paid, the basis for the nonpayment of the motor fuels tax;

(C) all gasoline that the dealer sold, distributed, or used, showing the date of the sale, distribution, or use;

(D) all diesel fuel that the dealer sold, distributed, or used showing the date of the sale, distribution, or use and individual invoices issued covering deliveries into fuel supply tanks of motor vehicles described under the definition of "interstate trucker" in the Tax Code, §153.001, in accordance with the Tax Code, §153.220; and

(E) all gasoline or diesel fuel that the dealer lost by fire, theft, or [~~other~~] accident.

(3) A permitted liquefied gas dealer must keep records showing the number of gallons of:

(A) all liquefied gas that the dealer sold or delivered for taxable purposes; and

(B) individual invoices that the dealer issued recording [~~issued covering~~] taxable sales and deliveries in accordance with the Tax Code, §153.309.

(4) An aviation fuel dealer, as that term is defined in the Tax Code, §153.001, shall keep the shipping document relating to each receipt or distribution of gasoline or diesel fuel, and shall also keep records showing the number of gallons of:

(A) all gasoline or diesel fuel inventories on hand on the first day of each month;

(B) all gasoline or diesel fuel that the dealer purchased or received, showing the name and location of the seller, the date of each purchase or receipt, the amount of motor fuels tax paid, or if no tax was paid, the basis for the nonpayment of the motor fuels tax;

(C) all gasoline or diesel fuel that the dealer sold, distributed, or used in aircraft or aircraft servicing equipment, showing the name of the purchaser or user, the date of each sale, distribution or use, and the registration or "N" number of the airplane or a description or number of the aircraft servicing equipment in which the gasoline or diesel fuel was used; and

(D) all gasoline or diesel fuel that the dealer lost by fire, theft, or [~~other~~] accident.

(5) An interstate trucker, as that term is defined in the Tax Code, §153.001, shall keep records of:

(A) the total miles that the interstate trucker traveled in all states and countries by all vehicles traveling into or from Texas and the total quantity of gasoline, diesel fuel, or liquefied gas consumed in those vehicles; and

(B) the total miles that the interstate trucker traveled in Texas and the total quantity of gasoline, diesel fuel, or liquefied gas delivered into the fuel supply tanks of motor vehicles and into storage facilities in Texas.

(6) A jobber, as that term is defined in the Tax Code, §153.001, shall keep the shipping document relating to each receipt or distribution of gasoline or diesel fuel, and shall also keep records that show[~~showing~~] the number of gallons of:

(A) all gasoline or diesel fuel inventories on hand on the first day of each month;

(B) all gasoline or diesel fuel that the jobber purchased or received, showing the name and location of the seller, the date of each purchase or receipt, and the amount of motor fuels tax paid[~~, or if no tax was paid, the basis for nonpayment of the motor fuels tax~~];

(C) all gasoline or diesel fuel that the jobber sold, distributed, or used, showing the name and location of the purchaser, the date of each sale, distribution, or use, and the amount of motor fuels tax assessed; and

(D) all gasoline or diesel fuel that the jobber lost by fire, theft, or [~~other~~] accident.

(7) A dyed diesel fuel bonded user, an agricultural bonded user, or[~~bonded user or~~] other user with nonhighway equipment who files a claim for refund shall keep the shipping document that relates to each receipt of gasoline or diesel fuel, and shall also keep records that show[~~showing~~] the number of gallons of dyed diesel fuel and the number of gallons of undyed diesel fuel that are in each of the following categories:

(A) all diesel fuel inventories on hand on the first day of each month;

(B) all diesel fuel that the user purchased or received, showing the name of the seller and the date of each purchase or receipt;

(C) all diesel fuel that the user delivered [~~deliveries~~] into the fuel supply tanks of motor vehicles;

(D) all diesel fuel that the user used for other purposes, showing the purpose for which used; and

(E) all diesel fuel that the user lost by fire, theft, or [~~other~~] accident.

(8) A common or contract carrier that transport motor fuel in Texas shall keep the shipping document that relates to each shipment of gasoline or diesel fuel, and shall also keep records that show:

(A) the date of transportation;

(B) the name of the seller or consignor;

(C) the name of the purchaser or consignee;

(D) the means of transportation;

(E) the quantity and kind of motor fuel that the carrier transported;

(F) the destination state or country of motor fuel that the carrier exported outside of Texas;

(G) the origin state or country of motor fuel that the carrier imported into Texas;

(H) the import verification number when that number is required by §3.187 of the title (relating to Documentation and Reporting of Imports and Exports, Import Verification Number, Export Sales by Distributors and Suppliers, and Diversion Number); and

(I) the diversion number when that number is required by §3.187 of this title;

(9) A person who claims a deduction or exclusion authorized by law must keep records that substantiate the claim. [~~(8) Additional records must be kept to substantiate any claimed deductions or exclusions authorized by law.~~] When records regarding the amount and applicability of any deductions or exclusions from the motor fuels tax are insufficient, the comptroller may estimate deductions or exclusions based on any records available or may disallow all deductions and exclusions. No exclusions for loss by fire, accident, or theft will be allowed unless accompanied by fire department, environmental regulatory agency, or police department reports that verify[~~verifying~~] the fire, accident, or theft.

(b) Failure to keep adequate records.

(1) If any person who is required [~~to do so~~] by this section [~~fails~~] to keep accurate records of receipts and purchases of gasoline or diesel fuel, fails to keep those records, the comptroller may estimate the tax liability based on any information available including, but not limited to, the records of the person's[~~its~~] suppliers or distributors.

(2) If any person who is required [~~to do so~~] by this section [~~fails~~] to keep accurate records of sales, distributions, or uses of gasoline or diesel fuel, fails to keep those records, the comptroller may estimate the tax liability of that person, if any, based on any information available including, but not limited to, the records of the person's[~~its~~] purchasers or distributees.

(3) The comptroller may suspend any permit or license the comptroller hasissued [~~by the comptroller~~] to a person if the person fails[~~for failing~~] to keep the records required by this section.

(4) Records may be written, kept on microfilm, or stored on data processing equipment.

(c) Information required.

(1) The comptroller may require any person who must [~~required to~~] hold a permit or registration under [~~the~~] Tax Code, Chapter 153, to furnish information that the comptroller needs to:

(A) identify any person who applies[~~applying~~] for a motor fuels permit, uses a signed statement to purchase tax-free diesel fuel, or transports motor fuel in Texas by truck as a common or contract carrier, or any person who is required to file a return;

(B) determine the amount of bond, if any, required to commence or continue business;

(C) determine possible successor liability; and

(D) determine the amount of tax the person is required to remit, if any.

(2) The information required may include, but is not limited to, the following:

(A) name of the actual owner of the business;

(B) name of each partner in a partnership;

(C) names of officers and directors of corporations and other organizations;

(D) all trade names under which the owner operates;

(E) mailing address and actual locations of all business outlets;

(F) license numbers, title numbers, and other identification of business vehicles;

(G) identification numbers assigned by other governmental agencies, including social security numbers, federal employers identification numbers, and drivers license numbers;

(H) names of diesel fuel suppliers or gasoline distributors with whom the supplier, distributor, or dealer will transact business;

(I) names and last known addresses of former owners of the business.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005274

Martin Cherry

Deputy General Counsel for Tax Policy and Agency Affairs

Comptroller of Public Accounts

Earliest possible date of adoption: September 10, 2000

For further information, please call: (512) 463-4062

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34 TAC §3.173

The Comptroller of Public Accounts proposes an amendment to §3.173, concerning refunds on gasoline and diesel fuel. The 76th Legislature, 1999, in Senate Bill 1547, amended Tax Code, Chapter 153, providing two new diesel fuel bonded user permits and setting out additional record keeping requirements for users of dyed and undyed diesel fuel.

An amendment is being made to the subsection regarding the delivery of tax-free diesel fuel into off- highway equipment and into farm machinery traveling on-highway.

A new paragraph is being added regarding retail sales of tax-free undyed kerosene from blocked pumps.

Nonsubstantive grammatical corrections are also made to various subsections.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas 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 in providing taxpayers with a more efficient means of obtaining tax information. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§153.104, 153.119, 153.121. 153.203, 153.205, 153.222, and 153.224.

§3.173. Refunds on Gasoline and Diesel Fuel Tax.

(a) Exclusive use. Exclusive use by a public school district or commercial transportation company means use of fuel only in motor vehicles or other equipment that:

(1) [~~operated by~~] the public school district operates; or

(2) [~~owned and/or operated by~~] aperson under [~~performing a~~] contract with [~~between~~] the public school district own and/or operates [~~and the owner and/or operator~~] to provide transportation services for the public school district and uses [~~when used~~] in performance of the contract.

(b) Refunds. A person may file a claim for refund of [~~the~~] taxes paid on gasoline or diesel fuel used off the highway[~~,~~] for certain resale, for export from Texas, for loss caused by fire, theft, or [~~other~~] accident, and for the provision of [~~to provide~~] transportation services to public school districts.

(c) Time limitation. A claim for refund must be filed before the expiration of the following time limitations, as provided by Tax Code, §153.121 and §153.224:

(1) one year from the first day of the calendar month that follows [~~following~~]:

(A) purchase;

(B) tax exempt sale;

(C) use, if withdrawn from one's own storage for one's own use;

(D) export from Texas; or

(E) loss by fire, theft, or [~~other~~] accident; or

(2) four years from the first day of the calendar month that follows [~~following~~] the overpayment of tax for motor fuel acquired prior to October 1, 1997, when the overpayment is the result of:

(A) the same taxpayer who makes [~~making~~] multiple payments of the tax directly to the comptroller on the same motor fuel, or pays [~~paying~~] tax on motor fuel that did not exist (e.g., a taxpayer reports and pays [~~reported and paid~~] the tax on 10,000 gallons of fuel in a particular reporting period. The taxpayer later files [~~filed~~] an amended report for the same period, or a report for another period, and reports and pays [~~reported and paid~~] tax again on the same fuel. Essentially, the taxpayer paid the tax on 20,000 gallons when [~~where~~] only 10,000 gallons existed.); or

(B) a typographical error or transposed number that caused more tax to be paid than was due; or

(C) a misplaced decimal point that caused more tax to be paid than was due; or

(3) four years from the first day of the calendar month that follows [~~following~~] the due date of the report on which an overpayment of tax was made [~~occurred~~] for motor fuel acquired on or after October 1, 1997, by a permitted distributor, supplier, dyed diesel fuel bonded

user, or agricultural bonded user who [that] determines that taxes were erroneously reported or that more taxes were paid [more taxes] than were due [this state] because of a mistake of fact or law. The distributor, supplier, dyed diesel fuel bonded user or agricultural bonded user must establish the credit by filing an amended tax report for the period in which the error [has] occurred and tax payment made to the comptroller.

(d) Filing forms and documentation. Each type of claim for refund must be filed on a form that the comptroller furnishes, and documentation of the identification of each vehicle or type of equipment in which the fuel was used and other information to fully substantiate the claim must be maintained. [Each type of claim for refund must be filed on a form furnished by the comptroller and documentation must be maintained to fully substantiate the claim, including identification of each vehicle or type of equipment in which the fuel was used.] For refund purposes, the original invoice may be a copy of the original impression if the copy has been stamped "Customer Original Invoice," "Original for Tax Purposes," or similar wording. If a copy is so stamped, the original and all other copies must then be stamped "Not Good for Tax Purposes" or similar wording. Invoices of original impression submitted in support of refund claims must be without the above wording stamped or imprinted [wording]. Refund [Categories of refund] claims must further comply with the following requirements[are]:

(1) Refund claim for export [exports] from Texas by non-permitted purchaser. A claim for refund can be filed only on gasoline or diesel fuel exported in quantities of 100 gallons or more. Invoices that reflect [reflecting] that the tax was assessed, and documentation that the fuel was exported, must be maintained. Proof of export must be one of the following:

(A) proof of export that United States Customs officials have certified, [certified by United States Customs officials] if the fuel was exported to a foreign country;

(B) proof of export that a port of entry official of the state of importation has certified, if the state of importation maintains ports of entry [proof of export certified by port of entry official of the state of importation if ports of entry are maintained];

(C) proof from the taxing officials of the state into which the fuel was imported that shows that the exporter has accounted for the fuel on that state's tax reports [proof from the taxing officials of the state into which the fuel was imported showing that the fuel has been accounted for by the exporter on that state's tax reports];

(D) other proof that the fuel has been reported to [the gallons have been accounted for to] the state into which the gasoline or diesel fuel was imported; or

(E) a common or contract carrier's transporting documents (see §3.182 of this title (relating to Motor Fuel Transporting Documents)) that list [listing] the consignor and consignee, the points of origin and destination, the number of gallons shipped or transported, the date of export, and the kind of fuel exported;

(2) Refund claim for sale to the federal government by dealer or jobber [sales by dealers and jobbers to the federal government]. For the purposes of this section, the federal government is [means] any department, board, bureau, agency, corporation, or commission that the United States government has created or wholly owns [created or wholly owned by the United States government]. Gasoline and diesel fuel may be sold tax-free to the federal government for its exclusive use. Evidence that sales were made to the federal government must be maintained and [must] consist of:

(A) a United States tax exemption certificate--Standard Form [form] 1094; or

(B) copies of the invoice(s) when a United States National credit card--Standard Form 149, was used for the purchase, which invoice must include [and including] the license plate number or official vehicle designation, if fuel is delivered into the fuel supply tank of a motor vehicle; or

(C) a copy of a contract between the dealer or jobber and the federal government that the [supported by] sales invoices or purchase vouchers under [the provisions of] the contract support;

(3) Refund claim for loss by fire, theft, or [other] accident. A tax refund may be claimed for a loss of 100 gallons or more that fire, theft, or accident has caused. The claimant must maintain records of the incident that establishes that the exact quantity of fuel that has been claimed as lost was actually lost, and that the loss resulted from that incident [A loss of 100 gallons or more for which tax refund is claimed must be caused either by fire, theft or other accident. The claimant must maintain a complete record documenting the incident which occurred to establish that the exact quantity of fuel claimed as lost was actually lost as a result of that incident]. The time limitation prescribed in subsection (c)(1) of this section is determined by the date of the first incident of a multiple incident loss that totals [multiple incident loss totaling] 100 gallons or more. A claim for refund for loss by fire, theft, or [other] accident shall be accompanied by fire department, police department, or regulatory agency reports as appropriate.

(A) If the incident is a drive-away theft at a retail outlet (i.e., theft occurs when a person delivers gasoline or diesel fuel into the fuel supply tank(s) of a motor vehicle at a retail outlet without payment [paying] for the fuel), the following documentation shall be maintained:

(i) a police department report or evidence that the incident of drive-away theft has been or will be taken as a deduction on the federal income tax return during the same or the subsequent reporting period; and

(ii) a separate report for each incident that the employee(s) who witnessed the event prepared and signed [, prepared and signed by the employee(s) witnessing the event]. The report must include the date and time of occurrence, type of fuel, number of gallons, outlet location, and, if the theft is reported to a police department, the police case number [assigned].

(B) If the accidental loss was incurred through a leak in a line or storage tank, the minimum proof required is [required proof includes]:

(i) a statement by the person who actually dug up or otherwise examined the hole or leak. Such statement should articulate [set out] the extent of the leak, the date of the examination, and the person's name and title; and

(ii) a statement of the actual loss as determined by computing the measured inventory next preceding the discovery of the accidental leak, plus motor fuel salvaged from the leaky tank or line, if any, less intervening withdrawals for sale or use.

(C) Claimants who are permitted distributors or suppliers must claim a loss on line 5 of the monthly Texas Fuels Tax Report. If the claim is for a drive-away theft, the claimant must also maintain the documentation and meet the requirements provided in subparagraph (A) of this subsection. If the claim is for loss by leakage, the claimant must also maintain the documentation provided in subparagraph (B) of this subsection.

(D) Dealers and jobbers must [are required to] take inventory on the first of each month and promptly correct the inventory

for any loss that has occurred in the preceding month [~~so an accident should be discovered no later than at the inventory of the succeeding month's business, and corrected promptly thereafter~~]. If inventories have not been accurately or timely measured, or [~~and~~] if complete records have not been kept of all withdrawals for sale or use as required by law, a refund claim cannot be honored for payment;

(4) [~~claim for refund~~] Refund claim for [~~on~~] gasoline or diesel fuel used off highway. A claim for refund on fuel used solely for off-highway purposes must list each off-highway vehicle or piece of equipment and the total number of gallons [~~which have been~~] used. Documentation that shows [~~showing~~] that the state tax was assessed and a schedule that lists [~~listing~~] the number of gallons of gasoline, dyed diesel fuel, and undyed diesel fuel used in both on- and off-highway vehicles and equipment must be maintained. [~~;~~]

(5) [~~claim for refund~~] Refund claim for on gasoline or diesel fuel used by a [~~the~~] lessor of off-highway equipment. The lessor of off-highway equipment who claims [~~claiming~~] a refund of state fuel tax must maintain documentation that shows [~~showing~~] that the state tax was assessed and paid, a list of each piece of off-highway equipment, and a schedule of [~~listing~~] the number of gallons of gasoline, dyed diesel fuel, and undyed diesel fuel used in both on-highway [~~on-~~] and off-highway vehicles and equipment. A lessor who claims [~~claiming~~] a refund of state fuel tax may include a separate refueling, fuel reimbursement, or fuel service charge on the invoice,if the invoice contains a statement [~~if there is a statement on the invoice~~] that the fuel charge does not include state motor fuel taxes.

(6) Refund claim for incidental highway use. A refund claim may be filed by a person who used gasoline or undyed diesel fuel in motor vehicles incidentally on the highway, when the incidental travel on the public highway is infrequent, unscheduled, and insignificant to the total operation of the motor vehicle.

(A) A record that shows [~~showing~~] the date and miles traveled during each highway trip must be maintained.

(B) 1/4 gallon for each mile of incidental highway travel shall be deducted from the number of gallons claimed;

(7) Refund claim for sales by diesel fuel dealer or jobber for off-highway use. Diesel fuel dealers or jobbers who have paid [~~the~~] state tax to their suppliers, or dealers who have made tax included purchases from jobbers, [~~supplier~~] and thereafter made [~~a~~] tax-free sales [~~sale~~] on which [~~a~~] refund claims are [~~claim is~~] filed must maintain copies of invoices issued on each tax-free sale. The invoices must have the names and addresses of the dealers stamped or preprinted on the invoices and must also include[~~The invoices must have the name and address of the dealer stamped or preprinted on the invoice, and be completed including~~]:

(A) the purchaser's name;

(B) date of delivery;

(C) number of gallons delivered;

(D) type or description of the vehicle into which the delivery was made (e.g., railway engines, motorboat, refrigeration unit, stationary engine, [~~or~~] off-highway equipment, or nonhighway farm machinery that has traveled between multiple farms or ranches as allowed in §3.183 of this title (relating to On- Highway Travel of Farm Machinery));

(E) a statement on the invoices that no tax was collected; and

(F) signature of the purchaser.[~~;~~]

(8) Refund claim for fuel used in gasoline-powered motor vehicles equipped with power take- off or auxiliary power units. A person who files [~~filing~~] a refund claim for gasoline used in the operation of power take-off or auxiliary power units must use one of the following methods in determination of [~~determining~~] the amount of gasoline used:

(A) direct measurement method. The use of a metering device, as defined by §3.176 of this title (relating to Metering Devices Used to Claim Refund of Tax on Fuel Used in Power Take-Off and Auxiliary Power Units), is an acceptable method for determination of [~~determining~~] fuel usage. A person who files [~~filing~~] a refund claim for gasoline used to propel motor vehicles with approved measuring or metering devices that [~~which~~] measure or meter the fuel used in stationary operations must maintain records on each vehicle so equipped, and the records must reflect:

(i) the miles driven as shown by any type of odometer;

(ii) the gallons delivered to each vehicle; and

(iii) the gallons used as recorded by the meter or other measuring device;

(B) gasoline-powered ready mix concrete trucks and solid waste refuse trucks equipped with power take- off or auxiliary power units. Operators of gasoline-powered ready mix concrete trucks and solid waste refuse trucks that are equipped with power take-off or auxiliary power units that are mounted on the motor vehicle and use [~~using~~] the fuel supply tank of the motor vehicle may claim refund on 30% of the total gasoline used in this state by each vehicle. Records that reflect the following information must be maintained [~~reflecting~~]:

(i) each motor vehicle so equipped;

(ii) the miles that each vehicle has traveled, as any type of odometer has recorded [~~the miles traveled by each vehicle as recorded by any type of odometer~~];

(iii) the gallons delivered to each vehicle; and

(iv) the date of delivery;

(C) proposed alternate methods. Proposals for the use of methods that this section does not specifically cover [~~not specifically covered by this section~~] to determine the amount of gasoline used in power take-off operations or auxiliary power units may be submitted to the comptroller for approval;

(D) accurate mileage records must be kept regardless of the method used;

(9) Refund claims for fuel used in diesel-powered motor vehicles equipped with power take- off or auxiliary power units. Permitted suppliers and agricultural bonded users who use [~~using~~] diesel fuel in motor vehicles that are equipped with power take-off or auxiliary power units that are mounted on the vehicle and use [~~using~~] the fuel supply tank of the vehicle may claim a tax credit for the fuel used in power take-off operations or by the auxiliary power unit. Dyed diesel fuel bonded users and other end users [~~Users~~] who are required to buy tax- paid diesel fuel for use in motor vehicles that are equipped with a power take-off or auxiliary power unit that is mounted on the vehicle may claim tax refund for fuel used in power take-off operations or by the auxiliary power unit. A person who files [~~filing~~] a refund claim or tax credit for diesel fuel that is used in the operation of power take-off or auxiliary power units must use one of the following methods to determine [~~in determining~~] the amount of diesel fuel used:

(A) direct measurement method. The use of a metering device, as defined by §3.176 of this title (relating to Metering Devices

Used to Claim Refund of Tax on Fuel Used in Power Take-off and Auxiliary Power Units), to measure fuel used in the power take-off or auxiliary power unit is an acceptable method for determination of [~~determining~~] fuel usage. A person who files [~~filing~~] a refund claim for diesel fuel that is used to propel motor vehicles with approved measuring or metering devices that [~~which~~] measure or meter the fuel used in stationary operations must maintain records on each vehicle so equipped, and the records must reflect:

(i) the miles traveled [~~driven~~] as [~~shown by~~] any type of odometer has recorded ;

(ii) the gallons delivered to each vehicle; and

(iii) the gallons used, as the meter or other measuring device has recorded [~~the gallons used as recorded by the meter or other measuring device~~];

(B) diesel-powered ready mix concrete trucks and solid waste refuse trucks that are equipped with power take-off or auxiliary power units. Operators of diesel fuel-powered ready mix concrete trucks and solid waste refuse trucks that are equipped with power take-off or auxiliary power units that are mounted on the motor vehicle and use [~~using~~] the fuel supply tank of the motor vehicle may claim refund on 30% of the total diesel fuel used in this state by each vehicle. Records that reflect the following information must be maintained [~~reflecting~~]:

(i) each motor vehicle so equipped;

(ii) the miles that each vehicle has traveled, as any type of odometer has recorded [~~the miles traveled by each vehicle as recorded by any type of odometer~~];

(iii) the gallons delivered to each vehicle; and

(iv) the date of delivery;

(C) mileage factor method. The nontaxable use may be determined by computing the taxable use at 1/4 gallon for each mile traveled, as the odometer or hubmeter has recorded, [~~as recorded by the odometer or hubmeter~~] and subtracting that amount from the total fuel delivered into the motor vehicle fuel supply tanks. The remainder will be considered nontaxable, and a tax credit or tax refund may be claimed on that quantity of fuel.

(D) two tank method. A motor vehicle may be equipped with two fuel tanks and an automatic switching device that [~~operated by~~] a spring-activated air release parking brake operates, and that switches [~~will switch~~] from one tank that is designated for highway use to another tank that is not so designated [~~not for highway use~~] when the vehicle is stationary. The highway tank and the not-for-highway tank [~~not-for-highway-tank~~] may not be connected by crossover line or equalizer line of any kind. The tax paid on the fuel delivered to the tank designated not-for-highway use [~~not-for-highway-use~~] may be taken as a tax credit or claimed as a tax refund. All fuel delivered into the fuel supply tanks of a vehicle that is equipped with an automatic switching device must be invoiced as taxable. Separate invoices must be issued for deliveries of fuel into each tank. A notation that indicates that fuel was delivered into the tank designated not- for-highway use must be made on invoices [~~A notation must be made on invoices indicating that fuel was delivered into the tank designated not-for-highway-use~~];

(E) fixed percentage method. In lieu of the use of [~~using~~] one of the previously mentioned methods, the owner or operator of a motor vehicle that is equipped with a power take-off or auxiliary power unit that is mounted on the vehicle may claim a credit or refund of the tax paid on 5.0% of the total taxable diesel fuel used in this state by each vehicle so equipped;

(F) proposed alternate methods. Proposals for the use of methods not specifically covered by this section to determine the amount of diesel fuel used in power take-off operations or auxiliary power units may be submitted to the comptroller for approval;

(G) accurate mileage records must be kept regardless of the method used;

(10) Refund claims by federal agencies [~~agency claim for refund~~] on tax-paid purchases [~~purchase~~]. A federal government agency may file a claim for refund on state taxes paid on gasoline and diesel fuel that such agency has used exclusively. Records that the agency maintains must include the following information [~~used exclusively by that agency. Records maintained by the agency must include~~]:

(A) original purchase invoice(s) that shows that the state tax was assessed, and that a United States tax exemption certificate-Standard Form 1094 supports [~~original purchase invoice(s) showing that the state tax was assessed and supported by a United States tax exemption certificate--Standard Form 1094~~]; or

(B) original purchase invoice(s) that shows [~~showing~~] that the state tax was assessed and is stamped with the imprint of a United States national credit card--Standard Form 149, issued to the agency that purchased [~~purchasing~~] the fuel;

(11) Refund claims for sales of gasoline or diesel fuel to a Texas public school district [~~in this state~~] for its exclusive use, or to a commercial transportation company that provides public school transportation services to a Texas public school district [~~in this state~~] and that [~~used by~~] the company uses exclusively to provide those services. The seller of gasoline or diesel fuel on which the tax has been paid may file for refund of the tax on sales to public school districts for the district's exclusive use, and on sales to commercial transportation companies that provide [~~providing~~] public school transportation services to a public school district exclusively. Sellers who file [~~filing~~] for refund must maintain copies of invoices that have been issued on each such tax-free sale. The invoice(s) must have the name and address of the seller stamped or preprinted on the invoice, and include:

(A) the purchaser's name;

(B) date of delivery;

(C) number of gallons delivered;

(D) type of fuel delivered;

(E) statement on the invoice that no tax was collected; and

(F) signature of the purchaser;

(12) Refund claims by public school districts [~~public school districts' claim for refund~~] on tax- paid purchases. A Texas public school district may file a claim for refund of state taxes paid on gasoline and diesel fuel that the district has used exclusively. Records that the district maintains must include original invoices that show [~~used exclusively by the district. Records maintained by the district must include original invoices showing~~] that the tax was assessed;

(13) Refund claims by commercial transportation companies [~~commercial transportation companies' claim for refund~~] on tax-paid purchases. A commercial transportation company may file a claim for refund of state taxes paid on gasoline and diesel fuel that has been used to provide public school transportation services exclusively for a Texas public school district. Records that the company maintains must include original invoices that show that the state tax was assessed [~~Records maintained by the company must include original invoices showing that the state tax was assessed~~].

(14) Refund claims on sales by dealers of undyed kerosene from a blocked pump. A retail dealer who purchased undyed kerosene and paid the state tax to its supplier, or a retail dealer who purchased tax- included kerosene from a jobber, and thereafter makes a tax-free sale of undyed kerosene sold for a non- taxable use from a blocked pump, may file a claim for refund. A blocked pump is a fuel pump at a fixed location that cannot (because, for example, of its distance from a road surface, or the length of its delivery hose) be used to dispense fuel directly into the fuel supply tank of a diesel-powered highway vehicle. A blocked pump must display a legible and conspicuous notice that states, "UNDYED KEROSENE, NONTAXABLE USE ONLY, FOR HEATING, COOKING, LIGHTING AND SIMILAR NONHIGHWAY USE." The invoice that the dealer has issued to the purchaser must include a notice that states "UNDYED KEROSENE, NONTAXABLE USE ONLY, FOR HEATING, COOKING, LIGHTING AND SIMILAR NONHIGHWAY USE, NO STATE MOTOR FUELS TAX COLLECTED." The dealer must maintain records that include the original purchase invoices that show that the state tax was paid on the undyed kerosene and sales invoices that show that no state tax was collected.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

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Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 463-4062

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34 TAC §3.180

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

The Comptroller of Public Accounts proposes the repeal of §3.180, concerning signed statements for purchasing diesel fuel tax free. The 76th Legislature, 1999, in Senate Bill 1547, amended the Tax Code, Chapter 153, substantially changing the provisions for purchasing tax-free diesel fuel using a signed statement. A new §3.180 is being proposed to include the legislative changes.

James LeBas, Chief Revenue Estimator, has determined that for the first five years the repeal of the rule will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. LeBas also has determined that for the first five years the rule will be in effect, there will be no cost or benefit to the public from the repeal of this rule. This repeal is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeal.

Comments on the repeal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This repeal is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The repeal implements the Tax Code, §153.205.

§3.180. Signed Statement for Purchasing Diesel Fuel Tax Free.

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

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Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
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For further information, please call: (512) 463-4062

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The Comptroller of Public Accounts proposes a new §3.180, concerning signed statements for purchasing diesel fuel tax free. The 76th Legislature, 1999, in Senate Bill 1547, amended Tax Code, Chapter 153, requiring anyone wanting to use a signed statement for the purchase of tax-free diesel fuel to register with the comptroller for an end user or agricultural user exemption number. Tax-free signed statement sales of undyed diesel are restricted to agricultural users. New §3.180 provides End User Number and Agricultural User Exemption Number requirements, examples of signed statements, and seller and purchaser limitations on the type of fuel and gallons of fuel sold or purchased.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. LeBas 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 in providing taxpayers with information regarding their tax responsibilities. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This new section is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §153.205.

§3.180. Signed Statements for Purchasing Diesel Fuel Tax Free.

(a) Signed statement numbers. A person who wants to use a signed statement to purchase dyed diesel fuel tax-free for use in nonagricultural, nonhighway equipment must apply to the comptroller for an End User Number. A person who wants to use a signed statement to purchase dyed or undyed diesel fuel tax-free for exclusive use in agricultural, nonhighway equipment must apply to the comptroller for an Agricultural User Exemption Number. A person cannot use a signed statement to purchase tax-free diesel fuel unless issued an End User Number or Agricultural User Exemption Number by the comptroller.

(b) End User Number. A person may purchase dyed diesel fuel tax free if the fuel is for nonagricultural, nonhighway use and

the buyer provides the seller with a signed statement, as described in paragraph (1) of this subsection and an End User Number issued by the comptroller. The total number of gallons of dyed diesel fuel purchased using a signed statement shall be subject to the limitations set out in paragraph (2) of this subsection. Copies of the blank signed statements are available for inspection at the office of the *Texas Register* or may be obtained from the Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711-3528. Copies may also be requested by calling our toll-free number 1-800-252-1383. In Austin, call 463-4600. (From a Telecommunication Device for the Deaf (TDD) only, call 1-800-248-4099 toll free. In Austin, the local TDD number is 463-4621.)

(1) The signed statement must specify that:

(A) all diesel fuel purchased is of the type that may not legally be used on the pubic highway;

(B) all diesel fuel will be used by the buyer and will not be resold; and

(C) none of the diesel fuel will be delivered into the fuel supply tanks of motor vehicles operated on public highways.

(2) A purchaser may not buy, nor may a supplier sell, dyed diesel fuel tax free using a signed statement if:

(A) the purchase or sale covering a single delivery is more than 3,000 gallons; or

(B) the purchaser purchases or the supplier makes sales of more than 10,000 gallons during a calendar month. The purchase, sale, or delivery that causes the 10,000 gallon limit to be exceeded during a calendar month is not taxable. Any subsequent purchase, sale, or delivery made during the same calendar month is taxable.
Figure: 34 TAC §3.180(b)(2)(B)

(c) Agricultural User Exemption Number. A person may purchase dyed or undyed diesel fuel tax free if the fuel is exclusively for use in agricultural, nonhighway equipment and the buyer provides the seller a signed statement as provided by paragraph (1) of this subsection and an Agricultural User Exemption Number issued by the comptroller. The combined total number of gallons of dyed and undyed diesel fuel purchased using a signed statement shall be subject to the limitations set out in subsection (b)(2) of this section. Copies of the blank signed statements are available for inspection at the office of the *Texas Register* or may be obtained from the Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711-3528. Copies may also be requested by calling our toll-free number 1-800-252-1383. In Austin, call 463-4600. (From a Telecommunication Device for the Deaf (TDD) only, call 1-800-248-4099 toll free. In Austin, the local TDD number is 463-4621.)

(1) The signed statement must specify that:

(A) all diesel fuel purchased will be used exclusively in agricultural, nonhighway equipment;

(B) all diesel fuel will be used by the buyer and will not be resold; and

(C) none of the diesel fuel will be delivered into the fuel supply tanks of motor vehicles operated on public highways.

(2) A purchaser may not buy, nor may a supplier sell, dyed or undyed diesel fuel tax free using a signed statement if:

(A) the purchase or sale covering a single delivery is more than 3,000 gallons; or

(B) the purchaser purchases or receives deliveries of, or the supplier makes sales of, more than 10,000 gallons during a calendar month. The purchase, sale, or delivery that causes the 10,000 gallon limit to be exceeded during a calendar month is not a taxable purchase or sale. Any subsequent purchase, sale, or delivery made during the same calendar month is taxable.

(d) Separate corporate divisions may also use a signed statement to buy diesel fuel tax free if they:

(1) meet all of the requirements as set out in subsections (b) or (c) of this section;

(2) do not resell the fuel;

(3) consume the fuel themselves; and

(4) maintain separate storage apart from other corporate divisions.

(e) The signed statement remains in effect until:

(1) it is revoked in writing by either the buyer or seller; or

(2) the comptroller notifies the supplier in writing that the buyer may no longer make tax-free purchases.

(f) The signed statement must be signed by the buyer or the buyer's authorized representative.

(g) A permitted jobber may purchase dyed diesel fuel using a signed statement under subsection (b) of this section only if the fuel is for the jobber's own use and will not be resold. A permitted jobber may not accept a signed statement for the sale of tax-free diesel fuel.

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

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Comptroller of Public Accounts
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34 TAC §3.182

The Comptroller of Public Accounts proposes an amendment to §3.182, concerning motor fuel transporting documents. The 76th Legislature, 1999, in Senate Bill 1547, amended Tax Code, Chapter 153, requiring additional information on shipping documents.

Subsections are being amended to add the phrase "shipping document".

Subsections are being amended to include the additional information that must be printed on a shipping document.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas 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 in providing taxpayers with a more efficient means of obtaining tax information. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is

no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §153.004 and §153.018.

§3.182. Motor Fuel Transporting Documents.

(a) Manifest requirements. The transportation of motor fuel as cargo shall be recorded on a cargo manifest or shipping document that is issued at the time the motor fuel is delivered into a cargo tank. The manifest or shipping document [~~and~~]shall accompany the cargo until the motor fuel[~~it~~] is resold or removed from the cargo tank, and shall be retained for four years for audit purposes.

(b) Information required. The cargo manifest or shipping document shall be issued in not less than duplicate and shall contain the following information:

(1) the type of motor fuel being transported, and if dyed diesel fuel is being transported, a notice that states "Dyed Diesel Fuel, Nontaxable Use Only, Penalty for Taxable Use";

(2) the nameand the federal employer identification number or social security number of the carrier;

(3) the quantity of motor fuel in gross gallons;

(4) the temperature and quantity in temperature adjusted gallons when the fuel is loaded at a terminal for export or import or when the sale of gasoline or diesel fuel must comply with §3.190 of this title (relating to Temperature Adjustment Conversion Table);

(5) the percentage of ethanol or methanol contained in the motor fuel;

(6) the types and percentages of cosolvents contained in the motor fuel, if methanol has been added;

(7) the date of loading or movement;

(8) the name and physical address of the terminal or bulk plant at which the [~~point~~] cargo was loaded;

(9) the destination of the cargo;

(10) the name of the seller, consignor, or shipper;

(11) the name, federal employer identification number, permit number if applicable, and physical address of the purchaser or consignee; [~~and~~]

(12) the method of transportation:

(A) if by truck, the license or unit number;

(B) if by barge or boat, the name of the vessel;

(C) if by railway, the rail car number and initial;

(13) the name of the person responsible for payment of the tax, if different from the permitted supplier or distributor;

(14) [~~(13)~~] the amount of delivery fee assessed under [~~the~~]Water Code, §27.3574; and[~~.~~]

(15) any other information the comptroller deems necessary for the proper administration of Tax Code, Chapter 153.

(c) Waybills or bill of lading. If a carrier transports motor fuel for which a waybill is required under the regulations of the Texas Railroad Commission, or a bill of lading is required under the regulations of the United States Department of Transportation, or if other similar documentation is required by another regulatory agency, these documents may be used in lieu of the manifest or shipping document prescribed in this section, so long as the waybill, bill of lading, or similar document lists the information described in subsection (b) of this section.[~~is transporting motor fuel which requires waybills pursuant to the regulations of the Texas Railroad Commission or a bill of lading pursuant to the regulation of the United States Department of Transportation, these documents may be used in lieu of the manifest prescribed in this section if the waybill or bill of lading lists the number of gross gallons, the temperature adjusted gallons, or temperature of motor fuel in the load, if subject to §3.190 of this title (relating to Temperature Adjustment Conversion Table) and the amount of delivery fee assessed under the Water Code, §26.3574.~~]

(d) Delivery of cargo manifest or shipping document [~~manifest~~]. One copy of the transporting document shall be delivered to the purchaser at the time of fuel delivery, and the seller shall retain one copy. If a common carrier or contract carrier delivers the fuel, the carrier must also retain one copy. [~~one copy retained by the seller, and if delivered by common or contract carrier, the carrier must retain one copy.~~]

(1) If the cargo is being loaded at different locations, a notation of the fuel loaded at each location must be made on the cargo manifest, or a separate manifest that covers[~~issued covering~~] the fuel or blend material loaded at each location must be issued.

(2) If the cargo is being off-loaded at various locations, then at the time the off-loading is accomplished, a notation of the fuel off-loaded shall be made on the required cargo manifest, or a customer invoice that indicates[~~shall be prepared indicating~~] the location and amount of motor fuel that [~~which~~] has been off-loaded at each place shall be prepared. If invoices are used instead of notations on the manifest, the invoices must be attached or cross referenced to the manifest for record purposes. The cargo manifest or a copy of the customer invoice shall be retained with the transporting vehicle until the motor fuel is removed from the cargo tank.

(3) A cargo manifest is not required on motor fuel that an end user purchases [~~purchased~~] on a signed statement [~~by an end user~~] and transports in the user's [~~transported in his~~] own cargo tank.

(4) If the delivery fee assessed under [~~the~~] Water Code, §26.3574, is not shown on the cargo manifest, it must be shown on the invoice that covers[~~covering~~] the delivery, and be cross referenced to the manifest for record purposes.

(e) Deliveries at different locations. Deliveries to the same purchaser at different locations may be construed to be single deliveries and qualify for temperature adjustment if the total of all deliveries to that customer is 5,000 gallons or more, and if:

(1) the fuel off-loaded at different locations is the same product type (gasoline or diesel fuel);

(2) the delivery is accomplished from the same cargo tank;

(3) proper notations are made on the cargo manifest or customer invoices, or delivery tickets are prepared and kept with the cargo manifest; and

(4) the off-loading occurs within a reasonable time that allows[~~allowing~~] for transit from one location to another.

(f) Separate deliveries. Deliveries from more than one cargo tank are presumed to be separate deliveries. This presumption may be overcome if:

(1) the seller is unable to make the requested delivery in a single cargo tank;

(2) the delivery of all the requested fuel was completed within a reasonable time (usually within 24 hours);

(3) the customer would have been able to accept the entire amount requested at one time; and

(4) the customer has previously requested deliveries of 5,000 or more gallons of the type of requested fuel, or the customer has changed business operations and now requires deliveries of 5,000 or more gallons of the type of requested fuel.

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

Filed with the Office of the Secretary of State, on July 31, 2000.

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Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 463-4062

♦ ♦ ♦

34 TAC §3.183

The Comptroller of Public Accounts proposes an amendment to §3.183, concerning on- highway travel of farm machinery. The amendment provides a tax exemption for fuel used by farm machinery traveling between farms and ranches, regardless of the number of miles traveled.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. LeBas 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 in providing taxpayers with additional information regarding their tax responsibilities. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §153.222.

§3.183. On-Highway Travel of Farm Machinery.

(a) Owners or operators of multiple farms, ranches, or similar tracts of land in the same vicinity may move farm tractors, combines, and similar self-propelled farm machinery over the public highways [~~for up to and including 10 miles~~] for the purpose of transferring the base of operation of the machinery. [~~Gasoline and diesel fuel used for travel on the highway by such machinery in excess of 10 miles during one trip is taxable.~~]

(b) Gasoline and diesel fuel used for travel on the highway for any purpose other than for moving the machinery from one tract of land to another to change base of operation shall be considered taxable.

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

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34 TAC §3.185

The Comptroller of Public Accounts proposes an amendment to §3.185, concerning diesel tax prepaid user permit. The 76th Legislature, 1999, in Senate Bill 1547, amended Tax Code, Chapter 153, to limit the diesel tax prepaid user permit to users whose use of diesel fuel is predominately for a nonhighway agricultural purpose. The amendment to this section adds a new subsection defining agricultural nonhighway purpose.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. LeBas 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 in providing taxpayers with a more efficient means of obtaining tax information. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §153.210.

§3.185. Diesel Tax Prepaid User Permit.

(a) Those[~~Many people~~] who qualify for an agricultural [~~a~~] bonded user permit may[~~can~~] obtain a diesel tax prepaid user permit instead, if they satisfy the requirements for a diesel tax prepaid user permit.

(b) To qualify for[~~These qualifications must be met to obtain~~] a diesel tax prepaid user permit, an applicant must:

(1) use at least 51% of all [~~half~~] the diesel fuel purchased by the applicant for agricultural nonhighway [~~must be used for nonhighway~~] purposes;

(2) not[applicants must] own or operate diesel-powered passenger cars or light trucks that are not within [only in] the weight classes listed in subsection (e) [(d)] of this section; and

(3) have[applicants must have their own] bulk diesel storage tank(s) used only by the applicant.

(c) An agricultural nonhighway purpose means for the purpose of use in nonhighway equipment, such as a tractor or combine, on a farm or ranch. A farm or ranch is one or more tracts of land used, either in whole or in part, in the production of crops, livestock, and/or other agricultural products held for sale in the regular course of business. A feed lot, dairy farm, poultry farm, commercial orchard, commercial nursery, or similar commercial agricultural operation is a farm or ranch. A home garden or timber operation is not a farm or ranch.

(d) [(c)] An application for a diesel tax prepaid user permit must be made to the comptroller for each vehicle. Permits must be renewed every 12 months.

(e) [(d)] The cost of the permit shall be determined according to the following schedule:[The following schedule determines permit cost.]

Figure: 34 TAC §3.185(e) [(d)]

(f) [(e)] Following are the requirements for a nonrefundable credit.

(1) If the cost of the annual permit is greater than the amount of tax due on the diesel fuel actually consumed during the permit year, a nonrefundable credit equal to the difference may be claimed, provided the required renewal date of the permit is October 1, 1995, or later.

(2) The credit may only be applied against the cost of renewal or purchase of a new diesel tax prepaid user permit for the following year, and the credit is valid for one year beginning with the required renewal date of the permit.

(3) The odometer of the vehicle for which a diesel tax prepaid user permit is held must be maintained in working order. If not, a credit claim cannot be approved.

(g) A claim for a nonrefundable credit must be filed on a form that the comptroller furnishes.[(f)] The following records are required for a nonrefundable credit.

(1) A distribution log must be submitted with an[a renewal] application for renewal of a diesel tax prepaid user permit. The distribution log must reflect the following information:

(A) the date of each delivery of diesel fuel into the fuel supply tank[tanks] of the motor vehicle for which the permit is held;

(B) the number of gallons delivered;

(C) the odometer reading of the motor vehicle at the time of delivery; and

(D) the state license plate number or [motor] vehicle identification number of the motor vehicle.

(2) Purchase invoices for diesel fuel delivered into the fuel supply tank of a motor vehicle for which a diesel tax prepaid user permit is held,[tanks] from other than one's own storage, must contain:

(A) the name of the seller;

(B) the name of the purchaser;

(C) the date of delivery;

(D) the number of gallons delivered;

(E) the odometer reading of the motor vehicle at the time of delivery;

(F) the state license plate number or [motor] vehicle identification number of the motor vehicle; and

(G) the signature of the recipient.

(3) Records pertaining to odometer repair or replacement.

[(g) A claim for nonrefundable credit must be filed on a form furnished by the comptroller. The form for the distribution log required by subsection (f)(1) of this section is an integral part of the claim for credit.]

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

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Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
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34 TAC §3.187

The Comptroller of Public Accounts proposes an amendment to §3.187, concerning documentation and reporting of exports and export sales by distributors and suppliers. The 76th Legislature, 1999, in Senate Bill 1547, amended Tax Code, Chapter 153, providing definitions of imports and exports, requiring an import verification number for each truck load of gasoline or diesel fuel imported into Texas, requiring a diversion number for each truck load of motor fuel delivered to a state or country different than the state or country printed on the shipping document, and requiring an importer and exporter to possess a shipping document. The amendment is changing the title of the section to more accurately reflect its content.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. LeBas 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 in providing taxpayers with a more efficient means of obtaining tax information. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§153.001, 153.018, 153.104, and 153.203.

§3.187. Documentation and Reporting of Imports and Exports, Import Verification Numbers,[and] Export Sales by Distributors and Suppliers, and Diversion Numbers.

(a) Imports.

(1) Imports. Motor fuel imported into Texas by or for a seller constitutes an import by that seller. Motor fuel imported into Texas by or for a purchaser constitutes an import by that purchaser.

(2) Import Verification Number. An importer must obtain from the comptroller an import verification number for each load of gasoline or diesel fuel imported into Texas by truck. An import verification number must be obtained within 72 hours before or after the gasoline or diesel fuel enters Texas. The importer must write the import verification number on the shipping document issued for that fuel.

(3) Documentation. An importer must possess a shipping document created by the terminal or bulk plant where the fuel was loaded (see §3.182 of this title (relating to Motor Fuel Transporting Documents)) for motor fuel imported by any means into Texas.

(b) [~~(a)~~] Exports and export sales.

(1) Exports. Motor fuel exported from Texas by or for a seller constitutes an export by that seller. Motor fuel exported from Texas by or for a purchaser constitutes an export by that purchaser. A permitted distributor or a permitted supplier exports motor fuel[~~makes an export~~] when the distributor or supplier [~~he~~] ships motor fuel to a point outside the state:

(A) through facilities that[~~operated by~~] the permittee operates; [~~or~~]

(B) through delivery by the permittee as consignor to a common or contract carrier, an ocean- going vessel (including ship, tanker, or boat), or a barge, for shipment to a consignee at the out-of-state point; or

(C) through delivery by the permittee to a customs[~~custom~~] or forwarding agent, for shipment forthwith outside the state.

(2) Export sales. A permitted distributor or permitted supplier makes an export sale when he sells motor fuel in Texas to a non-Texas permitted purchaser who then, prior to any other sale or use in Texas, sends or transports the motor fuel [~~forthwith~~] outside [~~of~~] the state by a common or contract carrier, an ocean-going vessel (including ship, tanker, or boat), or a barge.

(A) If the purchaser fails to provide or refuses to divulge the final destination of the fuel, which thereby prevents the proper reporting of the fuel export, then the seller shall collect Texas tax [~~to a point outside of Texas, thereby preventing the proper reporting of the fuel exportation, the Texas taxes shall be collected by the seller~~] at the time of the sale in Texas.

(B) A permitted distributor or supplier who makes[~~making~~] an export sale will not be liable for [~~the~~] tax on motor fuel that the purchaser diverts, [~~diverted by the purchaser~~] provided that the seller has obtained, at the time of sale, documentation from the purchaser that shows that [~~showing~~] the fuel is to be delivered to a destination outside [~~of~~] Texas.

(C) When both parties to the transaction in Texas are permitted distributors or permitted suppliers, the transaction will be reported as a distributor-to-distributor or supplier-to-supplier tax-free sale in Texas, followed by an export or export sale. The last Texas permitted distributor or supplier who holds legal title shall report the export or export sale.

(3) [~~(b)~~] Documentation.

(A) Shipping document. An exporter must possess a shipping document created by the terminal or bulk plant where the fuel was loaded (see §3.182 of this title relating to Motor Fuel Transporting Documents) for motor fuel exported by any means from Texas.

(B) [~~(1)~~] Common or[~~,~~] contract carriers. The documents for the distributor's or supplier's records, in addition to other records required, must be supported by a[~~the~~] bill of lading issued by the common or contract carrier, ocean-going vessel, or barge listing the consignor and consignee, the points of origin and destination, the number of gallons shipped or transported, the date of export, and the kind of fuel exported.

(C) [~~(2)~~] Proof of export. The comptroller may request proof of export from the distributor or supplier to verify that the motor fuel was exported from [~~the State of~~] Texas. This proof may consist of[~~be~~]:

(i) [~~(A)~~] proof of export that a U.S. customs office has certified,[~~certified by a U.S. customs office~~] if the fuel was exported from this state to a foreign country;

(ii) [(B)] proof of export that a port of entry of the state of importation has certified, [~~certified by port of entry of state of importation~~] if ports of entry are maintained by that state;

(iii) [~~(C)~~] proof from the tax officials of the state into which the motor fuel was imported, which shows that the exporter has accounted for the motor fuel[~~that the motor fuel has been accounted for by the exporter~~] on the state's tax reports; or

(iv) [~~(D)~~] other proof that the fuel has been reported[~~accounted for~~] to the state into which the motor fuel was imported.

(c) Diversion Number. An importer or exporter who diverts the delivery of a load of gasoline or diesel fuel being transported by truck from the destination state or country that is preprinted on the shipping document that has been issued for that fuel to another state or country must obtain a diversion number from the comptroller. A diversion number must be obtained within 72 hours before or after the diversion. The importer, exporter, or common or contract carrier must write the diversion number on the shipping document issued for that fuel.

[~~(c) Reporting. When both parties to the transaction in Texas are permitted distributors or permitted suppliers, the transaction will be treated as a distributor to distributor or supplier to supplier tax-free sale in Texas followed by an export or export sale; the last Texas permitted distributor or supplier who holds legal title shall report the export or export sale.~~]

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

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Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
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34 TAC §3.195

The Comptroller of Public Accounts proposes an amendment to §3.195, concerning due date for reports and payments. The 76th Legislature, 1999, in Senate Bill 1547, amended Tax Code, Chapter 153, providing reporting requirements for common and contract carriers transporting gasoline or diesel fuel in Texas by truck. New subsections are being added to provide criteria for mandatory electronic filing of reports by distributors, suppliers, and common or contract carriers, and to provide a penalty for failure to file reports electronically. Amendments are being made for nonsubstantive grammatical corrections. The amendment is changing the title of the section to more accurately reflect its content.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. LeBas 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 in providing taxpayers with a more efficient means of obtaining tax information. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§153.018, 153.118, and 153.221.

*§3.195. Electronic Filing of Reports and*Due Date for *Odd-Year Estimated Reports and Payments.*

(a) Electronic filing of reports and schedules.

(1) The comptroller may require a distributor, supplier, or common or contract carrier to file reports and schedules by means of electronic transmission under the following circumstances:

(A) the combined total number of gallons of tax-free gasoline and tax-free diesel fuel that a permitted distributor or permitted supplier receives during the preceding 12 months exceeds five million gallons, or the total number of transactions that a permitted distributor or permitted supplier reports on the monthly report schedules exceeds 100 transactions each month for three consecutive months on an individual permit basis; or

(B) the total number of transactions that a common or contract carrier reports on the quarterly report schedules exceeds 100 transactions.

(2) For the purpose of this section, one transaction means a single tax-free purchase, sale, import, or export of gasoline or diesel fuel, or the summary of multiple tax-free purchases, sales, imports, or exports of gasoline or diesel fuel during a reporting period, when the seller, purchaser, fuel type, common or contract carrier, origin state or country, and destination state or country are the same.

(3) The taxpayer or its authorized agent shall enter into a written agreement with the comptroller to permit electronic filing of reports and schedules. The signature of the taxpayer or its authorized agent on the written agreement into which the parties enter for this purpose shall be deemed to appear on each report filed electronically.

(4) Electronic transmission of each report and schedule shall be made in a format that the comptroller approves and that is compatible with the comptroller's equipment and facilities.

(5) The comptroller shall notify the taxpayers to whom this subsection applies no less than 90 days before the taxpayer is required to begin filing its reports and schedules electronically.

(6) Distributors, suppliers, and common or contract carriers who are required to file reports and supplements electronically, but are unable to do so, may request a waiver from the comptroller.

(7) The permit of a distributor or supplier who is required to file electronically may be suspended if the distributor or supplier fails to file reports and schedules by means of electronic transmission in an approved format, after being notified of such requirement.

(8) A common or contract carrier who is required to file reports and schedules electronically and who fails to do so in an approved format, after being notified of such requirement, may be assessed a penalty of $25 for each reportable transaction. The comptroller will send notice to the common or contract carrier about the assessment of the penalty. The common or contract carrier may request a redetermination under the terms of §§1.1-1.42 of this title (relating to Rules of Practice and Procedure). An oral hearing at the office of the Comptroller of Public Accounts in Austin, Texas, may be requested.

[~~(a) Due dates for gasoline distributors and diesel fuel suppliers.~~]

(b) Due dates for odd-year estimated reports and payments.

(1) The due date for the distributor and supplier estimated report and payment of tax for the month of July of each odd-numbered calendar year is August 15 of that year.

(2) An estimated payment of tax is an amount equal to the tax due for June of the same year or the actual tax due for July, whichever is less. [~~is required from gasoline distributors and diesel fuel suppliers on or before August 15 for the month of July of each odd-numbered calendar year.~~]

[~~(b) Payment of estimated tax.~~]

[~~(1) An amount equal to a reasonable estimate of the tax due for gasoline distributors and diesel fuel suppliers for July of each odd-numbered calendar year must be remitted to the comptroller on or before August 15 of that year.~~]

[~~(2) A reasonable estimate of the tax due for July is equal to the tax due for June of the same year or the actual tax due for July, whichever is less.~~]

(3) The regular monthly report and any additional tax due for July in excess of the estimated payment [~~reasonable estimate~~] must be filed on or before August 25 of that year.

[~~(c) Penalties.~~]

(4) [~~(1)~~] If the estimated payment is less than the amount required in subsection (b) of this section, a penalty of 5.0% will accrue on the difference between the amount paid and the amount due [~~required amount~~]. If the tax is not paid within 30 days after the due date, an additional 5.0% penalty will accrue.

(5) [~~(2)~~] If an estimated payment is not timely made, a 5.0% penalty will accrue on the total [~~entire~~] amount required to be paid by August 15. If the tax is not paid within 30 days after the due date, an additional 5.0% penalty will accrue.

(6) [~~(3)~~] A penalty of 5.0% will accrue on any additional tax due for the month of July on the regular monthly report if it is not

paid on or before August 25 of that year. If the tax is not paid within 30 days after the due date, an additional 5.0% will accrue.

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

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Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
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34 TAC §3.202

The Comptroller of Public Accounts proposes a new §3.202, concerning common and contract carrier registration, reports, due dates, and administrative remedies. The 76th Legislature, 1999, in Senate Bill 1547, amended Tax Code, Chapter 153, providing registration and reporting requirements for common and contract carriers transporting motor fuel in Texas by truck. The new rule provides that common and contract carriers are required to file a report each calendar quarter, sets out the due date of each quarterly report, and outlines administrative penalties for failure to register or file the required report. The new rule provides that information regarding the transportation of gasoline and diesel fuel in September 2000, should be included with the report filed for the last quarter of 2000.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. LeBas 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 in providing taxpayers with information regarding their tax responsibilities. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This new section is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §153.003 and §153.402.

§3.202. Common and Contract Carrier Registration, Reports, Due Dates, and Administrative Remedies.

(a) Registration. A common or contract carrier transporting gasoline or diesel fuel by truck in Texas is required to register with the comptroller (see §3.171of this title (relating to Records Required; Information Required)).

(b) Report required. Every calendar quarter a common or contract carrier must report to the comptroller information relating to the interstate and intrastate transportation of gasoline and diesel fuel by truck. A common or contract carrier that does not receive a report form or does not receive the correct report form from the comptroller is not relieved of the responsibility of filing the report.

(c) Due date. The common or contract carrier report is due on the 25th day of the month following the end of each calendar quarter. The due date for the quarter ending September 30, 2000 is extended to January 25, 2001. Common or contract carriers must report information regarding the interstate and intrastate transportation of gasoline and diesel fuel by truck during September 2000 on the fourth quarter 2000 report, which is due on or before January 25, 2001.

(d) Administrative remedies for violation of Tax Code, Chapter 153, Subchapter A.

(1) The comptroller may assess a penalty not to exceed $200 against a common or contract carrier that fails to register or provide registration information to the comptroller.

(2) The comptroller may assess a penalty not to exceed $200 against a common or contract carrier that fails to file a report. Each calendar quarter that a common or contract carrier fails to file a report with the comptroller is a separate violation.

(3) The comptroller may assess a penalty not to exceed $25 for each unreported truck load of gasoline or diesel fuel transported in Texas against a common or contract carrier that fails to file a report detailing the carrier's transportation of gasoline or diesel fuel by truck.

(4) The comptroller will send notice to the common or contract carrier that a penalty is being assessed. The common or contract carrier may request a redetermination within 30 days of the date of the notice under the terms of §§1.1-1.42 of this title (relating to Rules of Practice and Procedure).

(5) An oral hearing at the office of the Comptroller of Public Accounts in Austin, Texas, may be requested.

(6) The standard of proof in an administrative hearing pursuant to this section is by a preponderance of the evidence, unless otherwise provided by 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.

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005296
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 463-4062

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 145. PAROLE

SUBCHAPTER A. PAROLE PROCESS

37 TAC §145.6

The Policy Board of the Texas Board of Pardons and Paroles proposes an amendment to 37 TAC §145.6 concerning Notification of Parole Panel Decision. The amendment is proposed in order to reflect the Board's ongoing efforts to have more efficient procedures in place for parole release decisions. The proposed amendment, approved by the Policy Board on July 27, 2000, relating to notification by the parole panel of the decision to approve or deny release to parole, is to add subsection (e) to give the inmate notice that parole approval will be indicated by "A," and that parole denial will be indicated by "D."

Gerald Garrett, Chair of the Policy Board, has determined that for the first five-year period the amended rule is in effect, there will be no fiscal implications for state or local government.

Chairman Garrett has also determined that for each year of the first five years the proposed amended rule is given effect, the public benefit anticipated as a result of enforcing the amended rule will be to clarify procedures related to parole decision-making.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons required to comply with the amended rule as proposed.

Comments should be directed to Laura McElroy, General Counsel, Texas Board of Pardons and Paroles, 209 West 14th Street, 5th Floor, Austin, Texas 78701, or to the following electronic mail address: laura.mcelroy@tdcj.state.tx.us. Written comments from the public should be received within 30 days of the publication of the proposed amended rule.

The amendment is proposed under §508.036, Government Code, which grants the Policy Board the power to promulgate rules relating to the decision-making process used by the Board and parole panels; and under §508.044, Government Code, which provides that a Board member shall determine which inmates are to be released on parole and which also provides that the Policy Board may adopt reasonable rules as the Policy Board considers proper or necessary relating to release of an inmate on parole or mandatory supervision; and under §508.144, which requires the Board to develop guidelines that are the basic criteria on which a parole decision is made.

There is no cross-reference to the proposed amended rule.

§145.6. Notification of Parole Panel Decision.

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

(e) Parole approval will be indicated by "A" and denial will be indicated by "D."

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

Filed with the Office of the Secretary of State, on July 31, 2000.

TRD-200005264
Laura McElroy
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 463-1883

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 98. ADULT DAY CARE AND DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS

The Texas Department of Human Services (DHS) proposes amendments to §§98.12, 98.13, 98.15, 98.41, 98.42, 98.43, 98.61, 98.62, 98.81, 98.82, 98.95, and 98.103, concerning building approval, applicant disclosure requirements, renewal procedures and qualifications, construction and initial survey of completed construction, safety, sanitation, general requirements, program requirements, procedural requirements, determinations and actions pursuant to inspections, confidentiality, and revocation; proposes the repeal of §98.104, concerning emergency suspension and closing order; and proposes new §98.104, concerning emergency suspension and closing order, in the Adult Day Care and Day Activity and Health Services Requirements chapter.

The purpose of the proposal is to clarify and add additional requirements to Adult Day Care and Day Activity and Health Services Requirements rules in the licensure areas related to the Life Safety Code, health screening, training, and due process. As part of the renewal process, facilities will have an annual inspection by the local fire marshal. Facilities will be required to have a disaster plan. Metric equivalents will be deleted from the window dimensions. Definitions and examples of flame spread ratings will be added. Square footage requirements for ambulatory and semiambulatory clients will be changed to 40 square feet per client. The rule on an area of rest and a room or rooms with beds will be divided into two separate rules. Urinals will be allowed to be substituted for the third required toilet in the men's restroom. Providers will be required to have a written policy for control of communicable diseases. Facilities will have to provide all clients with a written list of the client's rights as outlined in chapter 102 of the Human Resources Code. The director will have to have 12 contact hours of annual continuing education. Providers and outside resource contracts will be required to ensure that new employees are screened for tuberculosis within two weeks of employment and that all employees are screened annually. Facilities will have to practice evacuation procedures with staff and clients at least once a month. Providers will be allowed to request an informal dispute resolution if they have a dispute regarding a violation. The confidentiality of a complainant's identity will be added to the rules. Provisions on grounds for revocation of a license will be added. The rule relating to relocation will be deleted to be replaced with a new rule clarifying the specific procedures to be used for relocation if a facility's license is suspended or an immediate closure of a facility is ordered.

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

Mr. Bost also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be clarified rules that promote good health and care for affected clients. The proposed rule changes will have an adverse economic effect on small and micro-businesses because of the requirements concerning tuberculosis (TB) testing and the continuing education requirements for directors. The county health department does not charge for

TB tests. County health department officials travel to rural areas that do not have county health department offices to administer TB tests approximately every other week. County health officials may not be located in the community in which an adult day care center is located. If the client or staff of an adult day care center is unable to travel to the location of the county health department official, they may need to obtain their TB test or inoculation from a physician. A physician may charge an administrative fee of $7.00 to $10. In such a case, a small provider with 14 clients and a minimum of 8.75 staff could have an initial cost of $227.50 for physician administrative fees, while a large provider with 250 clients and a minimum of 39.5 staff could have an initial cost of $2,500 for physician administrative fees. The initial cost to providers will be higher if no clients or staff have been tested for TB and they are in a rural areas where they are unable to travel to the location of the county health official. After the initial screening, it is likely that the costs to providers will decrease due to the smaller number of clients or staff being tested or inoculated. TB screening is essential as there is a health risk in this state; TB testing is good medical practice. There will be an additional cost to directors who must show evidence of 12 contact hours of annual continuing education. Educational seminars that meet these requirements can be obtained at no cost to providers, whereas other seminars may cost several hundred dollars. Continuing education for directors is required in all DHS programs.

Questions about the content of this proposal may be directed to Maxcine Tomlinson at (512) 438-3169 in DHS's Long Term Care Policy Section. Written comments on the proposal may be submitted to Supervisor, Rules and Editing Unit-244, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas, 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Texas Government Code, the department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §§98.12, 98.13, 98.15

The amendments are proposed under the Human Resources Code, Title 6, Chapter 103, which provides the department with the authority to license adult day care facilities.

The amendments implement §§103.001-103.011 of the Human Resources Code.

§98.12. Building Approval.

(a) (No change.)

(b) Local health authority. The following procedures allow the local health authority to provide recommendations to DHS concerning licensure of a facility.

(1) (No change.)

(2) Increase in capacity. The license holder must request an application for increase in capacity from DHS's LTC-R Facility Enrollment Section. DHS's LTC-R Facility Enrollment Section must provide the license holder with the application form, and the license holder [~~DHS~~] must notify the local fire marshal and the local health authority of the request. The license holder must arrange for the inspection of the facility by the local fire marshal. The facility must send DHS's LTC-R Facility Enrollment Section a copy of the written notice sent to the local health authority notifying them of the increase in capacity. DHS will approve the application only if the facility is found to be in compliance with the standards. Approval to occupy the increased capacity may be granted by DHS prior to the issuance of the license covering the increased capacity after inspection by DHS if standards are met.

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

§98.13. Applicant Disclosure Requirements.

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

(c) General information required.

(1) (No change.)

(2) The certificate of account status [~~good standing~~] issued by the Comptroller of Public Accounts must be filed for an initial application, a change of ownership, or a renewal.

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

(d) (No change.)

§98.15. Renewal Procedures and Qualifications.

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

(g) The facility must have an annual inspection by the local fire marshall as part of the renewal 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 July 26, 2000.

TRD-200005182
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 438-3108

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SUBCHAPTER C. FACILITY CONSTRUCTION PROCEDURES

40 TAC §§98.41 - 98.43

The amendments are proposed under the Human Resources Code, Title 6, Chapter 103, which provides the department with the authority to license adult day care facilities.

The amendments implement §§103.001-103.011 of the Human Resources Code.

§98.41. Construction and Initial Survey of Completed Construction.

(a) Construction phase.

(1) The Texas Department of Human Services (DHS) Facility Enrollment [~~Licensing Section~~] in Austin, Texas, must be notified in writing prior to [~~of~~] construction start.

(2) (No change.)

(b) (No change.)

(c) Initial survey of completed construction.

(1) (No change.)

(2) After the completed construction has been surveyed by DHS and found acceptable, this information will be conveyed to Facility Enrollment [~~the licensing officer~~] of DHS as part of the information needed to issue a license to the facility. In the case of additions or remodeling of existing facilities, a revision or modification to an existing license may be necessary. The building, grades, drives, and parking must essentially be 100% complete at the time of this initial visit for occupancy approval and licensing, including basic furnishings and operational needs. A facility may accept up to three clients between the time it receives initial approval from DHS and the time the license is issued.

(3) (No change.)

(d) (No change.)

§98.42. Safety.

(a) Disaster plans. The facility must have a written plan with procedures to be followed in an internal or external disaster and for the care of casualties. The rules must address areas, such as: emergency evacuation transportation; adequate sheltering arrangements; supplies; staffing; emergency equipment; individual identification of residents and transfer of records; responding to family inquiries; and post-disaster activities, including emergency power, food, water, and transportation. Plans dealing with natural disasters, such as hurricanes, floods and tornadoes, must be coordinated with the local emergency management coordinator. Information about the local emergency management coordinator may be obtained from the office of the local mayor or county judge.

(b) [~~(a)~~] Environmental safety.

(1) The physical plant safety requirements are designed to provide safety to the clients, participants, or adult individuals receiving day care.

(2) The facility must conform to all applicable state laws and local ordinances pertaining to occupancy. When these laws, codes, and ordinances are more stringent than the standards in this section, the more stringent requirements govern. If state laws or local codes or ordinances conflict with the requirements of these standards, the Facility Enrollment [~~Licensing Section~~] will be so informed so that these conflicts may be legally resolved.

(3) The facility must meet the provisions and requirements concerning accessibility for individuals with disabilities in the following laws and regulations: the Americans with Disabilities Act (ADA) of 1990 (Public Law 101- 336; Title 42, United States Code, Chapter 126); Title 28, Code of Federal Regulations, Part 35; Texas Civil Statutes, Article 9102; and Title 16, Texas Administrative Code, Chapter 68. Plans for new construction, substantial renovations, modifications, and alterations must be submitted to the Texas Department of Licensing and Regulation (Attn: Elimination of Architectural Barriers Program) for accessibility approval under Article 9102. At least 50% of the client restrooms must be in accordance with ADA. Exception: Facilities licensed for 45 or fewer persons may provide one unisex restroom in accordance with accessibility requirements.

(4) The jurisdiction of the Texas Department of Human Services (DHS) extends beyond the licensed facility when the licensed area is only a part of a building or floor that is not fire-separated in accordance with the Life Safety Code, §10-7.1.2.

(c) [~~(b)~~] Life Safety Code.

(1) The principles of the Life Safety Code, of the National Fire Protection Association (NFPA), 1988 edition, under §10-7 "Day Care Centers," and operating features under §31-3.4 "Day Care Centers," must be used in establishing life safety requirements for adult day care facilities, with the interpretation and exceptions as listed in paragraphs (2) and (3) of this subsection.

(2) Interpretations of the Life Safety Code, 1988, §10-7, are as follows:

(A) The principles of §10-7 apply to any size facility requiring licensing with four or more clients or participants.

(B) The principles of §10-7.1.1.3 relating to children six years of age and over apply.

(C) The manual fire alarm system and automatic smoke detection system must be installed in accordance with NFPA 72 series and state fire marshal licensing requirements.

(D) All facilities must follow the Life Safety Code, 1988, §10-7, including but not limited to the following:

(i) Where centers are located in a building containing mixed occupancies, the occupancies must be separated by one-hour fire barriers.

(ii) Exit access corridors must be not less than six feet clear width.

(iii) Each floor occupied by clients must have access to two remote exits in accordance with Chapter 5, Means of Egress. Doors in the means of egress must be equipped with hardware that opens with a single motion. Doors must swing in the direction of egress for occupant loads greater than 50 occupants.

(iv) Every room or space normally subject to client occupancy, other than bathrooms or any room with attended individual clients, must have at least one outside window for emergency rescue or ventilation. Such window must be able to be opened from the inside without the use of tools and provide a clear opening of not less than 20 in. [~~(50.8 cm.)~~] in width, 24. in. [~~(61 cm.)~~] in height, and 5.7 sq. ft. (821 sq. in.) [~~(.53 sq. m.)~~] in area (minimum width of 20 inches by 41.2 inches high and minimum height of 24 inches by 34.2 inches wide). The bottom of the opening must be not more than 44 in. (112 cm.) above the floor. In rooms located greater than three stories above grade, the openable clear height, width, and area of the window may be modified to the dimensions necessary for ventilation. Exceptions are as follows:

(I) in buildings protected throughout by an approved automatic sprinkler system in accordance with §7-7; or

(II) where the room or space has a door leading directly to the outside of the building.

(v) Interior finish in stairways, corridors, and lobbies must be Class A, and for all other walls and ceilings must be Class A or Class B in accordance with §6-5. Flame spread is the rate of fire travel along the surface of a material. (This is different from other requirements for time-rated "burn through" resistance ratings such as one-hour rated.) Flame spread ratings are Class A (0-25), Class B (26-75), and Class C (76-200).

(vi) Floor coverings within corridors and exits must be Class I or Class II in accordance with §6-5.

(vii) A smoke detection system must be installed in accordance with §7-6 with placement of detectors in each story in front of the doors to the stairways and at not greater than 30 ft. (9.1 m.) spacing in the corridors of all floors containing the center. Detectors also must be installed in lounges, recreation areas, and sleeping rooms in the center. Maintenance and testing must be conducted semi-annually on fire alarm systems by a person licensed by the State of Texas.

(viii) Fire department notification must be accomplished in accordance with §7-6.4, except in day-care centers with not more than 100 clients.

(3) Exceptions to the Life Safety Code, 1988, §10-7, are as follows.

(A) All required smoke detectors must be powered by the facility electrical system and be interconnected with the fire alarm system.

(B) Reference to apartment buildings in §10-7.1.2 must be deleted. Any floor above or below the floor of exit discharge which is used by semiambulatory clients, or those whose disability prevents them from taking appropriate action for self-preservation in emergencies, must be provided with smoke compartmentation.

(C) Emergency lighting is not required for means of egress if the facility operation is during daylight hours and if natural light, direct or borrowed, is provided so that the means of egress is usable in emergencies.

(D) Special protective electrical receptacle covers are not required.

(E) NFPA 96 publication relating to Vapor Removal Cooking Equipment must not be applicable if the facility has residential-type cooking equipment.

(F) Public corridors must not be used for return or supply air systems.

(G) Residential-type heating units or heating units designed for attic installations must not be considered to be units requiring furnace room construction as specified under §10-7.3.2.1.

(H) New additions or remodeling must be as required for new construction in accordance with paragraph (4) of this subsection.

(I) Sprinkler system for janitor's closet as specified under §10-7.2.2 are not required unless the building has a complete NFPA 13 system.

(4) For new construction, DHS requires conformance to the following codes, except that DHS may accept other nationally recognized codes that are locally enforced.

(A) If the municipality has a building code and a plumbing code, then those codes govern in those areas of construction. Where local codes or ordinances are applicable, the most restrictive parts concerning the same subject item apply unless otherwise determined by the authority having jurisdiction for local codes and the licensing agency.

(B) In the absence of local municipal codes or ordinances, nationally recognized codes must be used, such as the Standard Building Code and the Standard Plumbing Code, both of which are part of the Southern Building Code, published by Congress International, Inc. These nationally recognized codes, when used, must all be publications of the same group or organization to assure the intended continuity.

(C) Heating, ventilating, and air-conditioning (HVAC) systems must be designed and installed in accordance with NFPA 90A, relating to the Standard for the Installation of Air Conditioning and Ventilating Systems, and NFPA 90B, relating to the Standard for the Installation of Warm Air Heating and Air Conditioning Systems, as applicable, and the American Society of Heating, Ventilating, and Air Conditioning Engineers (ASHRAE), except as may be modified in this subchapter. Buildings required to meet NFPA 90A must have automatic shutdown upon initiation of the fire alarm system, in accordance with NFPA 90A, §4-3.

(D) Electrical and illumination systems must be designed and installed in accordance with NFPA 70, relating to the National Electrical Code, and the Lighting Handbook of the Illuminating Engineering Society (IES) of North America except as may be modified in this subchapter. Minimum illumination must be 20 foot candles in the toilets, bathing, and general use areas such as living, dining, corridors, and lobbies. Minimum illumination must be 50 foot candles in the kitchen, medication or food preparation areas, and activity areas for handicrafts or reading.

(5) An existing building either occupied as an adult day care facility at the time of initial inspection by the licensing agency, or converted to occupancy as an adult day care facility, must meet all local requirements pertaining to the building for that occupancy. The licensing agency may require the facility sponsor or licensee to submit evidence that local requirements are satisfied.

(6) Adult day care facilities must be of recognized permanent type construction as distinguished from movable buildings or construction. Buildings must be structurally sound with regard to actual or expected dead, live, and wind loads. DHS may require submission of evidence to this effect.

(7) Electrical and mechanical systems must be safe and in working order. DHS may require the facility sponsor or licensee to submit evidence to this effect, consisting of a report from the fire marshal or city and/or county building official having jurisdiction or a report from a registered professional engineer.

(8) DHS will consider a written request from the facility for a waiver of the requirements which, if strictly applied, would clearly be impractical in DHS's judgment for existing buildings and structures which are converted to adult day care occupancy. Any of these modifications will be allowed only to the extent that reasonable life safety against the hazards of fire, explosion, structural, or other building failure and panic are provided and maintained.

(d) [~~(c)~~] Personal safety.

(1) Fire safety.

(A) Fire safety must be observed at all times.

(B) Storage items must be neatly arranged and placed to minimize fire hazard. Gasoline, volatile materials, paint, and similar products must not be stored in the building housing clients unless approved by the local fire marshal. Accumulations of extraneous material and refuse is not permitted.

(C) The building must be kept in good repair; electrical, heating, and cooling systems must be maintained in a safe manner. Electrical appliances, devices, and lamps must be used in a manner that prevents overloaded circuits. Any extension cords in excess of six feet must be shielded or protected.

(D) The facility must report all fires to DHS, Facility Enrollment [~~Licensing Section~~], on DHS's Fire Report for Licensed Facilities form within 15 days after the fire. The facility must immediately notify DHS, Licensing Section, at (512) 438-2630 of disasters or any fires which caused death or serious injury. A telephone report must be followed by a written report on DHS's Fire Report form.

(E) The facility must develop and conspicuously post throughout the facility an emergency evacuation plan approved by the local fire marshal having jurisdiction and DHS.

(F) Smoking regulations must be established and conspicuously posted in the facility. All smoking must be supervised. Ashtrays of noncombustible material and safe design must be provided.

(G) The facility must have an emergency fire lane for access of fire apparatus if required by local authorities.

(H) There must be at least one telephone in the facility available to either staff or clients to use in case of an emergency. Emergency telephone numbers must be posted conspicuously at or near the telephone.

(I) An initial pressure test of facility gas lines from the meter must be provided. Additional pressure tests are required when the facility has major renovations or additions during which the gas service is interrupted. All gas heating systems must be checked for proper operation and safety prior to the heating season by someone experienced in the areas of heating and air conditioning. Any unsatisfactory conditions must be corrected promptly.

(J) Curtains and/or draperies in public spaces and individual rooms in which smoking is allowed must be flame retardant.

(K) Portable fire extinguishers must be provided and maintained to comply with the provisions of the National Fire Protection Association (NFPA) 10. This includes such items as type of extinguishers (A, B, or C), location and spacing, mounting heights, monthly inspections by staff, yearly inspections by a licensed agent (with any necessary servicing), and hydrostatic testing as recommended by the manufacturer.

(L) Metal wastebaskets of substantial gauge or any U.L. or F.M. approved containers must be provided in all areas where smoking is permitted. Garbage, waste, or trash containers provided for kitchens, janitor closets, laundries, mechanical or boiler rooms, general storage, and similar places must be made of metal or any U.L. or F.M. approved material, having a close fitting cover. Disposable plastic liners may be used in these containers for sanitation.

(2) General requirements.

(A) All exterior site conditions must be designed, constructed, and maintained in the interest of clients' safety. Newly constructed ramps must not exceed 1:12 slope. Ramps, walks, and steps must be of slip-resistive texture and be smooth and uniform, without irregularities. Guard rails, fences, and hand rails must be provided as required.

(B) All stairways must have substantial hand rails properly secured.

(C) Tubs or showers for client use must have non-slip bottoms or floor surfaces, either built in or applied to the surface.

(D) Elevators for client use must be in safe operating condition.

(E) An adequate supply of hot water must be provided. The hot water system connected to all client-use fixtures must deliver warm water no hotter than 120 degrees Fahrenheit at the fixture. Hot water for other sanitary usages must be provided at the temperatures required for the appliance or fixture served, or for the operation involved.

(F) There must be no occupancies or activities adversely affecting the safety of the clients in the buildings or on the premises of the facility.

(G) Licensure capacity will be calculated at 40 square feet per client. [~~There must be at least 35 square feet provided for each ambulatory client and at least 50 square feet for each semiambulatory client.~~] This space may not include the kitchen/food service area, rest rooms, bath areas, office, corridors, stairways, storage areas, and outdoor space. Facilities licensed before October 1, 2000, will be allowed to meet the requirements in effect prior to October 1, 2000, of 35/50 square feet for ambulatory/semiambulatory clients. If a facility licensed before October 1, 2000, chooses to increase its capacity, changes ownership, or relocates, the facility will be required to meet the current standards for usable space, outdoor area, and rooms for privacy.

(H) An office area must be provided in a central location to record and maintain files for each client.

(I) An area for rest, other than the treatment and/or exam room, must be provided with a sufficient number of reclining lounge chairs or beds to accommodate the needs of clients. [~~A room or rooms with beds must be provided for those clients who prefer privacy. Facilities licensed on or after May 1, 1999, must ensure that the room(s) with beds must provide space for a minimum 5% of the licensed capacity. The room(s) usable space must provide not less than 80 square feet per bed for one-bed room and not less than 60 square feet per bed for multiple-bed rooms. A bedroom shall be not less than eight feet in its smallest dimension, unless otherwise approved by DHS.~~]

(J) A separate room or rooms with beds must be provided for those clients who prefer privacy. Facilities licensed on or after May 1, 1999, must ensure that the room(s) with beds provide space for a minimum 5.0% of the licensed capacity. The usable space in the room(s) must provide not less than 80 square feet per bed for a one-bed room and not less than 60 square feet per bed for multiple-bed rooms. A bedroom shall be not less than eight feet in its smallest dimension, unless otherwise approved by DHS.

(K) [~~(J)~~] The facility must have at least one room available as a treatment and/or examination room for use by the nursing staff or the client's physician. The client may not be treated and/or examined in an area other than the treatment room.

(L) [~~(K)~~] The facility must have a safe, secure, and suitable outdoor recreation and/or relaxation area for clients. This area must be connected to, be a part of, be controlled by, and be directly accessible from the facility. This area must be enclosed by a wall or a fence or located in a courtyard and supervised by staff to prevent wandering and large enough to conduct outdoor activities. This area must be suitably furnished. A minimum of 20% of the required outdoor space must be shaded. The required outdoor space for facilities licensed on or after May 1, 1999 is:

(i) 400 square feet for facilities up to 59 clients;

(ii) 600 square feet for facilities up to 99 clients; and

(iii) 800 square feet for facilities with 100 or more clients.

§98.43. Sanitation.

(a) General.

(1) Waste water and sewage must be discharged into a state-approved municipal sewage system; any exception such as an [~~to an~~] on-site sewage facility must be as approved by the Texas Natural Resource Conservation Commission or authorized agent.

(2)-(7) (No change.)

(8) There must be complete, separate, and adequate rest room facilities for men and women. Toilets must be provided as necessary to meet the needs of the clients; however, there must be not less than one toilet and one lavatory for every 15 clients or fraction thereof. A urinal may be substituted as the third required toilet in the men's

bathroom. Multiple toilets must be compartmented. All toilets must be equipped with grab bars. Lavatories must be provided with hot and cold water, soap, and individual towels. A minimum of one bathing unit must be provided. Facilities licensed on or after May 1, 1999, must provide a minimum of one bathing unit, which does not interfere with the use of the restroom by other clients. Each tub or shower must be in an individual room or enclosure which provides space for the private use of the bathing fixture, for drying and dressing, and for the client and attendant.

(9)-(10) (No change.)

(b) Kitchen.

(1) The rules in 25 TAC §§229.161-229.171 and §§229.173-229.175 [~~229, Subchapter K~~] (relating to Texas Food Establishments) and local health ordinances or requirements must be observed in the storage, preparation, and distribution of food; in the cleaning of dishes, equipment, and work area; and in the storage and disposal of waste.

(2) (No change.)

(3) Food preparation kitchens must have separate hand washing fixtures including hot and cold water, soap, and individual towels, preferably paper towels, in accordance with 25 TAC §§229.161-229.171 and §§229.173-229.175 [~~229, Subchapter K~~] (relating to Texas Food Establishments).

(4) (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 July 26, 2000.

TRD-200005181
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3108

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SUBCHAPTER D. LICENSURE AND PROGRAM REQUIREMENTS

40 TAC §98.61, §98.62

The amendments are proposed under the Human Resources Code, Title 6, Chapter 103, which provides the department with the authority to license adult day care facilities.

The amendments implement §§103.001-103.011 of the Human Resources Code.

§98.61. General Requirements.

(a) All facilities are required to meet the following areas. For purposes of this subchapter, the term, "communicable diseases" has the meaning assigned to it under 25 TAC Chapter 97 (concerning Communicable Diseases). [:]

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

(4) written policies for the control of communicable disease in employees and clients, which include tuberculosis (TB) screening and provision of a safe and sanitary environment for clients and their families;

(5) [~~(4)~~] all relevant federal and state standards; and

(6) [~~(5)~~] all applicable provisions of the Human Resource Code, Chapter 102.

(b) All facilities must maintain policies and procedures regarding the following rules with respect to all adult individuals receiving services provided by the facility:

(1) all individuals must be provided with the following written information:

(A) the individual's rights under Texas law (whether statutory or as recognized by the courts of the state) to make decisions concerning medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives; [~~and~~]

(B) the facility's policies respecting the implementation of these rights; ; and [.]

(C) a written list of the individual's rights, as outlined under the Human Resource Code section 102.004, Rights of the Elderly.

(2)-(8) (No change.)

(c) (No change.)

§98.62. Program Requirements.

(a) Staff qualifications.

(1) Director.

(A) (No change.)

(B) The director must show evidence of 12 contact hours of annual continuing education in at least two of the following areas:

(i) individual and provider rights and responsibilities, abuse, neglect, and confidentiality;

(ii) basic principles of supervision;

(iii) skills for working with individuals, families, and other professional service providers;

(iv) individual characteristics and needs;

(v) community resources;

(vi) basic emergency first aid, such as CPR or choking; or

(vii) federal laws, such as Americans with Disabilities Act, Civil Rights Act of 1991, the Rehabilitation Act of 1993, and the Family and Medical Leave Act of 1993.

(C) [~~(B)~~] The activities director may fulfill the function of facility director if he meets the qualifications for facility director.

(D) [~~(C)~~] One person may not serve as facility nurse, activities director, and facility director, regardless of qualifications.

(E) [~~(D)~~] The facility must have a policy regarding the delegation of responsibility in the administrator's absence, not to exceed 10 working days.

(F) [~~(E)~~] The facility must request a waiver from Long Term Care-Regulatory (LTC-R) Regional Office for exceptional circumstances. Exceptional circumstances include, but are not limited to, hospitalization, death, etc.

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

(4) Attendants. Attendants must be 18 years old or older and may include, but are not limited to, bus drivers, aides, cooks, janitors, porters, maids, and laundry workers.

(A) (No change.)

(B) If an attendant handles food in the facility, he must meet the requirements described in the Texas Department of Health rules on food service sanitation as described under 25 TAC §§229.161-229.171 and §§229.173-175 [~~229, Subchapter K~~] (relating to Texas Food Establishments).

(5) Food service personnel. If the facility prepares meals on site, the facility must have sufficient food service personnel to prepare meals and snacks. Food service personnel must meet the requirements described in the Texas Department of Health rules on food service sanitation as described under 25 TAC §§229.161-229.171 and §§229.173-229.175 [~~229, Subchapter K~~] (relating to Texas Food Establishments).

(6) (No change.)

(b) Staffing ratio. The facility must ensure that:

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

(5) clients whose needs cannot be met by the facility are not admitted or retained. Sufficient staff must be on duty at all times to meet the needs of the clients. The facility is responsible for all care provided at the facility.

(c) Staff health. All direct staff must be free of communicable diseases.

(1) The facility must screen all employees for tuberculosis within two weeks of employment and annually, according to Center for Disease Control screening guidelines. All persons providing services under an outside resource contract must also screen all employees for tuberculosis within two weeks of employment and annually according to Center for Disease Control screening guidelines. When requested to do so by the facility, persons providing services under an outside resource contract must provide evidence of compliance with this requirement.

(2) If employees contract a communicable disease that is transmissible to individuals through food handling or direct individual care, the employee must be excluded from providing these services as long as a period of communicability is present.

(d) (No change.)

(e) Training.

(1) (No change.)

(2) Ongoing training.

(A) (No change.)

(B) The facility must practice evacuation procedures with staff and clients not less than once a month [~~quarterly~~]. The evacuation results must be documented in the facility records.

(f) Medications.

(1) (No change.)

(2) Assistance with self administration. Assistance with self administration of client's medication regimen by licensed nursing staff may be provided to clients who are incapable of self-administering without assistance. Assistance with self-medication [~~Supervision~~] includes, and is limited to:

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

(3)-(6) (No change.)

(g)-(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 July 26, 2000.

TRD-200005180
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 438-3108

♦ ♦ ♦

SUBCHAPTER E. INSPECTIONS, SURVEYS, AND VISITS

40 TAC §98.81, §98.82

The amendments are proposed under the Human Resources Code, Title 6, Chapter 103, which provides the department with the authority to license adult day care facilities.

The amendments implement §§103.001-103.011 of the Human Resources Code.

§98.81. Procedural Requirements.

(a) (No change.)

(b) An inspection may be conducted by a [~~an individual qualified surveyor or by a team, of which at least one member is a qualified~~] surveyor.

(c)-(g) (No change.)

(h) The source of the complaint is not revealed.

(1) DHS is authorized to photocopy documents, photograph residents, and use any other available recording devices to preserve all relevant evidence of conditions found during an inspection, survey, or investigation that DHS reasonably believes threaten the health and safety of a client.

(2) Examples of records and documents which may be requested and photocopied or otherwise reproduced are client medical records, including nursing notes, pharmacy records, medication records, and physician's orders.

(3) The facility may charge DHS at a rate not to exceed the rate DHS charges for copies. The procedure of copying is the responsibility of the director or his designee. If copying requires that the records be removed from the facility, a representative of the facility is expected to accompany the records and assure their order and preservation.

(4) DHS protects the copies for privacy and confidentiality in accordance with recognized standards of medical records practice, applicable state laws, and DHS policy.

§98.82. Determinations and Actions Pursuant to Inspections.

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

(c) At the conclusion of an inspection or survey, the violations are discussed in an exit conference with the facility's management. A written list of the violations is left with the facility at the time of the exit conference; any additional violation that may be determined during review of field notes or preparation of the official final list (when

the official final list was not issued at the exit conference) is communicated to the facility in writing within ten workdays of the exit conference, [and the facility has 10 workdays to reply before the additional violation is made a part of the permanent record]. Copies of any narratives or similar papers written to further describe the conditions are furnished to the facility.

(d) Violations found during facility visits [complaint investigations] are discussed with the facility management and a plan of correction obtained; the violations are furnished in writing to the facility, as well as any supporting narratives. [, but the source of the complaint is not revealed].

(e)-(f) (No change.)

(g) If the provider and the inspector cannot resolve a dispute regarding a violation of regulations, the provider is entitled to an information dispute resolution (IDR) at the regional level for all violations. For a violation which resulted in an adverse action, the provider is entitled to an IDR at either the regional or state office level.

(1) A written request and all supporting documentation must be submitted to the Regional Director, Long Term Care-Regulatory, for a regional IDR or to Long Term Care-Regulatory, Texas Department of Human Services (DHS), P.O. Box 149030, (E-343), Austin, Texas 78714-9030, for a central office IDR, no later than the tenth calendar day after receipt of the official statement of violations.

(2) DHS will complete the IDR process no later than the 30th calendar day after receipt of a request from a facility.

(3) Violations deemed invalid in an IDR will be so noted in DHS's records.

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

Filed with the Office of the Secretary of State, on July 26, 2000.

TRD-200005179
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 438-3108

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SUBCHAPTER F. ABUSE, NEGLECT, AND EXPLOITATION: COMPLAINT AND INCIDENT REPORTS AND INVESTIGATIONS

40 TAC §98.95

The amendment is proposed under the Human Resources Code, Title 6, Chapter 103, which provides the department with the authority to license adult day care facilities.

The amendment implements §§103.001-103.011 of the Human Resources Code.

§98.95. Confidentiality.

All reports, records, communications, and working papers used or developed by the Texas Department of Human Services (DHS) in an investigation are confidential and may be released only as provided in this section.

(1) (No change.)

(2) The final written investigation report may be released to the public upon request provided the report is de-identified [deidentified] to remove all names and other personally identifiable data, including any information from witnesses and other person furnished to DHS as part of the investigation. [No attachments to the report will be released.]

(3)-(4) (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 July 26, 2000.

TRD-200005178
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 438-3108

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SUBCHAPTER G. ENFORCEMENT

40 TAC §98.103, §98.104

The amendment and new section are proposed under the Human Resources Code, Title 6, Chapter 103, which provides the department with the authority to license adult day care facilities.

The amendment and new section implement §§103.001-103.011 of the Human Resources Code.

§98.103. Revocation.

(a) (No change.)

(b) In addition, DHS may revoke a license if the licensee:

(1) (No change.)

(2) used subterfuge or other evasive means to obtain the license; [or]

(3) concealed a material fact in the application for a license or failed to disclose information required in §98.13 of this title (relating to Applicant Disclosure Requirements) that would have been the basis to deny the license under §98.19 of this title (relating to Criteria for Denying a License or Renewal of a License); or [.]

(4) violated the requirements of the Human Resources Code, Chapter 103, or the rules adopted under Human Resources Code Chapter 103.

(c)-(e) (No change.)

§98.104. Emergency Suspension and Closing Order.

(a) The Texas Department of Human Services (DHS) will suspend a facility's license or order an immediate closing of part of the facility if:

(1) DHS finds that the facility is operating in violation of the licensure rules; and

(2) the violation creates an immediate threat to the health and safety of a resident.

(b) The order suspending a license or closing a part of a facility under this section is immediately effective on the date the license holder receives a hand-delivered written notice or on a later date specified in the order.

(c) The order suspending a license or ordering an immediate closing of a part of the facility is valid for ten days after the effective date of the order.

(d) A licensee whose facility is closed under this section is entitled to request an administrative hearing in accordance with Chapter 79, Subchapter Q of this title (relating to Formal Appeals), but a request for an administrative hearing does not suspend the effectiveness of the order.

(e) When an emergency suspension has been ordered and the conditions in the facility indicate that clients should be relocated, the following apply:

(1) In all circumstances, a client's rights or freedom of choice in selecting an adult day care facility must be respected.

(2) If a facility or part thereof is closed, the following procedures must be followed:

(A) DHS will notify the local health department director, city or county health authority, and representatives of the appropriate state agencies of the closure.

(B) The facility staff must notify each client's guardian or responsible party and attending physician, advising them of the action in process.

(C) The client or client's guardian or responsible party must be given opportunity to designate a preference for a specific facility or for other arrangements.

(D) DHS will arrange for relocation to other facilities in the area in accordance with the client's preference. A facility chosen for relocation must be in good standing with DHS and, if certified under Titles XVIII and XIX of the United States Social Security Act, must be in good standing under its contract. The facility chosen must be able to meet the needs of the client.

(E) If absolutely necessary, to prevent transport over substantial distances, DHS will grant a waiver to a receiving facility to temporarily exceed its licensed capacity, provided the health and safety of clients is not compromised and the facility can meet the increased demands for direct care personnel and dietary services. A facility may exceed its licensed capacity under these circumstances, monitored by DHS staff, until clients can be transferred to a permanent location.

(F) With each client transferred, the following reports, records, and supplies must be transmitted to the receiving institution:

(i) a copy of the current physician's orders for medication, treatment, diet, and special services required;

(ii) personal information such as name and address of next of kin, guardian, or responsible party for the client; attending physician; Medicare and Medicaid identification number; social security number; and other identification information as deemed necessary and available; and

(iii) all medication dispensed in the name of the client for which physician's orders are current. These must be inventoried and transferred with the client.

(G) If the closed facility is allowed to reopen within 90 days, the relocated clients have the first right to return to the facility. Relocated clients may choose to return, may stay in the receiving facility (if the facility is not exceeding its licensed capacity), or choose any other accommodations.

(H) Any return to the facility must be treated as a new admission including, but not limited to, exchange of medical information, medications, and completion of required forms.

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

Filed with the Office of the Secretary of State, on July 26, 2000.

TRD-200005176
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 438-3108

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40 TAC §98.104

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

The repeal is proposed under the Human Resources Code, Title 6, Chapter 103, which provides the department with the authority to license adult day care facilities.

The repeal implements §§103.001-103.011 of the Human Resources Code.

§98.104. Emergency Suspension and Closing Order.

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

Filed with the Office of the Secretary of State, on July 26, 2000.

TRD-200005177
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 10, 2000
For further information, please call: (512) 438-3108

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PART 19. TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES

CHAPTER 700. CHILD PROTECTIVE SERVICES

SUBCHAPTER Q. PURCHASED PROTECTIVE SERVICES

40 TAC §700.1718

The Texas Department of Protective and Regulatory Services (TDPRS) proposes an amendment to §700.1718, concerning purchased adoption services, in its Child Protective Services chapter. The purpose of the amendment is to (1) clarify and better describe the children for whom TDPRS purchases adoption and legal risk placement services; and (2) increase the maximum rates for purchased adoption and legal risk placement services. Currently, child-placing agencies may receive up to a maximum of $3,500 upon placement of an individual TDPRS child in an adoptive or legal risk home and an additional payment up

to $3,500 upon consummation of the adoption. The proposed amendment increases the maximum rates for an individual child up to $5,000 upon placement and up to $5,000 upon adoption consummation.

Mary Fields, Budget and Federal Funds Director, has determined that for the first five-year period the proposed section will be in effect there will be fiscal implications for state government as a result of enforcing or administering the section. The effect on state government for the first five-year period the amendment will be in effect is an estimated additional cost of $478,643 for fiscal year 2001, $526,507 for fiscal year 2002, $579,158 for fiscal year 2003, $637,074 for fiscal year 2004, and $700,781 for fiscal year 2005. There will be no fiscal implications for local government.

Ms. Fields also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that more adoptive homes will be available and adoptions will be achieved sooner. There will be no effect on large, small, or micro-businesses because TDPRS only purchases adoption services from nonprofit child placing agencies. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of the proposal may be directed to Susan Klickman at (512) 438-3302 in TDPRS's Child Protective Services Section. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-143, Texas Department of Protective and Regulatory Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Texas Government Code, the department has determined that Chapter 2007 of the Government Code does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

The amendment is proposed under the Human Resources Code (HRC), §40.029 , which authorizes the department to propose and adopt rules to comply with state law and implement departmental programs; and under the Texas Family Code, Chapters 261 and 264, which authorizes the department to provide services to alleviate the effects of child abuse and neglect.

The amendment implements the Human Resources Code, §40.029, and the Texas Family Code, Chapters 261 and 264.

§700.1718. Purchased Adoption Services.

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

(c) Client eligibility.

(1) Criteria. CPS purchases adoption services and legal risk placement services for children in TDPRS's managing conservatorship who:

(A) have a primary permanency plan of adoption [~~are members of a minority race or have a racially mixed background~~];

(B) are legally free for adoption, or for whom a motion for termination of parental rights has been filed and termination is pending; and [~~have a professionally diagnosed physical, mental, or emotional disability;~~]

(C) are not anticipated to be placed with or adopted by relatives. [~~siblings who need to be placed together; or~~]

~~[(D) are six years old or older.]~~

(2) (No change.)

(d) Types of purchased adoption services.

(1) When appropriate under the provisions in subsections (a)-(c) of this section, TDPRS contracts with providers to purchase the following [~~types of legal risk placement services and adoption services~~]:

(A) legal risk and adoptive placement services, including:

(i) recruitment, screening, and training of legal risk and adoptive families;

(ii) foster and adoptive home studies completed for a legal risk or adoptive placement;

(iii) preparation of the child and family related to foster care and adoption issues;

(iv) [~~(iii)~~] presentation of the child and pre-placement [~~preplacement~~] visits with the legal risk or adoptive family; and

(v) [~~(iv)~~] placement and supervision services; and

(B) post-placement [~~postplacement~~] services before consummation of the adoption, including:

(i) (No change.)

(ii) post-placement [~~placement~~] supervision.

(2) TDPRS may purchase placement and post-placement [~~postplacement~~] services together or separately.

(3) (No change.)

(e) Reimbursement of purchased legal risk placement services and adoption services.

(1) Basis of payment. TDPRS has established maximum payable amounts for purchased legal risk and adoption services. The first payment is made upon placement of a child in a legal risk or adoptive home. The second payment is made upon TDPRS's receipt of documentation that the child's adoption has been consummated. Only one payment for placement services is made when a child is placed in a legal risk placement that later converts into an adoptive placement. [~~The maximums are based on the costs that TDPRS incurs for providing adoption services directly.~~]

(2) Maximum payable amounts and required documentation. The following chart presents the:

(A) [~~the~~] maximum amounts that TDPRS pays for purchased legal risk placements and adoption services; and

(B) [~~the~~] documentation that contractors must provide to receive payment.

Figure: 40 TAC §700.1718(e)(2)(B)

(3)-(7) (No change.)

(f) The plan of operation for purchased legal risk or adoption services. In addition to including the elements specified in §700.1705(b) of this title (relating to Contract Documentation), the plan of operation in contracts for purchased adoption services must include the statements, agreements, and stipulations specified in this subsection:

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

(4) Placement services.

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

(F) A stipulation that the contractor must prepare a child and the child's prospective legal risk or adoptive parents for a placement as specified in CPS's policies and procedures for adoption services. The preparation must include:

(i)-(ii) (No change.)

(iii) as many additional pre-placement [~~preplacement~~] visits as necessary.

(G)-(I) (No change.)

(5) Post-placement [~~Postplacement~~] services.

(A)-(I) (No change.)

(6) Post-adoption [~~Postadoption~~] services. A stipulation that the contractor must provide information about the TDPRS post-adoption program and services available prior to an adoption being consummated. If the adoptive family needs additional services to support the adoption, the contractor must help the family find other sources of support and services. If the family returns for case record information, the contractor must assist the family and/or adult adoptee in obtaining this information whether the purpose is for background HSEGH, searching, or specific background details entitled to the person pursuant to the Texas Family 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 July 28, 2000.

TRD-200005226
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: September 22, 2000
For further information, please call: (512) 438-3437

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CHAPTER 740. INVESTIGATIONS

The Texas Department of Protective and Regulatory Services (TDPRS) proposes the repeal of Chapter 740, consisting of §§740.1-740.3, 740.1001, and 740.1002, concerning Investigations. As part of the rule review required by the Texas Government Code, §2001.039 and the General Appropriations Act of 1997, Article IX, §167, TDPRS is proposing to delete these rules, which were administratively transferred from the Texas Department of Human Services to TDPRS in 1992. The information in §§740.1 and 740.2 is included in TDPRS's Licensing rules. Section 740.3 is no longer needed. Sections 740.1001 and 740.1002 are requirements of DHS, which were inadvertently adopted by TDPRS.

Mary Fields, Budget and Federal Funds Director, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Fields 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 that obsolete rules will be deleted. There will be no effect on large, small, or micro businesses because no new requirements are being implemented. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of the proposal may be directed to Phoebe Knauer at (512) 438-5916 in TDPRS's Legal Services. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-136, Texas Department of Protective and Regulatory Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

Under §2007.003(b) of the Texas Government Code, the department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

SUBCHAPTER A. GENERAL PROCEDURES

40 TAC §§740.1 - 740.3

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

The repeals are proposed under the Human Resources Code, §40.029, which authorizes the department to adopt rules that facilitate the implementation of departmental programs.

The repeals implement the Human Resources Code, §42.029.

§740.1. Licensing Investigations.

§740.2. Investigation of Unlicensed Operating Facilities.

§740.3. Investigations Referred by Commissioner.

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

Filed with the Office of the Secretary of State, on July 28, 2000.

TRD-200005235
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: September 22, 2000
For further information, please call: (512) 438-3437

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SUBCHAPTER E. CRIMINAL CONVICTION CHECKS OF EMPLOYEES IN CERTAIN FACILITIES SERVING THE ELDERLY OR DISABLED

40 TAC §§740.1001, 740.1002

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

The repeals are proposed under the Human Resources Code, §40.029, which authorizes the department to adopt rules that facilitate the implementation of departmental programs.

The repeals implement the Human Resources Code, §42.029.

§740.1001. Basis.

§740.1002. Facilities 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 July 28, 2000.

TRD-200005234

C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: September 22, 2000
For further information, please call: (512) 438-3437

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WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 7. BANKING AND SECURITIES

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER D. POWERS OF CREDIT UNIONS

7 TAC §91.401

The Credit Union Department has withdrawn from consideration a proposed amendment to §91.401, which appeared in the May 26, 2000, issue of the *Texas Register* (25 TexReg 4684).

Filed with the Office of the Secretary of State on July 31, 2000.

TRD-200005339
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: July 31, 2000
For further information, please call: (512) 837-9236

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TITLE 22. EXAMINING BOARDS

PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 341. LICENSE RENEWAL

22 TAC §341.6

The Texas Board of Physical Therapy Examiners has withdrawn from consideration a proposed amendment to §341.6, which appeared in the May 26, 2000, issue of the *Texas Register* (25 TexReg 4686).

Filed with the Office of the Secretary of State on July 25, 2000.

TRD-200005139
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Effective date: July 25, 2000
For further information, please call: (512) 305-6900

♦ ♦ ♦

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 85. ADMISSION AND PLACEMENT

SUBCHAPTER B. PLACEMENT PLANNING

37 TAC §85.23

The Texas Youth Commission has withdrawn from consideration a proposed amendment to §85.23, which appeared in the March 24, 2000, issue of the *Texas Register* (25 TexReg 2552).

Filed with the Office of the Secretary of State on July 27, 2000.

TRD-200005204
Steve Robinson
Executive Director
Texas Youth Commission
Effective date: July 27, 2000
For further information, please call: (512) 424-6301

♦ ♦ ♦

ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 1. ADMINISTRATION

PART 5. GENERAL SERVICES COMMISSION

CHAPTER 117. SUPPORT SERVICES DIVISION

SUBCHAPTER D. PRINTING

1 TAC §117.61

The General Services Commission adopts new 1 TAC §117.61 regarding Printing. The new §117.61 is adopted without changes to the proposed text that was published in the June 23, 2000, issue of the *Texas Register* (25 TexReg 6011). The text will not be republished.

The new §117.61 is adopted in order to establish procedures and guidelines to assist, assess, and evaluate agencies with printing activities pursuant to the requirements of the Texas Government Code, §2172.003.

The new §117.61 will assess and coordinate printing activities between state agency printing shops.

No comments were received concerning the proposed new 1 TAC §117.61.

The new §117.61 is adopted under the authority of Texas Government Code, Title 10, Subtitle D, §2152.003 and §2172.003 which provide the General Services Commission with the authority to promulgate rules necessary to implement the 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 July 24, 2000.

TRD-200005102
Ann Dillon
General Counsel
General Services Commission
Effective date: August 13, 2000
Proposal publication date: June 23, 2000
For further information, please call: (512) 463-3960

♦ ♦ ♦

CHAPTER 123. FACILITIES CONSTRUCTION AND SPACE MANAGEMENT DIVISION

The General Services Commission adopts the repeal of 1 TAC, Chapter 123 - Facilities Construction and Space Management Division; Subchapter A - Capitol Area Development Program, §§123.1 - 123.3; Subchapter B - Building Construction Administration, §§123.11 - 123.21, 123.23; and Subchapter C, §§123.31 - 123.34 concerning the Prevailing Wage Rate Determination. The repeal is adopted without changes to the proposal that was published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5761).

The repeal of Chapter 123 is adopted in order to adopt a new 1 TAC, Chapter 123, which contains language in accordance with the Texas Government Code, Title 10, Subtitle D, Chapter 2166.

The repeal of Chapter 123 will delete obsolete language.

No comments have been received concerning the adoption of the repeal of 1 TAC, Chapter 123.

SUBCHAPTER A. CAPITOL AREA DEVELOPMENT PROGRAM

1 TAC §§123.1 - 123.3

The repeal of 1 TAC, Chapter 123 is adopted under the Government Code, Title 10, Subtitle D, Chapter 2166, §2166.062, which provides the General Services Commission with the authority to promulgate rules consistent with 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 July 24, 2000.

TRD-200005099
Ann Dillon
General Counsel
General Services Commission
Effective date: August 13, 2000
Proposal publication date: June 16, 2000
For further information, please call: (512) 463-3960

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SUBCHAPTER B. BUILDING CONSTRUCTION ADMINISTRATION

1 TAC §§123.11 - 123.21, 123.23

The repeal of 1 TAC, Chapter 123 is adopted under the Government Code, Title 10, Subtitle D, Chapter 2166, §2166.062, which provides the General Services Commission with the authority to promulgate rules consistent with the chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Ann Dillon
General Counsel
General Services Commission
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For further information, please call: (512) 463-3960

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SUBCHAPTER C. PREVAILING WAGE RATE DETERMINATION

1 TAC §§123.31 - 123.34

The repeal of 1 TAC, Chapter 123 is adopted under the Government Code, Title 10, Subtitle D, Chapter 2166, §2166.062, which provides the General Services Commission with the authority to promulgate rules consistent with the chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Ann Dillon
General Counsel
General Services Commission
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For further information, please call: (512) 463-3960

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CHAPTER 123. FACILITIES CONSTRUCTION AND SPACE MANAGEMENT DIVISION

The General Services Commission adopts new 1 TAC, Chapter 123 - Facilities Construction and Space Management Division; Subchapter A - General Matters, §123.1 and §123.2; Subchapter B - Real Property Acquisition, §123.12 and §123.13; Subchapter C - Construction Project Administration, §§123.23 - 123.33; and Subchapter D - Wage Rates, §123.43 and §123.44. The new rules are adopted without changes to the proposed text that was published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5762). The text will not be republished.

The new 1 TAC, Chapter 123 is adopted in order to bring all rules governing the division's activities into accordance with the Texas Government Code, Title 10, Subtitle D, Chapter 2166.

The new rules under this chapter updates, restructures, and revises language, and creates more efficient agency processes.

No comments have been received concerning the proposed new 1 TAC, Chapter 123.

SUBCHAPTER A. GENERAL MATTERS

1 TAC §123.1, §123.2

The new 1 TAC, Chapter 123 is adopted under the Government Code, Title 10, Subtitle D, Chapter 2166, §2166.062, which provides the General Services Commission with the authority to promulgate rules consistent with the 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.

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Ann Dillon
General Counsel
General Services Commission
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For further information, please call: (512) 463-3960

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SUBCHAPTER B. REAL PROPERTY ACQUISITION

1 TAC §123.12, §123.13

The new 1 TAC, Chapter 123 is adopted under the Government Code, Title 10, Subtitle D, Chapter 2166, §2166.062, which provides the General Services Commission with the authority to promulgate rules consistent with the 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.

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Ann Dillon
General Counsel
General Services Commission
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Proposal publication date: June 16, 2000
For further information, please call: (512) 463-3960

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SUBCHAPTER C. CONSTRUCTION PROJECT ADMINISTRATION

1 TAC §§123.23 - 123.33

The new 1 TAC, Chapter 123 is adopted under the Government Code, Title 10, Subtitle D, Chapter 2166, §2166.062, which provides the General Services Commission with the authority to promulgate rules consistent with the 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.

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Ann Dillon
General Counsel
General Services Commission
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For further information, please call: (512) 463-3960

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SUBCHAPTER D. WAGE RATES

1 TAC §123.43, §123.44

The new 1 TAC, Chapter 123 is adopted under the Government Code, Title 10, Subtitle D, Chapter 2166, §2166.062, which provides the General Services Commission with the authority to promulgate rules consistent with the 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.

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Ann Dillon
General Counsel
General Services Commission
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Proposal publication date: June 16, 2000
For further information, please call: (512) 463-3960

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CHAPTER 125. SUPPORT SERVICES DIVISION--TRAVEL AND VEHICLE SUBCHAPTER A. TRAVEL MANAGEMENT SERVICES

1 TAC §§125.1, 125.3, 125.5, 125.7, 125.9, 125.11, 125.13, 125.15, 125.17, 125.19, 125.21, 125.23, 125.25, 125.27, 125.29

The General Services Commission adopts the amendments to Title 1, T.A.C, Chapter 125, Subchapter A, §§125.1, 125.3, 125.5, 125.7, 125.9,125.11, 125.13, 125.15, 125.17, 125.19, 125.21, 125.23, 125.25, 125.27, and 125.29, concerning the Travel Management Services. The amendments to §125.1 and §125.19 are adopted with changes to the proposed text as published in the May 26, 2000, issue of the *Texas Register* (25 TexReg 4674). Amendments to all other sections are adopted without changes and will not be republished.

The amendments to Chapter 125, Subchapter A are adopted to clarify language and procedures in compliance with Chapter 2171, Texas Government Code.

The amendments to Chapter 125 are adopted in order to streamline procedures, provide comprehensive definitions, and update terminology relating to the State Travel Management Program.

Two commenters responded to the proposed amendments to the Travel Management Services rules. The comments addressed the following: 1)official county business travel in §125.1(a); 2) a lower fare offered to the general public by a non-contract travel vendor; and 3) a contract vendor experiencing a real or anticipated labor disruption.

The commission disagrees that language on official county business needs to be inserted in §125.1(b). The commission believes that the commenter interpreted the services provided to only state agencies for official state business travel expenses in §125.1 (b) had inadvertently omitted county officers and employees traveling on official county business. The language that extends the use of the contract airline fares to counties is included in §125.1(c) and §125.29. To improve readability, language in 125.1(c) has been deleted and now reads "use of the State Travel Management Program's Contract Airline Fares is extended to a Texas county employee, or persons who are in the custody of the state. . ." Language in §125.29(a) has also been deleted and now reads "a Texas county officer or employee, or persons who are in the custody of the state. . ."

The commission agrees that if a travel service contract vendor matches a lower fare/rate offered to the general public by a non-contract travel vendor that results in a lower total cost to the state, the travel service contract vendor must be used. The commission has changed the language in §125.19(d)(2) relating to exceptions in using the travel service contracts to read "{U}se of a non-contract travel vendor is less than the contract fare or rate which is offered to the general public, and/or when all trip expenses are evaluated, including ground transportation, insurance fees, parking fees, taxes, and travel time, the use results in a lower total overall cost to the state. If the contract travel vendor offers the same lower fare or rate, the contract travel vendor must be used, unless a valid exception exists."

The commission disagrees that the language in §125.19(d)(3) should be changed. When the commission is informed by the contract carrier of the date of an anticipated labor disruption, the commission immediately informs the state agencies through written communication and suggests that the state travelers not book air reservations on the contract carrier beginning the first day of the announced anticipated labor disruption by the contract carrier. When the commission is informed by the contracted carrier that the carrier is operating again, the state agencies are instructed to tell their travelers to immediately begin using the contract carrier. Information on labor disruptions will be put on the commission's web page. It is not in the best interest of the state to have the state travelers using non-contract carrier until after the disruption has commenced on the contracted carrier because of the possibility of state travelers being stranded at airports. The commission makes every attempt to keep the state agencies and the state travelers informed of any labor disruption that has been announced by the contract carrier. No changes have been made to the rules.

American Airlines - Against Craig Pardue, County Administration, Commissioners Court, Dallas - Against

The amendments are adopted under the authority of the Texas Government Code, Title 10, Subtitle D, §§2152.003 and 2171.002 which provides the General Services Commission with the authority to promulgate rules necessary to implement the sections.

§125.1. General.

(a) The travel and vehicle fleet services program of the commission administers the State Travel Management Program.

(b) State Travel Management Program services are provided to state agencies, their employees, elected or appointed officers, and

other persons entitled to reimbursement for official state business travel expenses incurred on behalf of the state.

(c) Use of the State Travel Management Program's Contract Airline Fares is extended to a Texas county employee or persons who are in the custody of the state, provided that the county has elected to participate in the program that provides this service.

(d) It is the policy of the commission to administer the State Travel Management Program to provide timely and efficient travel services to eligible entities as defined in subsections (b) and (c) of this section, and to generate savings, whenever possible.

(e) These rules are intended to be consistent with the State of Texas Travel Allowance Guide published by the comptroller of public accounts.

§125.19. Participation by State Agencies.

(a) State agencies' participation in the program is as follows:

(1) State agencies in the executive branch of state government shall participate in the program and use the travel agency, charge card, rental car, airline, hotel, and other travel services negotiated by the program;

(2) Institutions of higher education are not required to use the travel agency services contracts, but are required to use all other travel services contracts when such purchases are made using general revenue funds or educational and general funds as defined by the Education Code, § 51.009;

(3) The Employees Retirement System of Texas is not required to participate in the contract travel agency services or other travel services purchased from funds other than general revenue funds.

(b) A state agency that is not required to use the commission's travel services contracts, shall:

(1) Participate at its own option.

(2) Use the corporate travel charge card services if a state agency decides to use travel agency services contracts.

(3) Give the commission's program at least 60 days advance written notice if the state agency terminates its participation in the program.

(c) To begin participating in the travel agency and/or corporate travel charge card contracts, a state agency must submit a completed travel service requisition to the program and then the commission will:

(1) Preview and approve participation by the requesting state agency in the Program upon a determination that the program is capable of providing those services requested; and

(2) If the program cannot provide those services requested, then the director of Support Services Division shall not approve the travel service requisition and shall so notify the requesting state agency in writing as to the reasons for this determination.

(d) The commission's travel services contracts must be used unless at least one exception listed in paragraphs (1)-(4) of this subsection exists. Travel Agent contracts are not affected by the conditions listed in paragraphs (2)-(5) of this subsection.

(1) Contract travel agency alternative. Use of an authorized alternative method is allowable because the state traveler is already in travel status which renders the use of a contract travel agency impractical or unnecessary; airline reservations are not required; or travel is undertaken as part of a group program for which reservations must be made through a specified source to obtain a particular rate and/or service.

(2) Lower total cost to the state. Use of a non-contract travel vendor is less than the contract fare or rate which is offered to the general public, and/or when all trip expenses are evaluated, including ground transportation, insurance fees, parking fees, taxes, and travel time, the use results in a lower total overall cost to the state. If the contract travel vendor offers the same lower fare or rate, the contract travel vendor must be used, unless a valid exception exists.

(3) Efficient use of services. Use of a non-contract travel vendor is necessary because the contract travel vendor is sold out, is not able to provide services at the time or location necessary to accomplish the purpose of the trip, has a real or anticipated labor disruption, or is providing negotiated rates for group travel.

(4) Health and safety issues. Use of a non-contract travel vendor may be allowed when a state traveler finds that the accommodations provided by the vendor may reasonably present a risk to the state traveler or person under the state's custody in the following circumstances:

(A) Accommodations may lack a reasonable amount of security or safety, and/or may present a health risk based on the state traveler's individual needs;

(B) Accommodations fail to provide an adequate amount of services required for a person with disabilities; or

(C) Accommodations have limited availability of medical emergency facilities or equipment that may be required by a state traveler or person under the state's custody.

(5) Corporate travel charge card alternative. Use of a personal charge card is allowable only for non-contract airfares used in accordance with this chapter if it offers insurance benefits not available from the state's corporate travel charge card contract.

(e) An exception must be indicated on or with a voucher or other payment document as specified by the comptroller of public accounts. State agencies shall establish travel procedures to comply with this subsection and submit them to the program for approval.

(f) A state agency required to use the commission's travel services contracts may not purchase or reimburse a person for the purchase of commercial airline or rental car transportation in an amount exceeding the contract rate established by the commission unless an exception identified in subsection (d) of this section exists. The exception must be indicated on or with the voucher or other payment document as specified by the comptroller of public accounts.

(g) Contract rates will be distributed by the commission to state agencies and the comptroller of public accounts when contracts are established by the program.

(h) When a voucher or other payment document for travel services is submitted to the comptroller of public accounts and it does not show that a travel services contract was properly used or an exception listed in subsection (d) of this section is not reflected the comptroller of public accounts will handle the document as specified in paragraphs (1) and (2) of this subsection.

(1) Pre-payment audits by the comptroller of public accounts .

(A) Except as provided in subparagraph (B) of this paragraph, the comptroller of public accounts may not refuse to process a voucher or other payment document solely because it involves the non-use of a travel services contract negotiated by the Program. The comptroller of public accounts will report instances of non-compliance to the commission.

(B) The comptroller of public accounts will not process a voucher or other payment document that requests payment or reimbursement of commercial airline or rental car transportation that exceeds the amount of the contract rate unless a valid exception is noted. The comptroller of public accounts will report instances of non-compliance to the commission.

(2) Post-payment audits by the comptroller of public accounts .

(A) Except as provided in subparagraph (B) of this paragraph, the comptroller of public accounts may not require a state agency to obtain a refund of a payment or reimbursement made under a voucher or other payment document that shows the non-use of a contract travel service. The comptroller of public accounts shall report instances of non-compliance to the commission.

(B) The comptroller of public accounts may take the actions authorized by Government Code, §403.071 (h), concerning a voucher or other payment document that shows a payment or reimbursement of commercial airline or rental car transportation that exceeds the program's contract rate. The comptroller of public accounts shall report instances of non-compliance to the commission.

(i) A state agency may submit a written request for exemption from the required use of one or more travel services contracts. The commission will approve an exemption if it determines that such an exemption would provide an economic or service benefit to the state, taking into account any affect on the commission's contracts and ability to obtain favorable contracts in the future. An exemption expires when the related contract is terminated or replaced.

This agency 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 July 25, 2000.

TRD-200005140
Ann Dillon
General Counsel
General Services Commission
Effective date: August 14, 2000
Proposal publication date: May 26, 2000
For further information, please call: (512) 463-3960

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMMISSION

CHAPTER 353. MEDICAID MANAGED CARE

SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §353.3

The Health and Human Services Commission (HHSC) adopts new §353.3 in 1 TAC Chapter 353, Medicaid Managed Care, Subchapter A, General Provisions, without changes to the proposed text as published in the April 21, 2000, issue of the *Texas Register* (25 TexReg 3355).

Section 353.3 describes the experience rebate policy for contracts between the state and health maintenance organizations (HMOs) operating in the STAR and STAR+Plus programs.

No public comments were received regarding the proposed rule.

The rule is adopted under the Texas Government Code, §531.033, the Texas Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provides the commissioner of HHSC with broad rulemaking authority, and provides HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

This agency 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 July 31, 2000.

TRD-200005323
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Effective date: August 20, 2000
Proposal publication date: April 21, 2000
For further information, please call: (512) 424-6576

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CHAPTER 355. MEDICAID REIMBURSEMENT RATES

SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.101

The Texas Health and Human Services Commission (HSSC) adopts an amendment to §355.101 without changes to the proposed text published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5533).

Justification for the amendment is to establish payment rates for two years coincident with the state biennium. It will allow payment rates to be determined at the same time that the state legislature is establishing funding for these programs for the state's biennium. The amendment requires that payment rates for the Nursing Facility, Community Based Alternatives Waiver, Community Living Assistance and Support Services, Primary Home Care, Day Activity and Health Services, and Deaf-Blind Multiple Disabilities Waiver programs be determined on a state fiscal year basis for a period of two years.

The Texas Department of Human Services adopts similar policy for non-Medicaid funded services, codified at 40 TAC §20.101, in this issue of the *Texas Register*.

The department received no comments regarding adoption of the amendment.

The amendment is adopted under the Government Code, §531.033, which authorizes the commissioner of the Health and Human Services Commission to adopt rules necessary to carry out the commission's duties, and §531.021(b), which establishes the commission as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under Chapter 32, Human Resources Code.

The amendment implements the Government Code, §§531.033 and 531.021(b).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 27, 2000.

TRD-200005203
Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 438-3108

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SUBCHAPTER F. GENERAL REIMBURSEMENT METHODOLOGY FOR ALL MEDICAL ASSISTANCE PROGRAMS

1 TAC §355.731, §355.744

The Texas Health and Human Services Commission (THHSC) adopts the repeals of §355.731 and §355.744 of Chapter 355, Medicaid Reimbursement Rates, Subchapter F, governing general reimbursement methodology for all medical assistance programs, without changes to the proposal as published in the April 14, 2000, issue of the *Texas Register* (25 TexReg 3129).

Section 355.731 is repealed because it conflicts with 25 TAC §419.666 (relating to Provider Reimbursement), which was adopted to be effective March 1, 2000. Section 355.744 (relating to Right to Appeal) is repealed because provisions regarding fair hearings for Medicaid recipients of service coordination (previously referred to as case management) are described in 25 TAC §412.464.

No public comment on the proposal was received.

The repeals are adopted under the Texas Government Code, §531.033, which provides the commissioner of THHSC with broad rulemaking authority; the Texas Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide THHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides THHSC with the authority to adopt rules governing the determination of Medicaid rates.

This agency 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 July 31, 2000.

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Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Effective date: August 20, 2000
Proposal publication date: April 14, 2000
For further information, please call: (512) 206-5216

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CHAPTER 381. GUARDIANSHIP SERVICES

The Health and Human Services Commission (HHSC) adopts amendments to §§381.1, 381.2, 381.101, 381.102, 381.202, and 381.205 of Chapter 381, relating to guardianship services, without changes to the proposed text as published in the March 24, 2000, issue of the *Texas Register* (25 TexReg 2495).

The amendments implement changes to chapter 381 enacted by the 76th Texas Legislature.

No public comments were received concerning the proposed amendments.

SUBCHAPTER A. PURPOSE AND DEFINITION

1 TAC §381.1, §381.2

The amendments are adopted under the Government Code, §531.033, which authorizes HHSC to adopt rules necessary to carry out its statutory duties, and §531.125, which authorizes HHSC to adopt rules for the award of grants to local guardianship programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200005320
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Effective date: August 20, 2000
Proposal publication date: March 24, 2000
For further information, please call: (512) 424-6576

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SUBCHAPTER B. GUARDIANSHIP ADVISORY BOARD

1 TAC §381.101, §381.102

The amendments are adopted under the Government Code, §531.033, which authorizes HHSC to adopt rules necessary to carry out its statutory duties, and §531.125, which authorizes HHSC to adopt rules for the award of grants to local guardianship programs.

The adopted amendments affect Government Code, §§531.122, 531. 1235, 531.124 ,and 531.125, which provide HHSC with the authority to appoint a guardianship advisory board and prescribe the duties of the guardianship advisory board, and HHSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 31, 2000.

TRD-200005321
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Effective date: August 20, 2000
Proposal publication date: March 24, 2000
For further information, please call: (512) 424-6576

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SUBCHAPTER C. GRANTS FOR LOCAL GUARDIANSHIP PROGRAMS

1 TAC §381.202, §381.205

The amendments are adopted under the Government Code, §531.033, which authorizes HHSC to adopt rules necessary to carry out its statutory duties, and §531.125, which authorizes HHSC to adopt rules for the award of grants to local guardianship programs.

The adopted amendments affect Government Code, §531.125, which authorizes HHSC to adopt rules necessary to award grants to local guardianship programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Effective date: August 20, 2000
Proposal publication date: March 24, 2000
For further information, please call: (512) 424-6576

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TITLE 4. AGRICULTURE

PART 1. TEXAS DPEARTMENT OF AGRICULTURE

CHAPTER 3. BOLL WEEVIL ERADICATION PROGRAM

SUBCHAPTER F. GENERAL PROCEDURES

4 TAC §3.200

The Texas Department of Agriculture (the department) adopts the repeal of §3.200, concerning an expiration date for Chapter 3, relating to Boll Weevil Eradication Program, without changes to the proposal published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5570). The repeal of §3.200 is adopted because the establishment of an expiration date for Chapter 3 is no longer necessary due to the enactment of legislation establishing a timeframe for review of agency rules. The repeal of §3.200 eliminates the expiration date for Chapter 3.

No comments were received on the proposal.

The repeal is adopted under the Texas Agriculture Code, §12.016 which provides the Department with the authority to adopt rules to administer the Texas Agriculture 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 July 27, 2000.

TRD-200005208
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: August 16, 2000
Proposal publication date: June 16, 2000
For further information, please call: (512) 436-4075

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CHAPTER 9. SEED QUALITY

SUBCHAPTER F. SAMPLING PROCEDURES

4 TAC §9.13

The Texas Department of Agriculture (the department) adopts the repeal of §9.13, concerning an expiration date for Chapter 9, relating to Seed Quality, without changes to the proposal published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5570). The repeal of §9.13 is adopted because the establishment of an expiration date for Chapter 9 is no longer necessary due to the enactment of legislation establishing a timeframe for review of agency rules. The repeal of §9.13 eliminates the expiration date for Chapter 9.

No comments were received on the proposal.

The repeal is adopted under the Texas Agriculture Code, §12.016 which provides the Department with the authority to adopt rules to administer the Texas Agriculture 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.

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TRD-200005209
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: August 16, 2000
Proposal publication date: June 16, 2000
For further information, please call: (512) 463-4075

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CHAPTER 10. SEED CERTIFICATION STANDARDS

SUBCHAPTER I. MISCELLANEOUS PROVISIONS

4 TAC §10.31

The Texas Department of Agriculture (the department) adopts the repeal of §10.31, concerning an expiration date for Chapter 10, relating to Seed Certification Standards, without changes to the proposal published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5571). The repeal of §10.31 is adopted because the establishment of an expiration date for Chapter 10 is no longer necessary due to the enactment of legislation establishing a timeframe for review of agency rules. The repeal of §10.31 eliminates the expiration date for Chapter 10.

No comments were received on the proposal.

The repeal is adopted under the Texas Agriculture Code, §12.016 which provides the Department with the authority to adopt rules to administer the Texas Agriculture 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.

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TRD-200005210
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Texas Department of Agriculture
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Proposal publication date: June 16, 2000
For further information, please call: (512) 463-4075

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CHAPTER 13. GRAIN WAREHOUSE

4 TAC §13.5

The Texas Department of Agriculture (the department) adopts the repeal of §13.5, concerning an expiration date for Chapter 13, relating to Grain Warehouse, without changes to the proposal published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5571). The repeal of §13.5 is adopted because the establishment of an expiration date for Chapter 13 is no longer necessary due to the enactment of legislation establishing a timeframe for review of agency rules. The repeal of §13.5 eliminates the expiration date for Chapter 13.

No comments were received on the proposal.

The repeal is adopted under the Texas Agriculture Code, §12.016 which provides the Department with the authority to adopt rules to administer the Texas Agriculture 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.

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Dolores Alvarado Hibbs
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Texas Department of Agriculture
Effective date: August 16, 2000
Proposal publication date: June 16, 2000
For further information, please call: (512) 463-4075

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CHAPTER 16. AQUACULTURE

4 TAC §16.4

The Texas Department of Agriculture (the department) adopts the repeal of §16.4, concerning an expiration date for Chapter 16, relating to Aquaculture, without changes to the proposal published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5571). The repeal of §16.4 is adopted because the establishment of an expiration date for Chapter 16 is no longer necessary due to the enactment of legislation establishing a timeframe for review of agency rules. The repeal of §16.4 eliminates the expiration date for Chapter 16.

No comments were received on the proposal.

The repeal is adopted under the Texas Agriculture Code, §12.016 which provides the Department with the authority to adopt rules to administer the Texas Agriculture 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.

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Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
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TITLE 7. BANKING AND SECURITIES

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER E. DIRECTION OF AFFAIRS

7 TAC §91.502

The Texas Credit Union Commission adopts new §91.502 pertaining to directors' fees and expenses. The first request for comments was published in the February 11, 2000 issue of the *Texas Register* (25 TexReg 1011). Based on the number of comments initially received, the Commission modified the proposal and republished it for comment in the May 5, 2000 issue of the *Texas Register* (25 TexReg 3883). No changes are being made to that proposed text. This rule replaces existing §91.506(a) which is being repealed as noticed elsewhere in this issue of the *Texas Register*.

The rule sets forth the limitations on payment of fees to and expenses for directors, including a requirement that a credit union cannot pay such fees if it is operating under a net worth restoration plan unless a waiver is first obtained from the commissioner.

No comments were received on the proposal.

The new rule is adopted under the provisions of §15.402 of the Texas Finance Code, which is interpreted as authorizing the Credit Union Commission to adopt reasonable rules necessary for administering Subtitle D, Title 3, Texas Finance Code (Texas Credit Union Act); and §122.062 of the Texas Finance Code, which authorizes the Commission to establish by rule the nature of the fees that can be paid to a director, as well as the type of expenses for which a director may be reimbursed.

The specific section affected by the rule is Texas Finance Code §122.062.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Harold E. Feeney
Commissioner
Credit Union Department
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For further information, please call: (512) 837-9236

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7 TAC §91.506

The Texas Credit Union Commission adopts the repeal §91.506, without changes as published in the February 11, 2000 issue of the *Texas Register* (25 TexReg 1005).

The rule being repealed as a result of the adoption of two new rules, 7 T.A.C. §91.502 and §91.510, being adopted in conjunction with the Commission's four-year Rule Review. The new rules are printed elsewhere in this issue of the *Texas Register*.

No comments were received on the proposal to repeal this section.

This repeal is adopted under the provisions of §122.062 of the Texas Finance Code, which is interpreted as authorizing the Commission to establish rules regarding the payment of fees and the reimbursement of other expenditures to credit union board members; and §122.063 of the Texas Finance Code, which is interpreted as authorizing the Commission to set the requirements for purchasing a blanket surety or security bond on directors, officers, employees, and agents of credit unions.

The specific sections affected by the repeal of this rule are §122.062 and 122.063 of the Texas Finance Code.

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Harold E. Feeney
Commissioner
Credit Union Department
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For further information, please call: (512) 837-9236

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7 TAC §91.510

The Texas Credit Union Commission adopts new §91.510 pertaining to bond and insurance requirements. The first request for comments was published in the February 11, 2000 issue of the *Texas Register* (25 TexReg 1012). Based on the number of comments initially received, the Commission modified the proposal and republished it for comment in the May 5, 2000 issue of the *Texas Register* (25 TexReg 3884). No changes to the proposed text are being made. This rule replaces existing §91.506(b) and (c) which is being repealed as noticed elsewhere in this issue of the *Texas Register*.

The new rule sets forth the minimum insurance coverage required and the maximum deductible allowed based on a credit union's asset size. The rule also removes the requirement that the surety company be approved by the commissioner; the surety company must, however, be authorized by the commissioner for the Texas Department of Insurance as an acceptable fidelity on bonds in this state.

The Commission received three comment letters on the proposal from the Texas Credit Union League, U.S. Employees CU, and Corpus Christi City Employees CU (CCCECU). One commenter was concerned that coverages in the amounts proposed may not be available and stated that the Commission needs to ensure that its rules can be complied with by credit unions. Department staff has ascertained that such coverages are available. CCCECU opined that if NCUA, the primary share and deposit share insurer, doesn't object to existing minimum bonding limits in Texas, then there shouldn't be an urgency to make changes to the existing bonding requirements. This sentiment is echoed to some extent by the Texas Credit Union League who stated that out of 32 states surveyed, only one other state requires bond coverage greater than the amount required by the share insurer. CCCECU goes on to say that ultimately it is the share insurer that has the most to lose on any extraordinary bond claim that may jeopardize a credit union's solvency. The Commission disagrees with this line of thinking. The Commission is responsible for protecting the citizens of Texas by ensuring the effective supervision of credit unions under its jurisdiction. Recent experience has shown the Commission that additional bond coverage is needed. Furthermore, while the share insurer may be required to pay out funds to members in the event an extraordinary bond claim puts a credit union into insolvency, other credit unions may eventually bear the burden as the credit union industry as a whole is responsible for keeping the share insurance fund adequately capitalized.

The new rule is adopted under the provisions of §15.402 of the Texas Finance Code that authorize the Credit Union Commission to adopt reasonable rules necessary for administering Subtitle D, Title 3, Texas Finance Code (Texas Credit Union Act); and §122.063 of the Texas Finance Code that authorizes the Commission to establish by rule bond requirements.

The specific section affected by this rule is Texas Finance Code §122.063.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Harold E. Feeney
Commissioner
Credit Union Department
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SUBCHAPTER F. ACCOUNTS AND SERVICES

7 TAC §91.601

The Texas Credit Union Commission adopts amendments to §91.601 relating to share and deposit accounts. The amended rule is adopted without change to the proposed text published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3885).

One amendment gives the board of directors full authority to determine the type of share and deposit accounts to be offered by the credit union, along with the terms and conditions of the accounts, provided the board has adopted and implemented appropriate policies and procedures addressing asset liability

management and maintaining adequate liquidity. Another amendment eliminates the categorization of deposit and share accounts as capital for regulatory purposes given that federal law now requires all federally insured credit unions to follow generally accepted accounting principles for reporting purposes. The Credit Union Commission has always required Texas credit unions to comply with GAAP but allowed them to utilize the NCUA's 5300 reports for reporting purposes in an effort to reduce regulatory burden. A new subsection was added to conform the conditions for accepting non-member deposits to the regulations governing federal share and deposit insurance coverage. Lastly, a credit union accepting noninsured, non-member deposits is now required by rule to disclose to those depositors that their funds would not be insured.

No comments were received on the proposal.

The amendments are adopted under the provisions of §15.402 of the Texas Finance Code that are interpreted to authorize the Credit Union Commission to adopt reasonable rules necessary for administering Subtitle D, Title 3, Texas Finance Code (Texas Credit Union Act).

The specific sections affected by this amended rule are Texas Finance Code, §§123.202, 123.203, and 123.204.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Harold E. Feeney
Commissioner
Credit Union Department
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7 TAC §91.602

The Texas Credit Union Commission adopts new §91.602 relating to solicitation and acceptance of brokered deposits without changes to the proposed text published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3886).

The rule defines brokered deposits prohibits credit unions experiencing net worth adequacy problems from accepting them without prior approval of the commissioner.

No comments were received on the proposal.

The new rule is adopted under the provisions of §15.402 of the Texas Finance Code that is interpreted to authorize the Credit Union Commission to adopt reasonable rules necessary for administering Subtitle D, Title 3, Texas Finance Code (Texas Credit Union Act).

The specific sections affected by this rule are Texas Finance Code, §§123.202, 123.203, and 123.204.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Harold E. Feeney
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7 TAC §91.608

The Texas Credit Union Commission adopts amendments to §91.608 relating to confidentiality of member records, with two nonsubstantive changes to the proposed text as published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3887).

One amendment changes the term "reports and/or data" to simply read "information" in subsections (a) and (b). In paragraph (4) of subsection (a), the Commission is adding certain terms for clarification purposes. For consistency purposes, a heading under subsection (b) is being added. Lastly, a new subsection is added that requires credit unions to develop and implement a written policy on the protection of personal information of individual members in the credit union's possession.

One comment was received on the proposal from the Texas Credit Union League ("League"). The League recommended that a new paragraph be added to subsection (a) to read "(6) as otherwise authorized by law." The addition would then cover any existing or future legal requirements for disclosure of member information that are not encompassed in paragraphs (1) through (5). The League also recommended the insertion of the word "nonpublic" in subsection (c) given that a credit union is not required to maintain the confidentiality of information generally available to the public. The Commission agreed on both additions and have incorporated them into the final rule.

The amendments are adopted under the provisions of §15.402 of the Texas Finance Code that are interpreted to authorize the Credit Union Commission to adopt reasonable rules necessary for administering Subtitle D, Title 3, Texas Finance Code (Texas Credit Union Act).

The specific section affected by the amended rule is Texas Finance Code, §125.402.

§91.608. Confidentiality of Member Records.

(a) Confidentiality of members' accounts. No credit union officer, director, committee member or employee may disclose to any person, other than the member, or to any company or governmental body the individual savings, shares, or loan records of any credit union member, contained in any document or system, by any means unless specifically authorized to do so in writing by such the members, except as follows:

(1) reporting credit experience to a bona fide credit reporting agency, another credit union, or any other bona fide credit-granting business and/or merchants information exchange, provided that applicable state and federal laws and regulations pertaining to credit collection and reporting are followed;

(2) furnishing information to a duly constituted government agency or taxing authority, or any subdivision thereof, including law enforcement agencies;

(3) furnishing information, orally or in written form, in response to the order of a court of competent jurisdiction or pursuant to other processes of discovery duly issuing from a court of competent jurisdiction;

(4) furnishing reports of loan balances to co-borrowers, co-makers, and guarantors of loans of a member and of share or deposit account balances, signature card information, and related transactions to joint account holders;

(5) furnishing information to and receiving information from check and draft reporting, clearing, cashing and authorization services relative to past history of a member's draft and checking accounts at the credit union; or

(6) as otherwise authorized by law.

(b) Non-disclosure statement. Nothing in this rule shall prohibit the credit union from releasing the name and address of members to assist the credit union in its marketing efforts or sale of third party products, provided, however, that the credit union obtains a written non-disclosure statement providing assurances that the information will be used exclusively for the benefit of the credit union and no other.

(c) Privacy policy. Each credit union shall develop, implement and maintain a written policy on the protection of nonpublic personal information of individual members in its possession. This policy should contain clear and readily understandable disclosures about the handling of member information, and be supported by consistent internal procedures and methods to enhance compliance by credit union personnel.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Harold E. Feeney
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Credit Union Department
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For further information, please call: (512) 837-9236

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7 TAC §91.610

The Texas Credit Union Commission adopts amendments to §91.610 relating to safe deposit box facilities without changes to the proposed text as published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3887).

One amendment adds new subsection (a) that defines the purpose of the rule and ties it back to the enabling statute, Finance Code §59.110. The remaining subsections have been renumbered accordingly. The statutory cite contained in new subsection (f) has also been changed to reflect the codification of applicable sections of the Texas Civil Statutes into the Texas Finance Code.

No comments were received on the proposal.

The amendments are adopted under the provisions of §15.402 of the Texas Finance Code that are interpreted to authorize the Credit Union Commission to adopt reasonable rules necessary for administering Subtitle D, Title 3, Texas Finance Code (Texas Credit Union Act).

The specific sections affected by the amended rule are Texas Finance Code, §§59.110 and 125.508.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Harold E. Feeney
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Credit Union Department
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SUBCHAPTER H. INVESTMENTS

7 TAC §91.801

The Texas Credit Union Commission adopts amendments to §91.801 relating to investment in credit union service organizations (CUSOs), without changes to the proposed text as published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3889).

The amendments establish a definition for a CUSO and clarify how a credit union and a CUSO must be operated to demonstrate to the public the separate corporate existences of the credit union and the CUSO. The amendments also clarify that notice must be given to the Commissioner only upon a credit union's initial investment in or loan to a CUSO; and require the board of directors to specifically establish the maximum amount of assets, relative to the credit union's net worth, that will be invested in or loaned to any one CUSO subject to a new limitation on the aggregate loans to and investments in CUSOs of ten percent of total assets. Another amendment delineates additional permissible activities and services for CUSOs. Lastly, a new prohibition on investing in or making loans to a CUSO if revenue-producing activity other than the performance of services for credit unions or members of credit unions equals or exceeds one half (1/2) of the CUSO's total revenue has been added. An exception to this restriction was established for credit unions with a net worth ratio greater than six percent.

No comments were received on this proposal.

The amendments are adopted under the provisions of §124.352(c) of the Texas Finance Code that are interpreted to authorize the Credit Union Commission to adopt rules as necessary to authorize investments under §124.351(a)(1) of the Texas Finance Code pertaining to other investments.

The specific sections affected by the amended rule are Texas Finance Code, §§124.351 and 124.352.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Harold E. Feeney
Commissioner
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7 TAC 91.804

The Texas Credit Union Commission adopts new §91.804 relating to custody and safekeeping of purchased investments and repurchased collateral, without change to the proposed text published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3894).

The new rule requires that investments and repurchased collateral be in the credit union's possession, be recorded as owned by the credit union through the Federal Reserve Book-Entry System, or be held by a board-approved safekeeper. A safekeeper may be used only if it is regulated and supervised by either the Securities and Exchange Commission or by a federal or state financial institutions regulatory agency.

No comments were received on the proposal.

The new rule is adopted under the provisions of §15.402 of the Texas Finance Code that is interpreted to authorize the Credit Union Commission to adopt reasonable rules necessary for administering Subtitle D, Title 3, Texas Finance Code (Texas Credit Union Act).

The specific section affected by the new rule is Texas Finance Code, §124.351.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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7 TAC §91.805

The Texas Credit Union Commission adopts new §91.805 relating to loan participation investments, without change to the proposed text published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3894).

The rule establishes the maximum interest that may be obtained in any single loan participation and limits the aggregate investment in nonmember participations.

No comments were received on the proposal.

The new rule is adopted under the provisions of §15.402 of the Texas Finance Code that is interpreted to authorize the Credit Union Commission to adopt reasonable rules necessary for administering Subtitle D, Title 3, Texas Finance Code (Texas Credit Union Act).

The specific section affected by this rule is Texas Finance Code, §124.351.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER I. RESERVES AND DIVIDENDS

7 TAC §91.901

The Texas Credit Union Commission adopts amendments to §91.901 relating to reserve requirements, with changes to the proposed text as published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3895).

The amendments establish definitions for certain terms and revise the mandatory reserve transfers to more closely align with the requirements for maintaining federal share insurance. The amendments also impose new requirements on a credit union to comply with all capital requirements of its insuring organization and to submit net worth restoration plans should its net worth fall below a certain level. Lastly, the amendments provide for alternative standards regarding reserve transfers for new credit unions (those less than ten years old with $10 million or less in assets) in recognition of the fact that these institutions need a reasonable time to accumulate net worth.

Two comment letters were received on the proposed amendments from the Texas Credit Union League (the "League") and U. S. Employees Credit Union. Both parties commented that the language contained in subsections (a) and (b) concerning the definition of net worth was confusing or even contradictory. The Commission recognizes that the published wording could cause confusion and has therefore modified subsection (b), paragraphs (1) and (3), for clarity.

U.S. Employees Credit Union proposed using a minimum return on assets (ROA) percentage rather than a percentage of total assets as the basis for making reserve transfers under a capital restoration plan. The commenter believes using ROA would set forth a more "definable objective." The Commission has two reasons for utilizing the percentage of total assets method. Firstly, this method is mandated by the NCUA's Rules and Regulations to which Texas credit unions are subject pursuant to federal law. Requiring a separate calculation for credit unions would be unnecessarily burdensome. Secondly, ROA can be manipulated based, in part, on the timing of expenses.

The Commission is making one other change to the final text. The definition of total assets stated in subsection (a)(2) has been modified to match the definition contained in the federal regulation with which state-chartered credit unions must comply. This will ensure consistency in reporting for federal and state compliance purposes. This also addresses the League's concern that

using a static date for calculating total assets could result in a lower than normal net worth ratio because of seasonal or temporary spikes in total assets.

The amendments are adopted under the provisions of §122.104 of the Texas Finance Code that are interpreted to authorize the Credit Union Commission to adopt rules requiring credit unions to maintain reserves necessary to protect the interests of its members.

The specific sections affected by the amended rule are Texas Finance Code, §§122.103 and 122.104.

§91.901. Reserve Requirements.

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

(1) Net worth means the retained earnings balance of the credit union as determined under generally accepted accounting principles. Retained earnings consists of undivided earnings, regular reserves, and any other appropriations designated by management, the insuring organization, or the commission. This means that only undivided earnings and appropriations of undivided earnings are included in net worth. Net worth does not include the allowance for loan and lease losses account.

(2) Net worth ratio means, with respect to a credit union, the ratio of the net worth of the credit union to the total assets of the credit union.

(3) Total assets means the average of the total assets as measured using one of the following methods:

(A) average quarterly balance. The average of quarter-end balances of the four most recent calendar quarters; or

(B) average monthly balance. The average of month-end balances over the three calendar months of the calendar quarter; or

(C) average daily balance. The average daily balance over the calendar quarter; or

(D) quarter-end balance. The quarter-end balance of the calendar quarter as reported on the credit union's call report, and for semi-annual filers as calculated for the quarters ending March 31 and September 30.

(b) In accordance with the requirements of §122.104 of the Act, state-chartered credit unions shall set aside a portion of their current gross income, prior to the declaration or payment of dividends as follows:

(1) A credit union shall transfer in accordance with GAAP the following amounts at the indicated intervals to its regular reserve account until its net worth ratio equals 7% of total assets:

(A) in the case of a monthly dividend period, net worth must increase monthly by an amount equivalent to at least 0.0334% of its total assets; and

(B) in the case of a quarterly, semi-annual or annual dividend period, net worth must increase quarterly by an amount equivalent to at least 0.1% per quarter of its total assets.

(2) For a credit union in operation less than ten years or having assets of less than $10 million, a business plan must be developed that reflects, among other items, net worth projections consistent with the following:

(A) 2% net worth ratio by the end of the third year of operation;

(B) 3.5% net worth ratio by the end of the fifth year of operation;

(C) 6% net worth ratio by the end of the seventh year of operation; and

(D) 7% net worth ratio by the time it reaches $10 million in total assets or by the end of the tenth year of operation, which ever is shorter.

(3) Whenever the net worth ratio falls below 7%, the credit union shall transfer a portion of its current gross income to its regular reserve in such amounts as described in paragraph (1) of this subsection.

(4) Special reserves. In addition to the regular reserve, special reserves to protect the interest of members may be established by board resolution or by order of the commissioner, from current income or from undivided earnings. In lieu of establishing a special reserve, the commissioner may direct that all or a portion of the undivided earnings and any other reserve fund be restricted. In either case, such directives must be given in writing and state with reasonable specificity the reasons for such directives.

(5) Insuring organization's capital requirements. As applicable, a credit union shall also comply with any and all capital requirements imposed by an insuring organization as a condition to maintain insurance on share and deposit accounts.

(c) Net Worth Restoration Plan.

(1) When a credit union's net worth ratio falls below 6%, it must submit a plan to restore and maintain its net worth ratio at the 7% minimum requirement.

(2) The net worth restoration plan must be submitted to the department within 45 calendar days of the occurrence. At a minimum, the plan shall include the following:

(A) reasons why the net worth ratio fell below the minimum requirement;

(B) descriptions of steps to be taken to restore net worth to the minimum requirement within specific time frames;

(C) actions to be taken to maintain the net worth ratio at the minimum required level and increase it thereafter;

(D) balance sheet and income projections, including assumptions, for the current calendar year and one additional calendar year; and

(E) certification from the board of directors that it will follow the proposed plan if approved by the department.

(3) For the purposes of this subsection, a credit union must determine its net worth no less frequently than once each calendar quarter. The effective date or date of occurrence for a credit union's net worth ratio which falls below 6% shall be the most recent to occur of:

(A) the last day of the calendar month following the end of the calendar quarter; or

(B) the date the credit union's net worth ratio is recalculated by or as a result of its most recent examination.

(4) If a credit union fails to submit a net worth restoration plan; or the plan submitted is not deemed adequate to either restore net worth or restore net worth within a reasonable time; or the credit union

fails to implement its approved net worth restoration plan, the department may impose the following administrative sanctions in addition to, or in lieu of, any other authorized regulatory action:

(A) all unencumbered reserves, undivided earnings, and current earnings are encumbered as special reserves;

(B) dividends and interest refunds may not be declared, advertised, or paid without the prior written approval of the commissioner; and

(C) any changes to the credit union's board of directors or senior management staff must receive the prior written approval of the commissioner.

(d) Revised business plan for new credit unions. A credit union that has been in operation for less than ten years or has assets of less than $10 million shall file a written revised business plan within 30 calendar days of the date the credit union's net worth ratio has failed to increase consistent with its then-present business plan. Failure to submit a revised business plan; or submission of a plan not deemed adequate to either increase net worth or increase net worth within a reasonable time; or failure of the credit union to implement its revised business plan, may trigger the regulatory actions described in subsection (c)(4) of this section.

(e) Unsafe practice. Any credit union which has less than a 6.0% net worth ratio may be deemed to be engaged in an unsafe practice pursuant to §122.255 of the Finance Code, except that such a credit union which has entered into and is in compliance with a written agreement or order with the department or is in compliance with a net worth restoration or revised business plan approved by the department to increase its net worth ratio will not be deemed to be engaged in an unsafe practice on account of its inadequate capital structure. The department is not precluded from taking enforcement action against a credit union with capital above the minimum requirement if the specific circumstances deem such action to be appropriate.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Harold E. Feeney
Commissioner
Credit Union Department
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7 TAC §91.902

The Texas Credit Union Commission adopts an amendment to §91.902 relating to dividends, without changes to the proposed text as published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3895). The amendment requires credit unions in a troubled condition to seek written approval of the commissioner to pay dividends.

No comments were received on this proposal.

The amendment is adopted under the provisions of §123.208 of the Texas Finance Code that are interpreted to authorize the Credit Union Commission to adopt rules governing dividend and interest payments as necessary to protect members' interests and preserve the solvency of a credit union.

The specific sections affected by the amended rule are Texas Finance Code, §§122.103, 122.104, and 123.208.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Harold E. Feeney
Commissioner
Credit Union Department
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For further information, please call: (512) 837-9236

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SUBCHAPTER J. CHANGES IN CORPORATE STATUS

7 TAC §91.1004

The Texas Credit Union Commission adopts amendments to §91.1004 relating to the conversion of a charter, without changes to the proposed text as published in the May 5, 2000, issue of the *Texas Register* (25 Tex Reg 3899). The amendments make the provisions of this rule applicable to a credit union that desires to convert to another type of financial institution and prescribe the conditions necessary for the commissioner's approval.

No comments were received on this proposal.

The amendment is adopted under the provisions of §§122.201, 122.202, and 122.203 of the Texas Finance Code. Section 122.201 is interpreted as authorizing the Credit Union Commission to adopt rules facilitating the conversion of a state credit union to a federal credit union. Section 122.202 is interpreted as authorizing the Credit Union Commission to adopt rules facilitating the conversion of a state credit union to a state credit union organized under the laws of another state. Section 122.203 is interpreted as authorizing the Credit Union Commission to adopt rules facilitating the conversion of a federal or out-of-state credit union to a Texas state credit union.

The specific sections affected by the amended rule are Texas Finance Code, §§122.201, 122.202, and 122.203.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Harold E. Feeney
Commissioner
Credit Union Department
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7 TAC §91.1110

The Texas Credit Union Commission adopts amendments to §91.1110 relating to share and deposit insurance requirements, without changes to the proposed text published in the May 5, 2000, issue of the *Texas Register* (25 Tex Reg 3900). The amendments mandate that a credit union obtain share insurance as provided in Chapter 95 of this title. The amendments also allow, subject to the commissioner's approval and conditions, a credit union to offer uninsured membership shares that would be subordinated to all other claims.

No comments were received on the proposal.

The amendments are adopted under the provisions of §15.410 of the Texas Finance Code, which are interpreted as authorizing the Credit Union Commission to adopt rules requiring a credit union to provide share and deposit insurance protection for credit union members and depositors.

The specific section affected by the amended rule is Texas Finance Code, §15.410.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER E. CERTIFICATION, LICENSING AND REGISTRATION

16 TAC §25.107, §25.108

The Public Utility Commission of Texas (commission) adopts new §25.107, relating to Certification of Retail Electric Providers (REPs), and new §25.108, relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges with changes to the proposed text as published in the April 28, 2000 *Texas Register* (25 TexReg 3670). Proposed new §25.107 establishes requirements for certification of retail electric providers (REPs), application procedures, requirements for maintaining certificates, and provisions for suspension and revocation of certificates, as well as related administrative penalties. Proposed new §25.108 imposes additional financial requirements on REPs who will be billing and collecting transition charges resulting from securitization by utilities. These new sections were adopted under Project Number 21082.

In new §25.107, the commission establishes application procedures and threshold standards for REPs to obtain certification and to maintain certification on an ongoing basis. The commission finds that the largest task of the rule is to establish, as a matter of policy, the fundamental balance between the credit risk of REPs imposed on the financial integrity of transmission and distribution utilities (TDUs) and the potential competitiveness of REPs in the restructured environment. The commission concludes that the public interest is best served by the protection and encouragement of competition, especially by measures designed to maximize the number of competing REPs at the commencement of customer choice. Therefore, the commission sets credit standards for REPs at minimum levels and prohibits TDUs from setting more restrictive requirements on REPS unless the REPs default in making payments to TDUs.

In new §25.108, the commission establishes the standards for REPs in the billing and collection of transition charges, which are patterned after the financing orders adopted in the dockets concerning the securitization of funds. (See Docket Number 21527, *Application of TXU Electric Company for a Financing Order to Securitize Regulatory Assets and Other Qualified Costs;* Docket Number 21528, *Application of Central Power and Light Company for a Financing Order to Securitize Regulatory Assets and other Qualified Costs;* and Docket Number 21665, *Application of Reliant Energy, Incorporated for a Financing Order to Securitize Regulatory Assets and other Qualified Costs.*). The changes to the proposed rule are points of clarification that were agreed to by all parties in those dockets.

A public hearing on the proposed sections was held at commission offices on June 15, 2000, at 9:30 a.m. Representatives from Shell Energy Services (Shell), and Texas Electric Company Transmission and Distribution Utilities (TXU-TDU) attended the hearing and provided comments. To the extent that these comments differ from their submitted written comments, such comments are summarized herein.

The commission received comments on proposed new §25.107 from Brazos Electric Power Cooperative, Inc. (Brazos), the City Public Service of San Antonio (San Antonio), Central and South West Retail Electric Provider (CSW-REP), El Paso Electric Company (EPE), Entergy Gulf States, Inc. (EGS), retailers comprised of Enron Energy Services, Fowler Energy, Green Mountain.com, NewEnergy Texas, and Shell Energy Services (jointly "Retailers"), the Office of Public Utility Counsel (OPUC), Reliant Energy, Inc. (Reliant), Southwestern Public Service Company (SPS-REP), Texas Electric Company Retail Electric Provider (TXU-REP), TXU- TDU, Texas Industrial Energy Consumers (TIEC), Texas New Mexico Power Company Distribution Utility (TNMP-TDU), and Texas New Mexico Power Company Retail Electric Provider (TNMP-REP). Reply comments were received from the City of Austin (Austin), Consumers Union (Consumers), EGS, Retailers, Reliant, San Antonio, Shell, Texas Electric Cooperatives (TEC), TIEC, and Utility.com.

Comments on proposed new §25.108 were received from CSW-REP, Retailers, San Antonio, and TXU-TDU. In addition, Reliant, OPUC, TIEC, Shell Energy Services Co., L.L.C., Enron Energy Services (Enron), Inc., NewEnergy Texas, L.L.C. (NewEnergy), the State of Texas, Texas Retailers Association (TRA), Occidental Chemical Corporation (Occidental), and EGS (jointly "Securitization Parties") filed joint comments on proposed §25.108. Reply comments were received from Shell and Retailers.

On several occasions in its open meetings, the commission has discussed the potential diversity of entities that may want to participate in the REP market. The commission notes that the market may offer many niche opportunities for service providers who do not wish to assume the full responsibilities and operational scope of being a REP. Further, a development that has occurred in the course of this rulemaking proceeding is the articulation amidst the Electric Reliability Counsel of Texas (ERCOT) proceedings of the role of the Qualifying Scheduling Entity (QSE). With that development, it has become apparent that many REPs may wish to contract with a QSE rather than become a QSE themselves. Once the notion of outsourcing settlement and other technical requirements to a QSE arise, it quickly becomes evident that the notion of subcontracting other requirements is also of interest.

The commission believes healthy competition can be achieved most readily if the opportunities for participation are many and diverse. These rules are designed to encompass all aspects of providing continuous and reliable electricity to retail customers for which a REP is responsible, regardless of how many of the service components it directly provides to the customer. The commission believes a customer has a right to expect all service components necessary for continuous and reliable electric service from any REP so that, in that respect, there are no gradations of REPs as far as the customer is concerned. On the subject of whether there should be different distinctions among REPs corresponding to the proportion of services they provide directly, as opposed to outsourcing, the commission received the following comments:

Consumers characterized the comments made by commissioners in open meeting, while discussing adoption of the aggregator registration rule, as agreement with Consumers and other consumer commenters that aggregators should represent only buyers and never sellers. Consumers said that the commissioners expressed a preference for letting the market determine how REPs might conduct business, for example through use of an agent, and observed the commissioners using the terms "REP-lite" and "REP-heavy" in its discussion.

Consumers stated that they do not oppose REPs using agents or any other creative marketing strategy, so long as the certificated REP is ultimately responsible for the agent's behavior. Consumers explained that, in such a scenario, a REP could hire another firm as an agent and that firm would not be required to obtain its own certification, but the REP should be responsible for that firm's actions, and suffer the consequences if its agent violates commission rules. Consumers reminded the commission that much of the problem faced by customers with "slamming" in long distance telecommunications service had to do with third-party telemarketers, acting on behalf of the long distance carrier, who slammed customers in order to increase sales. Consumers noted that the long distance carriers typically did not endorse or encourage this behavior, but neither did they provide sufficient oversight to prevent it.

Consumers suggested that the commission include a reference to the use of agents or other third parties who act on behalf of the REP without obtaining a certificate, and require that the REP have full responsibility for their actions. Consumers suggested that such provisions could be made in either §25.107 (a) or (b).

The commission agrees with Consumers that REPs are responsible for the activities conducted by any agents on its behalf and, given that condition, such agents do not need to be certified as REPs, or to otherwise register with the commission. Given its decision in §25.111, *Registration of Aggregators*, that aggregators are necessarily buyer's agents when customer choice begins, the commission agrees that, when customer choice begins and for as long as aggregators are limited to being buyer's agents, REPs and their agents are sellers and seller's agents, respectively, and should not represent themselves to the market as buyer's agents. As an example, a firm that wishes to specialize in marketing electric power but does not want to engage in the business of purchasing power and making other arrangements necessary for customers to receive retail electric service, could contract with one or more REPs to conduct their marketing. It could represent itself as a seller's agent for the REPs with which it contracts marketing services. The REP would be wise to include liability measures in its contract with the marketing firm because, if the firm does not treat customers, including applicants for electricity service, in accordance with commission rules, the REP will be liable to applicable legal and commission sanctions. The accountability rests with the REP regardless of whether the niche provider offers marketing, billing and collection, call center, or other niche services. The commission adds language to §25.107(a) to clarify its view that market participants include both certificated REPs and niche service providers for whom the REPs are held accountable.

The commission requested comments on four preamble questions, as follows:

1. Concerning §25.107(f)(1), relating to financial resources required for credit quality: (A) To what extent does the approach of this provision, and the three credit quality alternatives in particular, achieve the goals of sufficient financial creditworthiness to promote fair competition and minimal financial barriers to entry to the market place?

The Financial Basis for Credit standards:

The question asks whether the commission balanced the conflicting goals of encouraging competition among REPs and TDU credit risk. The TDUs and Retailers provided comments on aspects of the commission's proposed rule's standards of financial creditworthiness: 1) the financial standards necessary for certification, and 2) the ongoing creditworthiness standards necessary for the financial health of the utilities. In general, the TDUs criticized the proposed rule as being unfair because it did not adequately address the REP's creditworthiness with respect to payments to TDUs. In contrast, Retailers, for potential REPs, supported the rule as being fair because it did not create unreasonable barriers to entry, at least partly because the TDUs were not permitted to impose credit risk restrictions on the REPs.

Reliant in its Reply Comments referred to the "Licensing" versus "Creditworthiness" dichotomy in the Coalition for Uniform Business Rules ("CUBR") publication, *Standards for Uniform Business Rules* (Version 1.1, Sept. 1999). According to the CUBR, the purpose of the financial requirements for licensing, certification in the case of Texas, is to ensure the payment of fines and penalties levied by the regulatory authority. In contrast, the purpose of the CUBR requirements for creditworthiness is to protect the credit interests of the TDU.

Reliant emphasized that the proposed REP rule was designed for only four purposes: 1) to encourage and permit the entry of small REPs into the retail electric market; 2) to provide credit protection between the REP and the commission; 3) to provide financial protection for customer deposits; and 4) to provide for the collection of transition charges. Reliant then complained that

the rule lacked the standard credit provisions that address the business interaction between the REP and the TDU.

The commission agrees with Reliant that CUBR's proposed separation of financial and credit standards for REPs should be considered. In addition, the commission generally agrees with Reliant that the underlying purpose of its proposed standards was to encourage the entry of REPs of all sizes into the market, and to protect the relationship between the commission and the REP, the financial deposits of customers, and the securitization of transition charges. However, the commission does not accept the TDU position that the commission's proposed credit standards do not address or mitigate the TDU's credit risks arising from doing business with the REPs. Further, the commission views the rule as applying to both certification and the ongoing maintenance of credit quality. As is discussed below, the commission is modifying the financial requirements of the proposed rule to provide additional assurance that REPs will be able to pay their bills to TDUs.

The Goal of Fairness in Balancing Competition Against Credit Risks:

TXU-TDU did not believe that subsection (f)(1) of the proposed rule achieved the goal of fostering the financial creditworthiness for REPs necessary to promote "fair competition." TXU- TDU said that paragraph (1)(A) appeared to be directed at establishing the minimal creditworthiness threshold for certification alone, while at the same time providing the commission itself with some security should an insolvent REP fail to pay any administrative penalties imposed by the commission.

TXU-TDU asserted that in no other commercial endeavor was a supplier of services required to absorb 100% of the risk of non-payment by those businesses taking services from it. TXU-TDU complained that there was no justification for leaving the utility alone without such security while other parties were secured by the proposed rule. TXU-TDU said that such an approach was not consistent with a competitive market where the relative credit-worthiness of competitors should be one of the factors that influences the price each competitor charges for its product. TXU-TDU argued that there was no reason to remove this basic element from the market and replace it with a regulatory alternative.

EGS stated that financial and creditworthiness criteria should promote fair competition while at the same time not creating unnecessary barriers to entry. EGS stressed the need for proper safeguards, and the need to mitigate risk of REP failure by creating rules that ensure that REPs meet minimum standards for certification.

Reliant said that the standards in subsection (f)(1) must be enhanced through one of its three alternative proposals in order to provide adequate credit protection for TDUs, as well as to provide a framework that is equally viable for both large and small REPs. Reliant also said that customer choice would require different credit protection arrangements between the various entities, including those between REPs and TDUs that were transacting business in accordance with the unique goods and services that were being exchanged.

Retailers criticized the three credit proposals presented by Reliant, arguing that the two alternative approaches raised by Reliant did not differ materially from the investment grade or 60 day deposit proposal preferred by the utility. In fact, Retailers noted that Reliant's two alternative proposals might actually be deemed more onerous to customers, pointing out that a REP serving 1,000 residential customers would need the same deposit as a REP serving a single industrial customer, and that the securitization standard would represent over-protection of TDU credit risk.

Reliant admitted that any future credit problems would likely cause the commission to intervene to revisit the rules and restrict participation by these high-risk REPs. However, Reliant urged the commission to proactively address these concerns in this rule.

In contrast to the TDUs, CSW-REP and SPS-REP believed that the balance achieved in the proposed rule was appropriate. In particular, CSW-REP noted that by providing different options for REPs with varying scopes of operations, the rule provided an opportunity for a variety of REPs to enter the marketplace by meeting financial credit standards specifically directed to their scope of business. SPS-REP believed that the proposed rule provided sufficient flexibility for a REP of any size to demonstrate its financial ability to perform in the retail marketplace without posting significant cash deposits.

Retailers stated that the proposed creditworthiness provisions of the rule promoted fair competition and imposed acceptable financial requirements that should not deter viable potential entrants. Retailers stated that the proposed terms fairly balance competitive considerations with customer protection interests. In addition, Retailers stated that the financial subsection of the rule reasonably implemented the pro-competitive goals that both Senate Bill 7, 76th Legislature, (SB7) and the commission had established for the restructured retail market, which they characterized as follows: affording each customer a choice of electric providers; encouraging full and fair competition among all electric providers; avoiding regulation of competitive services, prices, and competitors; utilizing competitive, not regulatory, methods to achieve SB7's goals; implementing rules and orders having the least impact on competition; avoiding actions that could stifle competitors' creativity; avoiding barriers to entry; and not basing the REP's financial requirement on an assumption that everyone has bad credit.

Retailers argued that the proposed rule fairly balanced these concerns with the desire to exclude REPs with an insolvency risk. Retailers felt that the proposed rule struck this good balance between various interests by favoring relatively benign financial certification requirements, which permitted small companies lacking extensive financial backing to bring dynamic and creative offerings to the market, and by minimizing the regulatory and resource burdens on financially established companies. Retailers said that the commission correctly decided not to require all applicants to possess extensive cash holdings to obtain a certificate.

Retailers observed that requirements to amass tremendous cash resources before serving a single customer would only compound the significant business difficulties faced by REPs when competition begins. Retailers stressed that one of the key difficulties for REPs at the onset of customer choice was competing against a significant incumbency advantage, which SB7 heightened by awarding all retail customers to the TDU's affiliated REP. Retailers noted that several Texas service areas would offer very little headroom for profitable pricing as another competitive difficulty.

Retailers argued that an intensely competitive market provides the best possible customer protection. Conversely, a market with only a few firms tends to experience less innovation, higher

prices, and fewer customer choices than a market where numerous firms are competing. Even if some firms ultimately become insolvent, Retailers argued that rigorous competition ultimately provides customers more innovative products and services, greater supply and responsiveness, and superior prices.

In brief, Retailers asserted that the insolvency risk of a particular customer's REP pales in comparison to the need to promote the dynamic and vigorous competition that permitting more companies to enter the market will foster.

The commission agrees with the TDUs that they are exposed to the credit risk that some REPs might default in their payment for electric service. However, the commission also agrees with Retailers that there must be a balancing of this credit risk against the conflicting need to foster a competitive environment as envisioned by Senate Bill 7 and the commission. The commission believes that a large, dynamic REP market accessible to many competitors is important public policy at the start of customer choice. The commission also agrees with Retailers' rationale for implementing a pro-competitive market structure. In particular, the commission believes that its rules should avoid unreasonable barriers to entry for REPs to the extent possible, and that the underlying premise for such rules should not assume that all REPs will be bad credit risks.

At the same time, the commission agrees with Reliant that if severe credit problems arise in the future, the commission would likely intervene to revisit the rules and rewrite them to restrict participation by high risk REPs.

The commission is convinced that the advantages of incumbency of the affiliated REP through the assignment of all of its TDU's "price-to-beat" customers at the start of competition are formidable and must be counterbalanced. Unlike their affiliated counterparts, unaffiliated REPs will not have an automatic revenue stream on the first day of customer choice, and will necessarily need to compete aggressively to acquire customers. In this regard, the commission notes the inherent reluctance and basic inertia of customers to change suppliers in a new and uncertain market environment. The commission has explicitly designed its rule to function as a counterbalance to the incumbency advantages.

The commission modifies the proposed rules in several ways, as discussed below, to strike an improved balance between fostering competition at the start of customer choice and addressing the credit risk burden on the TDUs. In establishing this balance, the commission believes that minimizing the barriers to REP entry is relatively more important at the start of customer choice than achieving the complete amelioration of the TDU's credit risk. The commission believes that to the extent that the cost associated with the risk that a REP will not pay its bills is spread among all TDU customers and REPs as a group, such spreading of credit risks and its associated costs is a reasonable price that must be paid to create a competitive electric market. Further, as articulated below, the commission believes that this credit risk is substantially mitigated by certain aspects of the rule itself, as well as by specific actions that the TDUs can take to protect themselves from this risk.

Reasonable Minimum Credit Standards (Subsection (f)(1)(A)):

TXU-TDU acknowledged that the $100,000 cash resource threshold was intended to ensure that a small REP could compete, but felt that such a minimal requirement overlooked the fact that a business could be insolvent and still have $100,000 cash in the bank. TXU-TDU stated that the proposed rule does not require a REP to maintain the financial standards that qualified it for certification, which could mean that a REP with cash resources of $100,000 when certified could lose all of its cash resources the next day, without jeopardizing its certification. The Retailers countered that if a REP does become insolvent, its customers will not lose service because they could switch to the provider of last resort (POLR), or to another REP.

TXU-TDU stated that, whatever the amounts ultimately chosen by the commission for the minimum credit standards in this subsection, these financial requirements should be considered minimum standards that must be maintained. TXU-TDU recommended that paragraph (1)(A) of this subsection should be revised to read: "must demonstrate that it has and it must maintain".

TIEC opposed TXU-TDU's proposal that REPs be required to continuously demonstrate a level of creditworthiness beyond that contemplated for certification. According to TIEC, REP certification should be a one-time event, not a continual process. TIEC noted that the proposed rule contains provisions, such as annual update requirements, that permit the commission to exercise adequate authority over REPs without the need for perpetual supervision, and that TXU- TDU's proposal would raise the barriers of entry to the competitive market.

Reliant also argued that the security provided by the minimum cash resources would be illusory if REPs are allowed to withdraw those resources after the certification process is complete. To avoid this result, Reliant argued that the cash resources described in paragraph (1)(C)(i) and (ii) should be placed in an escrow account for as long as the REP does business in Texas, and change if the REP pursued business activity levels that exceeded existing levels of credit coverage. Reliant also felt that the TDU needed to be named beneficiary to the financial resources.

Retailers disagreed with Reliant's proposal to escrow cash requirements because the purpose of cash was to fund operations, not create a source of cash, and the escrow account would simply create a cost without any corresponding benefit. Retailers noted that the deposits could increase rates if the REP passed them on to its customers, but even if not passed on to its customers, the deposits would decrease the profits of REPS, thereby reducing their numbers, and depriving customers of choices.

TNMP-TDU, TXU-TDU, and EGS stated that minimal cash resources of at least $100,000 did not provide enough protection for the TDU. Further, TNMP-TDU stressed that neither the customer nor the TDU should be exposed to any additional risk connected with the passage of SB 7. TNMP-TDU did not provide details but stated that it would support the highest financial requirements consistent with the purposes of SB 7. EGS's suggested alternative figure was $250,000, which it did not believe would be an unreasonable barrier to certification and entry.

Retailers said that the statute required only that the applicant possess financial resources enabling it to provide continuous and adequate service only when certified. In addition, Retailers said that "financial resources" include more than simply cash holdings because an entity with significant financial strength could acquire greater financial resources than a firm that obtains the bare minimum cash infusion before certification.

Retailers went on to state that the $100,000 minimum figure was equivalent to the bonding requirements set forth in the CUBR standards, and moreover was consistent with the component of the previous strawman proposal of staff requiring a minimum of

$250,000 for both certification and creditworthiness. Because this $100,000 standard addressed smaller companies without an established credit rating or extensive net assets, Retailers asserted that the ability to satisfy the requirement with cash equivalents enabled smaller companies to enter the market without incurring burdensome financial obligations.

Reliant disagreed with the assertion of Retailers that the minimum proposed standards were consistent with the credit standards proposed by the CUBR because of Retailer's incorrect assertion that the $100,000 amount "represented the same bond requirement set forth in the CUBR's Proposed Creditworthiness Standards." Rather, the $100,000 figure that Retailers referenced was located in the "Licensing" section of the CUBR document related to REP certification, and not the "Creditworthiness" section related to TDU credit risk.

OPUC and TIEC argued that the minimum $100,000 cash resource requirement was too high. OPUC argued that this requirement might be a significant hurdle for newer, smaller REP entities, and suggested that the minimum initial deposit should be set at $25,000, and gradually increased to $100,000 as the number of a REP's customers grew. OPUC argued that the $25,000 guarantee would not be so onerous as to discourage REPs from entering the market, and the cash requirement could be increased readily as the REP signed up more customers, and revenues from business operations increased over time. OPUC did not provide details about how to implement the sliding-scale proposal for increasing the REP's cash requirements.

In its reply to OPUC, Reliant argued that the alternate financial resource requirements contained in the proposed rule, such as letters of credit, would enable REPs to meet minimum cash resource requirements for only a fraction of the coverage that was actually being provided. Reliant suggested that, for example, the $100,000 of coverage referenced by OPUC could be obtained reasonably for around $1,000.

While Reliant agreed with the worthy goal of promoting market entry via setting minimum credit standards as proposed by a few commenters, it nevertheless emphasized that credit standards are still required between REPs and TDUs. Reliant stressed that any one of its three credit standard alternatives with various forms of REP cash deposits could balance these two goals through scalable, or sliding, credit standards that would be based on the level of business conducted between the REP and TDU.

In their Reply Comments, Retailers charged that the TDUs place an inappropriate reliance on regulation and said that the commission correctly employs more market-friendly methods in order to address REP standards. Retailers argued that the TDU's complaints about the $100,000 credit minimum ignore the rule's safeguards against insolvency. Retailers cited as safeguards the rule's provisions that permit the commission to suspend or revoke a certificate if the REP becomes bankrupt or unable to pay its bills, and that require a REP to report material changes to the commission within ten days. Hence, the commission, as well as the TDUs, would quickly become aware of a REP with developing financial difficulties. In conclusion, Retailers stressed that a higher cash balance would permit fewer REPs to enter the market, thereby reducing competition.

More broadly, Reliant stressed that the importance of appropriate and complete credit standards for REPs should not be overemphasized. Reliant argued that low credit standards for REPs would effectively give them a "free option" because those REPs with nothing to lose could operate with inadequate finances and the remaining market participants would bear the cost. Specifically, Reliant argued that REPs with nothing to lose would take a completely different approach to serving the market than REPs with equity at stake, and that the market would not be served well by defaulting REPs.

Reliant complained that TDUs that absorb the cost of defaulting REPs would be forced to recover these costs directly via self- or purchased-insurance or indirectly via the equity risk premium requirements of the capital markets. Reliant concluded that if the TDU did not directly address the risk of REP default, the capital markets would do it for them. TXU-TDU made the added point that if the risk of non-payment was placed on the TDU, then each utility's cash working capital and insurance costs would be negatively impacted, ultimately increasing the cost of transmission and delivery service for everyone. Hence, the default cost of one REP would be borne by all the customers of every REP.

Reliant went on to complain that either of these scenarios increased the TDU non-bypassable delivery charges passed on to competing REPs and that this cost reduced the profits of non-offending competing REPs, effectively "socializing" the cost of default because it was borne by the industry and not the defaulting REP and its customers. Reliant noted that market participants would be served best when the cost of doing business were commensurate with the credit quality of each REP, and directly proportional to the level of business activity pursued by that REP.

The commission agrees with Retailers that the $100,000 minimum credit standard for certification is in the public interest. The commission further agrees that the higher figures recommended by TXU-TDU and EGS, and the deposits recommended by Reliant, would create barriers to entry. While it understands OPUC's concern about an excessively high entry hurdle, the commission believes that the proposed $100,000 credit standard for REPs is the minimal figure that is consistent with the need to balance the conflicting goals of TDU credit protection and the REPs' ease of entry into the retail market.

Overall, the commission agrees with Reliant that, once a REP begins operating, its credit requirement should increase as its monthly obligations to TDUs increase. Otherwise, a REP could obtain certification under the credit provisions for small REPs but build up a large volume of business and a large monthly obligation to TDUs. In order to address this concern, the commission finds it appropriate to require REPs to maintain greater cash resources after they achieve a threshold level of business. However, the commission also believes that any sliding scale should not unduly limit the entry of all smaller firms and their growth opportunities.

The commission concludes that the $100,000 minimum cash balance should allow a REP to conduct up to $250,000 of monthly business with TDUs and that, after surpassing this monthly threshold, the REP should be required to increase and maintain cash resources at the same ratio to its monthly business with TDUs. For example, for every $25,000 of monthly business above the initial $250,000 figure, the REP needs to maintain incremental cash resources of $10,000 above the initial $100,000 required for initial certification. For purposes of this calculation, the monthly level of a REP's business with a TDU is the amount billed by the TDU except for transition charges on securitized funds, since they are supported in a separate manner. To inform the commission of the change in applicable requirements, a REP shall file with the commission a sworn affidavit demonstrating compliance with subsection (f)(1)(A)

within 90 days of surpassing the $250,000 threshold level of business permitted with initial certification. Demonstration of continued compliance with this and other financial requirements is included in the REP's annual report thereafter.

The commission believes that this modification addresses the concern of TXU-TDU and Reliant that the cash certification of REPs could be fleeting, and that the funds could disappear the next day. The commission also believes that TXU-TDU's concern is addressed in subsection (i)(3)(B) dealing with reporting requirements for material changes in the financial basis for a REP's certification, in subsection (f)(1)(E) dealing with verifying financial resources "at any time after certification," and also in modified subsection (j)(6) and (j)(7) and new subsection (j)(8) relating to various financial grounds for suspension or revocation of certificates. Subsection (j)(8) is added for the express purpose of indicating that the commission regards failing to pay the TDU on time a significant violation of commission rules. These provisions permit the commission, as well as the TDUs, ready access to information on any developing financial difficulties for existing REPs. As such, these provisions will reduce the financial repercussions of the TDU credit risk.

However, to help address the concerns of TXU-TDU and Reliant, and the other TDUs, the commission modifies paragraph (1)(A)(iii) to make it clear that the evidence of financial resources is an ongoing obligation. (The commission notes the concept of an ongoing requirement was already implied in the proposed subsection (f)(1)(E) referencing unencumbered resources at certification and "at any time after certification").

The commission intends that the $100,000 minimum threshold and the increasing cash requirements associated with increased obligations to TDUs is a resource that is available to cover both commission penalties and TDU credit losses. The commission believes that this modification to the financial requirements will ensure that as a REP becomes larger it will have adequate cash resources to make timely payments to TDUs. Further clarification is added to subsection (f)(1)(A)(iii) that first the commission and then the TDUs are entitled to these resources in the event of default. The reduction of the grace period of subsection (i)(3)(B) from 30 days to ten days is added as further mitigation to the risk borne by TDUs.

The commission does not believe that this credit standard for REPs will unreasonably restrict their entry into the market, and it should reduce credit risk for the TDUs. On June 29, 2000, the commission adopted 16 T.A.C. §26.109, Standards for Granting of Certificates of Operating Authority (COAs), and §26.111, Standards for Granting of Service Provider Certificates of Operating Authority (SPCOAs), which permit financial verification and review of competitive providers of local telephone service for a period 12 months beyond certification. As also adopted by the commission on June 29, 2000, 16 T.A.C. §26.114, Suspension or Revocation of Certificates of Operating Authority (COAs) and Service Provider Certificates of Operating Authority (SPCOAs) specifically delineate grounds for suspension or revocation to include the following: "bankruptcy, insolvency, failure to meet financial obligations on a timely basis, except if reasonably disputed, or the inability to obtain the financial resources needed to provide adequate service." The commission adopts an analogous strategy in this rule.

Reliant stated that a $50 million standard is inappropriate and should be deleted because shareholder equity in a company, or its guarantor, is not a credit standard used alone by any recognized rating agency, thus making equity a particularly poor standard to apply as a basis for REP certification. Reliant stated that a large amount of equity does not ensure that a REP would have the cash to satisfy its financial obligations, and proposed that a REP who could not demonstrate an investment grade rating or $100,000 of cash resources should not be certified as a REP.

In opposing the deletion of the $50 million equity alternative, TIEC asserted that REPs should be able to establish creditworthiness in a variety of ways because a competitive retail market depends in part on REPs of different sizes and degrees of establishment being able to compete.

Retailers emphasized that the first two proposed alternatives to establish creditworthiness under the proposed subsection (f)(1) reasonably implement the pro-competition goals of SB 7 and the commission because both provided access to working capital and capital markets. Retailers said the $50 million net assets standard would qualify relatively large companies with adequate financial resources and little financial impairment risk, but without an independent credit rating. Retailers also stressed that the investment grade credit rating approach permitted small- to medium-sized companies to obtain certification without posting cash or cash equivalents as security.

The commission agrees with Retailers and TIEC that the minimum equity figure of $50 million is in the public interest because this standard minimizes the certification scrutiny and costs for relatively substantial REPs that have yet to issue public debt, or are not publicly-traded in the financial markets.

Reasonable Utility Credit Standards (Subsection (f)(1)(B)):

TXU-TDU argued that the goal of reducing barriers to entry should not overshadow the fundamental need of ensuring that REPs are truly creditworthy. TXU-TDU argued that paragraph (1)(B) failed to provide sufficient credit protection to the TDUs; failed to be truly customer friendly by requiring all REP customers pay for the credit difficulties of a single REP; or failed to properly reflect fundamental elements of a competitive market.

EGS argued that creditworthiness, security for payment, and remedies for non-compliance are important issues in the business relationship between a TDU and the REP doing business in a TDU's service area, yet are separate from the certification threshold. EGS said that these separate issues should be addressed in the TDU's tariff and related service agreements governing its business relationship, and that the REP certification rules should not specify circumstances in which a TDU is precluded from imposing additional credit requirements on a REP because such limitations could be addressed in Project Number 22187, *Terms and Conditions of Transmission and Distribution Utilities' Retail Distribution Service*. EGS proposed that paragraph (1)(B) should distinguish the certification of REPs from their creditworthiness in dealing with TDUs, by stating "TDUs may impose credit standards on a REP to the extent specified in its tariff, and allowed by commission rules."

Reliant and TXU-TDU complained that the proposed paragraph (1)(B) did not allow additional TDU credit standards unless the REP defaulted, which left the TDU exposed for the collection of delivery charges other than transition charges and left the utility with no mechanism to recover amounts due for services already provided by the TDU. According to TXU-TDU, the TDU was exposed to losing a minimum of two months of revenue in the event of REP payment default. Reliant stated that not affording TDUs

adequate credit protection would be contrary to standards contained in the CUBR, which were adequate and appropriate to protect TDUs. As a result, Reliant suggested revising paragraph (1)(B) to use significant portions of the CUBR standards.

TIEC noted that while TXU-TDU, Reliant, and EGS proposed modifications to allow TDU utilities to impose additional credit standards on REPs, especially through the requirement for deposits, it opposed these changes because they would adversely affect the ability of small REPs to become certified, thus reducing competition. TIEC also observed that while the TDUs argued that failing to impose their standards might result in higher costs of credit risk being passed on to customers, none of the consumer groups appeared to share that concern. TIEC urged the commission not to change the proposed language of paragraph (1)(B).

As noted, Reliant argued that the commission should replace the proposed rule with one of its three suggested alternatives, all of which required specific levels of cash deposits for REPs. Reliant summarized these credit alternatives as follows: 1) investment grade credit rating, or secure cash resources based on two months of estimated annual TDU tariff-based billings to the REP, or; 2) investment grade credit rating or secured cash resources equal to $100,000 for every 1,000 customers; or 3) use of the transition charge language in §25.108 to cover all charges payable to TDUs by a REP.

Reliant stated that any of its proposals would provide adequate credit protection to the TDUs, while simultaneously providing a framework that was equally viable for both large and small REPs. Reliant explained that this balance would be achieved because the cash resource credit standard alternatives were scalable; moved in proportion to the level of business occurring between the REP and the TDU; and permitted REPs to use the same financial security filed with its application for certification to meet its ongoing credit standards.

In addition to paying transition charges for securitized funds, TXU-TDU argued that REPs are required to pay TDUs for transmission service charges, distribution service charges, non- securitized competition transition charges, system benefit fund fees, nuclear decommissioning fund fees, and potentially discretionary service charges. TXU-TDU complained that these amounts at risk were not trivial to TDUs; for example, a REP responsible for 1.0% of the TXU- TDU's revenue requirements would be paying approximately $2 million every month in distribution charges.

Reliant claimed that additional TDU credit requirements did not create insurmountable financial hurdles for smaller REPs. In fact, Reliant asserted that using a conservatively estimated cost of 1.0% yearly, a financially viable REP should be able to obtain surety bond credit coverage of $1,000,000 for only $10,000.

Retailers argued that the credit cost impact of Reliant and TXU-TDU depended on false premises. Retailers asserted that the TDUs wrongly assumed that REPs will default on a minimum of two months of delivery charges, and that default would actually be less onerous than claimed by TDUs because the TDU-TXU scenario was unlikely to occur due to the fact bills are commonly paid on a daily basis and not sent to customers on just a few days. If the REP defaults on one day of bills, Retailers said that the TDU would demand that the REP then post a deposit, and take other steps to reduce risk. During the public hearing, TXU-TDU responded that Retailers were incorrect in minimizing the amount of obligations subject to default because default depended not just on the first unpaid obligation, but rather on a growing level of outstanding obligations, so that once default started, it would cascade as each day of nonpayment was added to the total obligations under default.

TXU-TDU proposed that the commission does not need to decide all the issues associated with the subject of REP security payments in this proceeding, noting that this subject is also being addressed in Project Number 22187. TXU-TDU stated that the tariff rulemaking is the most appropriate forum to resolve this issue, and recommends that paragraph (1)(B) should be revised to defer these credit standards to that rule making. TIEC argued that the commission is the proper regulatory body authorized to establish credit quality standards for REPs, and that it is entirely appropriate for the commission to set these standards in this rulemaking. While TIEC felt that the ERCOT draft rule embodies some principles in common with the proposed rule, it was still in a developmental stage, therefore requiring the commission to establish REP credit requirements in this rulemaking.

While the commission believes that TXU-TDU made a strong case for the potentially longer time period for default, the commission still believes that the argument over the length of the default and the amount of default is more a factual issue subject to accounting experience than a logical issue subject to an *a priori* resolution. Hence, the commission concludes that the amount of default and the actual credit loss to the TDUs are best resolved through the accumulation of REP credit loss experience, and therefore defers the recovery of such costs to a future rate proceeding brought by the TDUs. In addition, the modification to the $100,000 cash standard discussed previously will lessen the possibility for default because it will ensure that as a REP becomes larger it will have adequate cash resources to make timely payments to TDUs.

The commission disagrees with TXU-TDU and agrees with TIEC that this proceeding is the appropriate rulemaking for establishing credit standards for REPs. The commission believes that Project Number 22187 is the appropriate proceeding for establishing non-credit standards, such as the equally important conditions and mechanisms imposed in the event a REP default in making payments to TDUs.

The commission does not believe that TDUs should be able to require additional security beyond that adopted in financing orders or in proposed §25.108 until, and unless, a REP defaults on payment to the TDU. While the commission recognizes the concern the TDUs have expressed related to the payment of TDU charges, the commission notes that the TDU, as a regulated entity, retains the ability to request an increase in rates if REP defaults cause the TDU to not fully recover their regulated cost of service.

In addition, the commission will establish payment timelines and standards for the remittance of TDU charges in Project Number 22187, as well as establish the remedies that the TDU may pursue upon default in payment by a REP. It is the commission's intention to make those remedies substantive and severe in order to encourage REPs to remit their payments to the TDU on a prudent and timely basis.

Furthermore, the commission has stated in §25.107(j) that REP certificates are subject to suspension or revocation for significant violations of PURA or commission rules. The commission believes it is important to state in this rule that it will consider a failure to abide by the rules adopted in Project Number 22187, and the standardized tariff adopted as a result of that proceeding,

a significant violation of commission rules and that such failure will result in suspension of a certificate. As such, the commission has explicitly added a provision in §25.107(j) to state that a failure to timely remit payment to the TDU and to abide by the standardized tariff will be treated as a significant violation of its rules.

As a result of its conclusions against requiring REP deposits to address TDU credit risk, the commission declines to further modify subsection (f)(1)(B).

Mitigating Factors Offsetting Credit Risk:

In conclusion, the commission believes that there should be no TDU deposit requirements for REPs before default because the barriers to market entry should be kept low, at least at the start of customer choice. The commission agrees with Retailers that the barriers to entry in a new market should be minimized to the extent possible in order to facilitate entry into the newly competitive market. The commission believes that the financial standards and creditworthiness criteria established in this rule in conjunction with the requirements relating to the security needed for transition charges are the only financial requirements that the commission should require REPs to meet, in the absence of a default by a REP.

Moreover, the commission believes that the following aspects of the rule and the competitive environment will serve as mitigating factors to minimize the TDU exposure to the REP credit risk of nonpayment: minimum certification standards, including the sliding-scale cash standard, discourage non-viable entrants; on-going standards maintain credit quality over time; required notice reveals developing financial difficulties; failure to remit TDU charges violates commission rules; power contracts with power generating companies and Qualified Scheduling Entities (QSE) will require a showing of financial soundness; payment defaults permit the recovery of credit losses; and the severe remedies for default encourage on-time payments. In addition, the provisions relating to the REPs that bill for the recovery of securitized assets have stringent credit and payment requirements that are intended to ensure that REPs are timely in their payments of transition charges, so as to preserve a high credit rating for the securitization bonds.

After consideration of these aspects of the coming competitive environment, the commission believes that the nature of the retail electric service business is that the market will require that REPs have a significant amount of financial resources and be creditworthy entities. Therefore, the commission does not find it necessary at this time to impose additional burdens on REPs beyond those adopted in this rule.

1.(B). How do the credit quality standards that are set in this rule integrate with the expected credit quality standards to be established by an independent organization, as defined in PURA §39.151(b), and how should any differences be addressed?

CSW-REP, EGS, SPS-REP, Retailers, and TIEC observed that the credit standards of the independent organizations (IO) have not been established yet. Nevertheless, CSW-REP and SPS-REP stressed that the standards must be consistent with commission rules. CSW-REP went on to note that consistency between the rule and the IO should be achieved easily within ERCOT because the commission has jurisdiction over setting both standards, and that the commission staff should coordinate with IOs outside of ERCOT to achieve the same consistency. CSW-REP and SPS-REP stressed the credit standards established by the IO must be a requirement for maintaining the REP's certification. CSW-REP also stated that the credit standards must not be additive, which could create a barrier to entry.

EGS, Reliant, and TXU-TDU stated that the credit quality standards established by the REP certification rule would not preclude an independent organization, as defined in PURA §39.151(b), from establishing separate credit criteria between the IO and the REP. Reliant noted that these two entities have their own separate and unique credit considerations. EGS noted that the IO may well require additional credit quality standards and obligations with REPs to mitigate potential imbalances in energy purchases and sales, ancillary service obligations, and other costs. TXU-REP stated that the commission does not need to address the credit quality standards of ERCOT because its requirements address considerations for market settlement between market participants, while the commission's rule is designed to address consumer protection goals.

Retailers stated further that ERCOT credit quality standards would apply only to QSEs, which would schedule power transactions, and not to REPs, which generally were separate entities. As such, Retailers believed that no need existed to require REPs to provide security for such payments because ERCOT would impose requirements on QSEs, using a private, bilateral relationship outside the commission's jurisdiction. However, Retailers noted that if a REP became a QSE, the commission's rule should avoid any potential pancaking of credit requirements that might occur if separate security requirements were applied both at the ERCOT level and at the commission. This pancaking would simply result in over-security of the REP if it conducts its own scheduling.

In its Initial Comments, TIEC noted that the commission is the proper regulatory body authorized to set credit quality standards for REPs, and it is appropriate for the commission to do so in this proceeding. In its Reply Comments, TIEC referenced CSW-REP's comments that there should be consistency between the IO and this rule because the commission has jurisdiction over both. However, if the CSW-REP advocated allowing credit quality standards to be developed at ERCOT instead of in this rulemaking, TIEC disagreed because the parties in this rulemaking devoted significant analysis to determining a REP's credit quality standards. TIEC argued that deferring determination of these standards would mean wasted effort in this project, and ultimately delay of the REP certification process.

The commission believes that its credit standards for REPs are entirely separate from those established by an IO, including ERCOT, for QSEs or the entities responsible for scheduling and interacting with the IO. That is, the IO's credit standards are distinct from the minimal credit standards, the financial requirements to protect customer deposits, and the securitization of transition charges set out in this rule. The QSE standards of IOs are separate from any REP credit concerns of the TDUs, or for that matter, generating companies. As such, the $100,000 minimum cash requirement for REP certification should be in addition to any other requirements that the REP must meet when dealing with other parties. The commission observes that the nature of the retail electricity business will require REPs to contract with entities such as QSEs in order to operate, and that the QSEs are likely to require financial security in excess of what the commission has adopted in these rule.

2. Concerning §25.107(f)(2), Financial resources required for customer protection, do the financial standards set in paragraph

(2) adequately protect the customers of small REPs against potential harmful effects of financial derivatives that may arise from buyer speculation in or seller default of these securities? If not, how should they be addressed?

CSW-REP, TXU-REP, EGS, SPS-REP, Reliant, and Retailers all stated that the standards set forth in subsection (f)(2) were adequate to protect customer deposits against the potential harmful effects of financial derivatives that might arise from buyer speculation or seller default.

TXU-REP and CSW-REP noted, however, that even without the use of financial derivatives, a REP might engage in speculation or otherwise engage in risky strategies that could put customer deposits at risk. Nevertheless, TXU-REP and CSW-REP stated that regardless of the reason that a REP might go out of business, *i.e.*, regardless of whether the harmful effects of financial derivatives caused the business failure or by any other cause, the requirements of subsection (f)(2) would protect customers. Consequently, no further provisions addressing any specific business risk would be necessary to protect customers. While TNMP-TDU supported the language that was contained in subsection (f)(2), the utility held that it should be made clear that the financial obligations are independent of operations and should not be used to support operations.

Retailers stated that it is impossible to write a rule that anticipates every potential event in a competitive market, including the impact of hedging and derivatives. However, the commission could protect the consumer from unfair market practices through this rule because it provides the financial assurances that a certified REP has the creditworthiness necessary to protect customers. However, Retailers felt that the question goes deeper than the REP's financial health, including determining the appropriate business practices of that REP. Retailers argued that regulating hedging crosses the threshold and constitutes an impermissible regulatory solution. The commission should not dictate the business strategy that a REP might use to protect itself from market price volatility.

In its Reply Comments, Consumers emphasized that while they supported subsection (f)(2) because it protects customer deposits and prepayments, the question goes further. Consumers noted that the question specifically asks whether the paragraph is sufficient to protect customers against any potential harmful effects resulting from the use of financial derivatives or default on securities. Consumers noted that there are other potential harmful effects of these instruments, including REP default and the transference of customers to the POLR. Therefore, the commission should still inquire of REPs whether they are planning to use such financial instruments and about their experience with these investments.

The commission agrees with the various parties that proposed subsection (f)(2) adequately protects customer deposits and other advance payments against the risks inherent in hedging and other financial derivatives, or for that matter, other business factors that could put the REP at risk. Furthermore, the commission agrees with Retailers that in the restructured environment of SB7, it is not appropriate for the commission to over-regulate the ongoing business operations and risk-taking decisions of REPs. While the commission recognizes Consumers' concern about the transfer of customers of a defaulted REP to the POLR, perhaps at higher cost, the commission believes that this "fallback" function of the POLR is one of the basic reasons for its very existence. The paragraph is adopted as proposed except for a correction to ensure consistent terminology throughout the rule.

3. Concerning §25.107(g), should the commission further distinguish between the continuing requirements for certified REPs and the application requirements, especially before retail choice begins?

CSW-REP, TXU-REP, TNMP-TDU, EGS, Reliant, SPS-REP, and Retailers indicated that the rules need not further distinguish between initial application and continuing certification requirements. No party offered comments to the contrary.

As support for this position, TXU-REP suggested that the application requirements appear to be sufficiently flexible to allow, for example, an applicant to show only what is reasonably feasible under subsection (g)(1) if an ERCOT independent system organization (ISO) procedure has not been finalized by the time the application is submitted. TXU-REP, EGS and Retailers noted that the annual reporting requirements in §25.107(i) provide sufficient demonstration of ongoing compliance with the certification requirements of §25.107(g).

Reliant stated that, after retail choice begins, it might be necessary to conduct a proceeding to review the requirements based on actual experiences in the market. Reliant maintained that such a proceeding should be the forum for parties to suggest modifications or revisions of various rules, including the REP certification rule.

The commission concurs with all the parties that further distinction between the initial application and continuing certification requirements is not necessary. The commission also agrees with TXU-REP, EGS, and Retailers that the requirements of subsections (g) and (i) combine to ensure that the commission receives adequate ongoing information about REPs. With respect to Reliant's comment, future activity in the marketplace will determine whether a comprehensive review of rules concerning the restructured marketplace is warranted.

4. Finally, concerning the annual report required by §25.107(i), Requirements for updating or changing the terms of a REP certificate: What circumstances should the commission consider in establishing a reporting period and due date for the report?

CSW-REP, TNMP-TDU, and SPS-REP supported the commission's proposed reporting period and due date of June 1. CSW-REP conditioned its support on the fact that subsection (i) requires more contemporaneous reporting for some events. SPS-REP concluded that the proposed rule's requirements for reporting and for changing the terms of a REP certificate were adequate.

CSW-REP and TNMP-TDU requested language in the rule to clarify the due date of the first report. CSW-REP noted the first annual report should be due on June 1 of the year following the year in which the certification is granted, even if the calendar year reported includes only a partial year of operation. TNMP-TDU said that, without a year specified, REPs participating in the pilot program that commences on June 1, 2001 may be unclear whether they are required to file an annual update in 2002.

EGS, TXU-REP, Reliant, and Retailers did not object to the June 1 due date but expressed concern that reporting periods and report dates in each of the commission rules applicable to REPs be coordinated. Reliant suggested the REP Annual Report be similar in form and due date to the utility Annual Report filed by each electric utility in Texas. EGS offered that the reporting requirements in §25.107(g) should be determined after considering the

schedules for all reporting requirements imposed by PURA and the commission's rules.

TXU-REP asserted that the commission should strive to achieve consistency and to eliminate redundant reporting obligations under all of its rules and the ERCOT ISO requirements. To the greatest extent possible the commission should rely on publicly available information compiled by other sources, such as the ERCOT ISO, before imposing reporting obligations on REPs. Retailers replied in agreement, noting that the redundant reporting obligations should be avoided under all commission rules and the ERCOT ISO requirements because they impose unnecessary regulatory burdens on REPs and increase costs. Retailers proposed the commission consider extending the deadline for good cause circumstances. TXU-REP further suggested that the first annual report should cover no less than a 12-month period, and proposed language to that effect.

The commission adopts the calendar year reporting period and June 1 annual report date of the proposed rule. The commission notes the congruence of this provision with the reporting period and date for reports required by utilities pursuant to §25.84, relating to *Reporting of Affiliate Transactions for Electric Utilities*. The commission further notes that it strives to coordinate such reporting dates across rules when possible and appropriate. The commission adds language to subsection (i)(4) to clarify that the first annual report of a REP is due in the year following its certification as a REP, regardless of whether the first report contains only a partial year of company activity. The commission believes it can grant extensions on the basis of good cause without changes to the rule language as proposed.

§25.107(a), Application

Brazos supported the proposed rules as written and expressed concern that a statement in the published preamble did not accurately reflect the meaning of the proposed rule text. Brazos noted that the last two sentences of the proposed subsection (a) were consistent with PURA §11.003(14) and §31.002(17) with regard to the terms "cooperative" and "REP." However, Brazos asserted that the sentence in the first full paragraph on page 4 of 46 of the preamble should be modified to read as follows: "These credit standards apply to a REP's business with TDUs serving Texas, as well as a REP's business to any electric cooperatives or municipal utilities electing customer choice."

In reply comments, CPS, Austin, and TEC supported Brazos. TEC understood the intent of the preamble statement to require that credit standards apply to a REP's business with (1) TDUs serving Texas, (2) electric cooperatives electing customer choice, and (3) municipal utilities electing customer choice. TEC added that Brazos' suggested wording would eliminate confusion.

The commission agrees with Brazos and replying parties and reaffirms, with Brazos' correction, its statement in the publication preamble concerning the components of the financial strategy of the rule. The scheme of financial standards in these rules has three additive components that are found in the first three paragraphs of §25.107(f): (1) three alternative credit quality standards for certification as a REP; (2) a financial standard for protecting customer deposits and other advance payments made to the REP; and (3) a financial standard and procedure for REPs to bill and collect any transition charges resulting from securitization. These credit standards apply to a REP's business with TDUs serving Texas, as well as to a REP's business with any electric cooperatives or municipal utilities electing customer choice.

EPE, in its initial comments, noted that, by virtue of PURA §39.102(c), it is not subject to PURA Chapter 39 until the expiration of its freeze period in 2005. Therefore, the rules proposed in this project do not apply to EPE until the end of EPE's freeze period. EPE requested that proposed subsection (a) be amended to include specific acknowledgement of the fact that the rule does not apply to companies subject to PURA §39.102(c).

The commission agrees that the rule does not apply to a company that is subject to PURA §39.102(c) until its freeze period ends and therefore amends §25.107(a) to include the clarification.

§25.107(b), Definitions

EGS stated that, to the extent defined terms already exist, current definitions should be used in the commission's proposed rule and, along with TXU-REP, supplied alternatives to the definition for "customer" to correlate it to PURA §31.002(16). EGS believed that the term should be changed to "end use customer" and clarified to mean a customer who does not buy electricity for resale but who purchases and ultimately consumes electricity. TXU-REP stated that the definition of "customer" should only include those to whom the REP is actually selling electricity or to whom the REP has committed to sell electricity, and requested deletion of the someone who merely "has applied for" service from a REP from the rule's definition. TXU-REP argued that including such applicants, who may never actually receive or commit to service would expand the rule's definition of "customer" beyond the definition of "retail customer" contained in the governing statute.

Consumers replied in opposition to the elimination of "has applied for" from the definition of customer on the grounds that such would be inconsistent with the customer protection rules, which currently apply to applicants as well as customers. Consumers noted that, while certain provisions of the rules will not apply to persons who were applicants but not customers of a REP, the anti-discrimination provisions of PURA clearly apply to applicants, and in fact are intended to prevent REPs from discriminating in the provision of service to potential customers.

The commission agrees with Consumers and therefore declines to change the definition of "customer."

EGS and Retailers argued that the commission should change the definition of "Residential Customer" and strike the clause "as defined in statewide transmission and distribution utility tariffs." Retailers asserted that the statement does not add to the definition and the tariff definition referenced may differ among utilities. EGS also suggested speaking to the consumption of "electricity" rather than "power."

Consumers replied in opposition to the proposal to strike the reference to "statewide transmission and distribution utility tariffs" from the definition of residential customer and said it is crucial that "residential customer" be defined consistently for all purposes. Consumers argued that a customer who pays non-bypassable charges, as allocated to the residential class, must be considered a residential customer for purposes of calculating the 300-megawatt requirement under SB7. Consumers restated the concept as "a residential customer is a residential customer is a residential customer- there should be no opportunities to game the system by reclassifying customers into different rate classes

for different purposes." Consumers said that the reference back to the tariff governing the TDU charges will ensure all REPs classify residential customers the same.

Because a common understanding of what the term "residential customer" means is essential only to the threshold residential service calculations required by subsection (e)(3), and because that provision becomes moot three years after customer choice begins, the commission deletes the proposed definition of "residential customer" in subsection (b). Instead, the commission incorporates the definition components into the requirements of subsection (e)(3). The commission agrees with Consumers that if a customer is considered to be in the residential class of the utility tariff, the customer should be counted toward the 5.0% threshold, and if the customer is not of that class, it should not be counted. To allow for the possibility, at some point in the future, that utility tariffs do not specify a residential rate class, the commission inserts language from the proposed definition, augmented by comments of parties, to identify the customers captured in existing residential rates classes.

§25.107(c), Application for REP Certification

Reliant and TXU-REP expressed concerns with the certification process being a contested case, and Reliant proposed that the commission add a sentence in §25.107(c) stating that the REP certification process will not be treated as a contested case. Reliant stated that PURA §39.003 does not require that a certification process be conducted as a contested case and focused on the importance of a speedy and efficient certification process in order to facilitate entry of competitors into the retail market. According to Reliant, although PURA §39.003 does not except certification from the contested case requirement, it assumes that each contested case will involve an incumbent electric utility. Because PURA §31.002(6) defines an "electric utility" as a person that "owns or operates for compensation in this state equipment or facilities to produce, generate, transmit, distribute, sell, or furnish electricity in this state," Reliant argued that a REP is not an incumbent electric utility. TXU-REP asserted that the commission should handle REP certification requests as administrative proceedings, and maintained that the rule should clearly provide for such a process.

As an alternative, Reliant stated that, if the commission decides that the certification proceeding must be a contested case, that proceeding should be conducted quickly, with a minimum of discovery and briefing. Consumers posited that restricting the contested aspects of the application to a minimum would facilitate the legislative goal of establishing a "fully competitive electric power industry," as specified in PURA §39.001(a).

Consumers disagreed both with the statement that the rule requires a contested case and with the suggestion that a contested case should be prohibited, and asserted that the commission cannot deny a party, including its own staff, the right to challenge an application. Consumers indicated that, if an application is challenged, all parties including the applicant are entitled under law to have a contested case to offer evidence to support their position. Consumers insisted that contested cases should be allowed, but predicted that contested cases would be warranted in only a few circumstances.

Shell maintained that the commission must conduct every proceeding under PURA Chapter 39, other than a rulemaking proceeding, report, notification, or registration, as a contested case. Further, Shell asserted that an application for certification constitutes a contested case within the meaning of the Administrative Procedure Act, Texas Government Code Annotated §2001.003(1) (Vernon 2000) (APA). The APA defines a "contested case" as "a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." The due process interest in granting a hearing therefore outweighs any slight delay that treating these applications as contested cases may cause.

The commission concurs with Shell and concludes that the REP certification process is a contested case according to the APA, as cited by Shell. In addition, PURA §39.003 requires that, unless specifically provided otherwise, each commission proceeding under PURA Chapter 39, other than a rulemaking proceeding, report, notification, or registration, shall be conducted as a contested case and that the burden of proof is on the incumbent electric utility. While the commission agrees that a REP is specifically excepted from the definition of "electric utility," the commission does not agree that PURA §39.003 assumes that each contested case will involve an incumbent electric utility. The commission interprets this PURA provision as intending to expand, rather than restrict, contested cases under the APA.

Although the commission concludes that the REP certification process shall be a contested case, experience with contested cases involving certification applications in the telecommunications industry demonstrates that such cases can be managed fairly and efficiently. The commission expects to utilize a conservative standard with respect to intervention in these proceedings. Assertions of justiciable interest will be subject to strict scrutiny. For example, the mere allegation that an entity is a competitor or potential competitor with respect to the applicant is unlikely to be sufficient grounds for admission as a party to a REP certification proceeding. The commission intends these proceedings to be aggressively managed. Commission Procedural Rule §22.32, relating to Administrative Review, authorizes administrative review in instances where, among other requirements, the matter has been fully stipulated so that there are no issues of fact or law disputed by any party. Moreover, Procedural Rule §22.35, relating to Informal Disposition, allows informal disposition in contested cases under proper circumstances. Presiding Officers also have discretion to limit discovery, where appropriate. When a contested issue of fact arises in a REP certification proceeding, fairness and due process require an opportunity for hearing. The commission concludes that an expeditious process must be balanced with the obligation of the commission to protect the interests of the Texas customer and competitors in the market. Both the contested case nature of the proceeding and the timelines for reviews of applications are designed to serve these goals.

EGS and Retailers stressed the importance of a certification process that does not unnecessarily delay a REP's ability to enter the market, and proposed condensing the timelines for evaluating completeness of applications and for completing the certification process by as much as half. Both parties emphasized that the commission could extend the deadlines when necessary with a finding of good cause. According to EGS, it is imperative that the process does not hinder the transition to competition, including a REP's participation in the Customer Choice Pilot Programs.

The commission does not agree that the timelines for review of REP certification applications should be shortened from those in the proposed rule (20 days to evaluate completeness and 90

days to complete the certification process). Given that there is no statutory limit on the certification process, given the steps required to process an application, and given the commission's experience in the telecommunications industry, the commission determines that times allowed in the proposed rule are appropriate.

The commission carefully considered the timelines and finds that they reflect an efficient timeline by which the majority of sufficiency reviews can be completed. Practically speaking, a number of steps must happen in the application process. When many applications must be managed simultaneously, efficiency may well be impaired, particularly when a new process is being initiated. The volume of REP applications that will be filed at the first opportunity cannot be precisely anticipated, but the commission expects that many applications will be received in September and October of 2000. Although every effort will be made to complete the sufficiency part of the process as quickly as possible, to create a provision in the rule that could result in the need for issuance of orders for good cause extensions that could otherwise be avoided is not prudent.

Similar estimation processes were employed in determining the 90-day overall review timeline adopted in the rule. In addition to the work of customer protection and financial and technical review, a proposed order must be drafted and filed twenty days before the open meeting at which the commissioners will consider the case. This means that only 70 of the 90 days in the schedule are actually available for the work of review. While commenters suggest reducing this time to 45 or 60 days, the commission's experience with telecommunications industry certification processes, which are subject to a 60-day statutory timeline, reflects the frequent need for good cause extensions. Sometimes these extensions were the result of a need to find a "fit" with the open meeting schedule, but more often were the result of motions for extensions of time by the parties. Rather than adopt an unreasonably short timeline that will result in good cause extensions being the rule rather than the exception, the commission chooses a timeline that it anticipates will be appropriate to the needs of the majority of REP certification cases. The commission finds that the 90-day review timeline adopted in the rule is reasonable and appropriate. In any event, prompt filings after September 1, 2000 will be processed well in advance of the pre-marketing activities for the pilot project program in Spring 2001.

§25.107(d), REP certification requirements based on service area

Subsection (d)(1)(A)

Reliant and TXU-REP stated that the geographical service areas specified in proposed §25.107(d)(1)(A)(i-iii) should be consistent with the service areas used for POLRs in Project Number 21408. According to Reliant, a REP affiliated with a TDU will almost certainly be required to serve an entire POLR service area, and therefore will have to become the POLR by default if no other REP chooses to serve that entire area. The geographical requirements in subparagraph (A) should be broad enough to ensure that REPs other than the affiliated REP are eligible to serve as the POLR for a particular area. TXU-REP stated its concerns about allowing certain REPs, by unilaterally designating their own small service areas, to circumvent the requirements of PURA §39.106(f), which imposes upon all certified REPs the potential obligation to serve as POLR. TXU-REP stated that the commission should revise §25.107(d)(1)(A) to ensure that only the state, a power region within the state, or the service areas of a TDU, can be designated as service areas. TXU-REP pointed out that requiring larger service areas would also facilitate the commission's record keeping.

Consumers maintained that, the smaller the service territory, the greater the potential for "redlining and cream skimming." Consumers further maintained that greater potential for competitive choice in rural areas would result if the minimum size REP service area region is the TDU service territory. Contrary to Reliant and TXU-REP, Consumers stated that it is not averse to naming the affiliated REP as the POLR.

TXU-REP stressed that the commission should ensure that the geographical service areas that may be designated for REP certification match the geographical areas that will be identified in the ERCOT registration database as well as the areas that are being contemplated for delineating the bounds of service areas for POLR. TXU-REP said that, to date, market participants who have been involved in establishing the parameters for the registration database (which will identify each customer and its chosen REP) have agreed that the zip code and the service area of the TDU that serves the customer are the appropriate geographical identifiers. If the commission allows REPs to designate their service area in any different manner, especially if the area designated is smaller, then it will be difficult for the registration database to sufficiently fulfill its purpose.

The commission finds that the financial requirements that were inserted into the proposed rule at publication, and largely maintained in the adopted rule, facilitate market entrance for new and small REPs and eliminate the need to allow for small geographical service areas in order to facilitate market entry. The commission agrees with Consumers that, the smaller the geographical service area, the opportunities for "redlining" increase. The commission believes that requiring the smallest REP service areas to equate a TDU service area will encourage REPs to broaden their customer base.

Subsection (d)(2)

EGS asserted that the reporting requirements related to Option 2 in §25.107(d)(2)(F) are unduly burdensome and should be deleted, since Option 2 is available only to REPs serving individual customers who contract for one megawatt (MW) or more of capacity.

The commission does not agree that the Option 2 REPs should be exempted from the reporting requirements of the rule. The sophistication of Option 2 customers is recognized by the reduced application requirements imposed upon REPs who serve them; the reporting requirements are designed to serve purposes in addition to customer protection. However, the commission does agree that §25.107(d)(2)(F) should be modified to read: "A REP certified pursuant to this paragraph is subject to reporting requirements specified in subsection (i) of this section."

§25.107(e), Administrative requirements.

Subsection (e)(1)(A)

Reliant Energy objected to limiting a REP to two assumed names, stating that this requirement: 1) is not supported by any facts in this proceeding; 2) could restrict a REP's marketing strategies that would require using several different names; and 3) would restrict a REP with multiple distribution service areas from using a different name for each of its service areas. Reliant argued that, at the least, the rule should clarify that it allows for two assumed names in each distribution service area. CSW-REP concurred with Reliant, stating that the requirement

is arbitrary. CSW-REP suggested that the commission review and approve the use of authorized names instead of limiting a REP to two names, and noted that §25.111(f)(1)(A), relating to Registration of Aggregators, permits five trade names. TXU-REP and Retailers urged the commission to consider authorizing the use of more than just two names, and suggested that the commission revise its rule to allow REPs to use up to ten names, all of which would be identified on the REP's original or amended certificate. EGS argued that, as long as a REP properly registers all assumed names with the commission, the commission would have the means to monitor a REP's activities in the marketplace.

Consumers countered by recalling the reasons offered in debate on the affiliate use of an incumbent's name in earlier rulemakings. Consumers argued specifically that customers should understand with whom they are doing business and that, therefore, the commission should not lift the proposed limit on the number of assumed names used by a REP.

The commission finds that the unlimited use of assumed names by REPs would create the potential for confusion on the part of the public. On the other hand, the commission is sympathetic to the issues raised by the commenters. Therefore, the commission revises subsection (e)(1)(A) to allow a REP to use up to five names at any one time, consistent with the practice adopted in the aggregator registration rule. If an applicant demonstrates sufficient justification for a good cause exception to this requirement, it may seek one.

Subsection (e)(2)

EGS suggested that the commission should provide a REP reasonable advance notice with respect to visits set forth in §25.107(e)(2), and proposed that the phrase "on the same basis available to an electric customer" be replaced with "A REP is entitled to reasonable advance notice of any visit so that the REP can have appropriate representatives available to respond to the commission's authorized representative." Utility.com objected to the requirement that its Texas office provide customer service, stated that more is available to a customer on its website than at its Texas office, and argued that acceptance of process serving at its Texas office would create delay of a day or more for the proper company officials to receive it.

The commission finds that the prior notice requested of EGS would undermine the effectiveness of an inspection intended to reveal the conditions of a REP's office as experienced by an electric customer, and therefore would be inconsistent with the purpose of such an inspection. The commission notes that the person onsite at the REP's Texas office does not need to be responsible for anything so onerous as a full commission audit. Rather, the person on site must simply be able to show a commission representative that the office meets the requirements of PURA §39.352(b)(4). The commission interprets this statute to list functions that the office is capable of providing and not that the office be the REP's only or primary location of providing the functions. Therefore, a commission representative may reasonably expect a demonstration that customer service is available, that service of process can be accepted at the site, and that documents demonstrating that the REP is in compliance with the requirements of Chapter 39, Subchapter H of PURA are accessible. The commission includes in the rule the phrase "on the same basis available to an electric customer" to indicate that the required burden in responding to the commission's representative is no more onerous than responding to a customer (or server of process) in a manner that complies with the law. To address Utility.com's concern about customer service functions occurring at the site, the commission clarifies that the availability of a company representative in the Texas office that can provide a customer with assistance in navigating Internet or other communication with a service center located elsewhere would be sufficient to comply with the letter of the law and rule.

Subsection (e)(3)

OPUC recommended modification of the "4CP method" calculation of the 300 MW threshold contained in subsection (e)(3)(A), stating that it is unclear whether the REP's "4CP" is measured at the time of a utility service area's overall four monthly peaks, or at the time of the ERCOT four monthly peaks. OPUC asserted that, if the "4CP method" is intended to refer to the demands at the time of the REP's internal peak demand in each of the four summer months, the reference to "4CP" is misleading, since the measurement is non-coincident with respect to the loads of other REPs. In the event that the 4CP method refers to a REP's internal peak demand in each of the four summer months, OPUC recommended alternate language. EGS interpreted the rule to mean that statewide (ERCOT and non-ERCOT areas) peak hours will be used and supported the rule language. TIEC stated that it is unclear whether OPUC opposes a 4CP methodology that measures a REP's internal peak demand in each of the four summer months, and stated that OPUC's description of this methodology as "the average of the REP's maximum hourly demand in each of the months, June, July, August, and September" is an accurate characterization of the rule's 4CP methodology. TIEC stated that it would not oppose including the language cited by OPUC to clarify the methodology.

OPUC further stated that the rule provision does not state whether the 4CP is measured at the meter or at the generating source, and asserted that the determination of this question should depend, in part, upon the intended data source for the measurement, *i.e.*, the IO or the TDU. OPUC suggested that the commission specify the entity to supply the measurement data and confirm that the data will be readily available. TIEC offered that the 4CP is measured at the meter, not at the generating source, and would support clarification to that effect. OPUC also noted that, given the lack of specificity in the rule as to how the "4CP" data will be collected and measured, it is unclear whether load profile information will be necessary in order to comply with the rule.

OPUC observed that the rule does not clearly define "4CP Method." OPUC disagreed with the specified measurement, if 4CP refers to REP demand at the time of utility system peak hour, statewide peak hour or ERCOT peak hour. According to OPUC, in such cases, the demands of customer loads which are completely off-peak (*e.g.*, street lighting or night lighting) would never affect the measurement of the REP's size; by limiting the peak demand measurement to summer months, the loads of winter heating customers would never affect whether the REP crosses the 300 MW threshold. OPUC maintained that the concept of coincident peak may have relevance to pricing or costing, but it has less meaning for purposes of determining the size of a particular REP. OPUC and Consumers stated that the Legislature did not intend to exempt a REP that aggregates 300 MW of off-peak load (or winter heating load) from the residential service requirement. OPUC and Consumers offered that an alternative measurement is to utilize the REP's class maximum diversified demands, summing the maximum demand of each customer class served by the REP. According to OPUC, the TDUs would be the best source of that data. If that method is

not used, OPUC recommended basing the measurement upon the maximum hourly demand of the REP, regardless of month.

EGS urged that OPUC's recommendation for calculating the 300-MW threshold be rejected for two reasons. EGS asserted that OPUC's method complicates the calculation of the threshold by utilizing classes in the calculation. According to EGS, the issue underlying PURA §39.352(g) is whether the REP's aggregate load meets the 300-MW threshold, and it is not necessary to use classes to resolve this issue. EGS further stated that the maximum diversified demand method proposed by OPUC would require calculations specific to each REP using data obtained from the TDUs, while the 4CP method could utilize data and calculations from centralized entities such as ERCOT and IO in non-ERCOT areas. EGS further argued that there is no basis in PURA §39.352(g) for differentiating between on-peak and off-peak load, and that the 4CP method is a reasonable method of measuring aggregate load under this provision. Retailers observed that the commission staff has historically depended on a 4CP over the summer months as the standard methodology for determining capacity demand and setting rates.

The commission agrees that the intent of the 300-megawatt aggregate load threshold is to establish the size of a REP to which the 5.0% residential load requirement will apply. In choosing to employ the "4CP" method for calculating the 300 megawatt threshold, the goal was to determine the average of the highest hourly demand in megawatts of all of a REP's customers during each of the months of June, July, August and September. The commission recognizes that this average is non-coincident with respect to other REPs (or with respect to the system peak), and that, therefore, the use of "4CP" terminology may create confusion. Therefore, the commission removes the "4CP" terminology from the rule.

The commission finds that the maximum diversified demand measure suggested by OPUC is not consistent with the statutory requirement, which is couched in terms of aggregated demand.

While the commission agrees that looking only at summer months, or the single highest day in that month may not capture the most accurate picture to the size of each REP, the commission finds that utilizing the average of a REP's highest hourly average demand in the hottest months strikes a good balance. While the law is written in a manner that can be construed to cast the broadest net of any instance in the year of surpassing the 300-megawatt threshold, the commission finds that a single unanticipated reading at that level would be deterrence to competition. The commission's balance in the rule avoids imposing an unexpected burden on those REPs that may, on a single occasion, have a 300 MW demand, but captures those REPs whose business justifies the requirement.

This procedure is also intended to ease the calculation and reporting burdens on REPs. It is crucial, however, to capture all of a REP's demand in both ERCOT as well as other reliability councils or regions. Therefore, for those REPs serving load in multiple IO jurisdictions, the calculation must include the combined demand scheduled concurrently at all relevant IOs and that of affiliates. The commission adopts a calculation based on the amount of power scheduled by or on behalf of the REP because it believes that this will be administratively straightforward for the REP to report and for the commission to verify. While the commission recognizes that amount of load scheduled by a REP (or its QSE) will be different from that ultimately deemed to have occurred after settlement, the commission notes that there is little if any incentive for REPs to purposely under-schedule for the purposes of avoiding the obligations of subsection (e)(3) because such REPs will be assessed balancing energy by the IO for the amount of load under- scheduled.

§25.107(f), Financial requirements

Subsection (f)(1)(A)(i):

EGS proposed that REPs should be allowed to provide audited financial statements for the last two years as a means of demonstrating the capitalization requirements in paragraph (1)(A)(i).

The commission disagrees with the unqualified use of yearly audited financial statements to demonstrate the $50 million capitalization requirements because such data tends to become out of date and unreliable. The commission believes that the financial data for certifying REPs must be as current as possible and that quarterly financial data should also be provided when available to update and support the annual data.

Retailers noted that the word "or" appears to be missing at the end of subsection (f)(1)(A)(i) and should be added.

The commission agrees and incorporates the grammatical correction.

Subsection (f)(1)(A)(iii):

Because Retailers believed that the $100,000 liability represented a burden to a smaller REP, they proposed that the commission permit an "early release" from this requirement without having to file a new certification application once the REP establishes an investment grade credit rating or when it satisfies the $50 million in net assets test.

The commission agrees with Retailers that if a REP achieves investment grade status, or at least $50 million of net assets, then the REP should be able to obtain an early release from its cash requirement. However, rather than specifying conditions in this rule under which such a release would be allowed, the commission leaves it to REPs to realize this credit upgrade through an amendment to their certification.

Subsection (f)(1)(C)

EGS proposed that REPs should have the opportunity to obtain a credit rating from nationally recognized credit rating firms in addition to Standard & Poor's ("S&P") or Moody's Investor Services ("Moody's"). Furthermore, EGS proposed that, if the current credit rating was downgraded below investment grade or the rating was otherwise suspended or withdrawn by one credit rating agency, the REP should have the opportunity to substitute the requisite rating of another rating agency for the commission's consideration prior to requiring alternative sources of financial evidence.

The commission agrees with the use of other credit rating agencies in addition to S&P and Moody's, such as Fitch for financial institutions and Best for insurance companies. However, as a practical matter, the commission does not agree to the substitution of rating agencies if one of them downgrades the REP's credit. Generally speaking, the commission believes that the credit downgrade by an agency is usually a harbinger of the REP's downgrade by other rating agencies. Nevertheless, the commission will expand subsection (f)(1)(F) to reflect the inclusion of acceptable alternative credit rating agencies with national presence as proposed by EGS.

TXU-TDU stated that the financial instruments specified in this subsection should specify that the financial institution issuing the

instrument should have a required credit rating (such as A- or better) and should be an U.S. financial institution or a foreign institution with an U.S. branch. Furthermore, since the commission will presumably be the party drawing on the security under subsection (i)(9), this subsection should specify who will be entitled to negotiate the precise form of the financial instrument and who will be entitled to draw on the security.

The commission believes that it is sufficient to rely on its future ability to approve these financial instruments in advance of their use. At the same time, however, the commission modifies subsection (f)(1)(F) to state that a minimum investment grade credit rating of "BBB-" from S&P or "Baa3" from Moody's, or their equivalents, is more appropriate than pursuing the much lower risk "A" rating that is also assigned by both agencies to much stronger financial credits.

Retailers proposed that a new subparagraph be crafted to allow a performance bond to be an option for evidence of financial resources in meeting the minimum credit standard, specifically a "bond issued by a financially viable surety company authorized to transact business of this type in the state of Texas." During the public hearing, Retailers addressed the nature and pricing of bonds used to meet the credit standards of subsection (f), noting that the cost of such bonding depended on the type of bond required by the commission for certification. However, no details were provided addressing the quantification of these costs.

Since relevant details of bonding are not yet resolved, the commission conforms its rule to the wording consistent with that adopted in §25.111, Registration of Aggregators, by modifying subparagraph (C)(iv) to read "… including a bond in a form approved by the commission." However, the commission modifies subsection (f)(1)(F) to allow that a "BBB-" investment grade credit rating by S&P or a "Baa3" rating by Moody's, or their equivalents, to be a reasonable minimum requirement for a bonding entity in Texas.

Subsection (f)(2)(A)(ii):

Utility.com requested that clause (ii) be re-written so that there was no misunderstanding that only REPs receiving prepayments or deposits must file the 90 day sworn affidavit.

For the sake of clarity and consistency, the commission re-writes the clause to specify "deposits or other advance payments."

Subsection (f)(3).

CSW-REP noted that the first sentence of subsection (f)(3), referring to a TDU that is subject to a financing order, should reference PURA §39.303, which pertains to commission adoption of securitization financing orders, rather than PURA §39.310, which addresses the pledge of the state related to transition bonds.

The commission corrects the reference.

§25.107 (g), Technical and managerial resource requirements

Reliant stated that the technical and managerial resource requirements set forth in subsection (g) are necessary and appropriate, but incomplete from a TDU's perspective. Reliant noted the proposed rule focuses on a REP's ability to comply with IO obligations, but is silent regarding a REP's capability to comply with obligations set forth in the TDU tariffs and service agreements. Reliant submitted that a REP should satisfy terms and conditions in the tariffs and service agreements applicable to a TDU's service area in which the REP makes retail sales, prior to the REP being permitted to begin operations and enroll customers in the TDU's service area. Retailers countered that the TDU Access tariff proceeding will be consistent with the technical requirements of this rule, and that the ability to comply with the tariff is a matter for consideration in Project Number 22187. Consumers supported subsection (g) as written.

The commission believes that these are issues that are also being addressed in Project Number 22187.

Subsection (g)(1)-(4)

Retailers asserted that the commission should require the applicant to submit only a sworn affidavit to establish compliance with subsection (g)(1)-(4). The applicant would file the affidavit as part of its application, and would then need to actually meet these requirements before commencing service. Retailers argued that requiring compliance before certification would be burdensome, and it would be unrealistic to expect a prospective REP to execute contracts for capacity and ancillary services prior to obtaining REP certification. Retailers recommended the commission accept a sworn affidavit to establish compliance. The applicant would file the affidavit as part of its application, and would then need to actually meet these requirements before commencing service. Especially with respect to subsection (g)(1), Retailers said that applicants should be allowed to submit affidavits to demonstrate compliance with these obligations through contracting with a QSE.

The commission concurs with Retailers and amends subsections (g)(9)(G) and (i)(2) of the rule to clarify that applicants can meet the certification requirements of (g)(1)-(4) by affidavit. A REP that initially demonstrates that it can meet these requirements by affidavit must provide evidence that the requirements in (g)(1)-(4) are met 21 days before beginning to offer service.

Retailers suggested that the commission remove the compliance requirements for the renewable portfolio standards from the REP certification requirements, since the renewable resource rule provides for penalties the REP must pay. Failing to meet the requirement constitutes a business decision on the part of the REP.

The commission concludes that specifying the renewable standard in the rule will allow REPS to make an informed business decision. Therefore, the commission retains, as an integral part of the REP compliance requirement, the renewable portfolio standard, but makes wording adjustments to acknowledge the business decision mentioned by Retailers.

Subsection (g)(6)

TXU-REP and Retailers suggested the deletion of paragraph (6) of the subsection (g), since competitors should be expected to know and accept the responsibility of adequate staffing or training. According to TXU-REP and Retailers, it is not the commission's role to regulate such matters in a competitive market.

While competition will weed out unfit suppliers, the commission is required by the legislature to ensure that providers of electricity meet certain minimum financial and technical requirements, and abide by the customer protection rules. Therefore, subsection (g)(6) ensures from the outset that certain minimum standards have to be in place prior to allowing a REP to provide service in Texas. The commission concludes that these standards will promote healthy competition and deter unscrupulous operators.

Subsection (g)(7)

CSW-REP stated that paragraph (7) should be rewritten to recognize that the REP may be the initial point of contact with a customer, and that the REP should provide adequate procedures to enable the customer to contact the distribution service provider on a 24-hour basis. CSW-REP suggested that REPs could provide a recorded message with the telephone number of the distribution utility needing to address the distribution service issue for after-hours calls. CSW- REP also suggested that distribution utilities take calls directly.

TXU-TDU stated the REP's function as the primary point of contact for retail customers for distribution system services will be defined in the standard tariff terms and conditions being developed in Project Number 22187, and, to avoid confusion, those terms and conditions should be cross-referenced in subsection (g)(7). TXU-TDU further stated that REPs would need to communicate electronically with the utilities to convey outage notices.

Retailers proposed that REP compliance to outage notices on a 24-hour basis be based on high volume automated call routers or interactive voice response (IVR) equipment on a 24-hour basis; answering calls, or obtaining interruption information and relating the information to the utility.

The commission believes that there may be situations that warrant direct contact between the retail customer and the TDU. This and related IVR issues are being addressed in Project Number 22187.

Subsection (g)(9)(B)

TXU-REP and Retailers said that the requirement in subsection (g)(9)(B) to submit a 12- month load projection with an application should be deleted. TXU-REP stated that it seems unlikely that, at the time of applying for certification as a REP, the potential REP will be able to reasonably estimate the total load and residential load that it expects to serve over the next year. Retailers argued that a REP's projection of 12-month load at the outset, with residential load separately identified, would be speculative and of little value.

While the commission disagrees that initial load projections would be of little value, the commission finds that the information is not essential to the application process and deletes the requirement from the rule.

Subsection (g)(9)(C)

CSW-REP stated that the three-year complaint history requirement of paragraph (9)(C) seemed unnecessarily burdensome for affiliated REPs. The commission has extensive regulatory experience with the predecessor of the affiliated REP, and can be expected to rely heavily on that experience in evaluating the application for a certification. Because of these circumstances, CSW-REP believes that affiliated REPs should be relieved of the obligation to provide a complaint history and compliance record for affiliates providing utility-related services. CSW- REP also requested the commission to consider easing these restrictions in a similar manner for other established REPs, for example, when they simply seek to extend their area of operation into Texas. For an established entity that has been operating as a REP for a number of years, its direct complaint history and compliance record is substantially more significant than that of affiliated telecommunications, gas, water and cable providers, argued CSW-REP, and, accordingly, requirements for additional information would burden the process unnecessarily.

Retailers offered substitute language to this provision to parallel the intent found in numerous other states' rules. In Nevada, Arizona, California, Connecticut, Maryland, and Massachusetts, state rules recognize the difference between a violation and a complaint. Retailers complained that requiring applicants to file all complaints, which are subjective at that stage, would be less meaningful than requiring the filing of only actual violations and sanctions, and only those relating to customer protection.

The commission notes that load and billing information will be kept in ERCOT for several years. Therefore, given the state and cost of technology, a three-year complaint history is not burdensome. The commission agrees that a distinction between complaint and sanction and/or violation may be relevant. Therefore, the commission retains the requirement as proposed.

Subsection (g)(9)(G)

TXU-REP stated that PURA §39.151(j) requires all REPs to comply with the ERCOT ISO's scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures. Consequently, there is no need to allow REPs an alternative of merely relying on the entities from which they buy power to comply with the IO's procedures. Thus, subsection (g)(9)(G) of the proposed rule should be revised accordingly.

The commission has stated all along that REPS will be required to comply with additional technical and reliability requirements imposed by the IO. Subsection (g)(9)(G) recognizes that for certain functions, such as scheduling power, a REP may delegate this function and corresponding IO technical requirements to the QSE. The commission concludes that requiring a REP to personally perform functions that will be performed by the QSE (on behalf of the REP) is unnecessary and redundant.

§25.107(h), Customer protection requirement

EGS commented that customer protection requirements are best addressed in Project Number 22255, *Customer Protection Rules for Electric Restructuring*, and need not be enumerated in this rule. EGS and Retailers suggested that subsection (h) be modified to cross- reference existing customer protection requirements and that future customer protection requirements and subsection (h)(1) - (h)(8) be deleted.

Consumers supported the rule as proposed, including the retention of subsection (h)(1) - (h)(8), noting that the proposed rule referenced them by allowing that, "In the absence of further specificity in other commission rules, certificated REPS shall be held to the general standards listed below." Consumers felt the provisions are an important safety net for customers, as REPs may be certificated and begin signing up customers prior to the time the customer protection rules are adopted. Consumers expressed hopefulness for the future outcome of the customer protection rules but stated an unwillingness to rely on that result due to the deep division between consumer representatives and REPs observed in that rulemaking project. Consumers noted the minimum standards listed in this rule would provide some minimal protections for customers regardless of the outcome of the other rulemaking.

The commission agrees with Consumers that a list of minimal customer protection standards in this rule is appropriate given that new entrants to the market will apply for certification before rules are adopted under Project Number 22255. The commission reaffirms its statement in the preamble for publication that the existence of such a list in this rule serves several functions. First, it briefly indicates the scope of the customer protection requirements a prospective REP must prepare to meet at the point of making an application. The commission notes that

PURA §39.352, relating to REP certification, includes mention of customer protections as a threshold to REP certification and therefore mention of customer protection obligations of a REP is imperative in the certification rule. The commission reaffirms its concern that the subsection not limit the considerations of Project Number 22255 and therefore deletes the PURA reference in the subsection's introduction and makes several other wording adjustments in the subsection text.

Subsection (h)(3)

TXU-REP and Reliant noted proposed paragraph (3) can be ambiguous about what the REP is obligated to tell its customers regarding customer's rights. Reliant interpreted proposed paragraph (3) to mean that a REP must notify its customers of the practices that are forbidden under the Customers' Service Rights, and of the procedures available to remedy such infractions. Reliant did not interpret the provision to mean that when a REP is accused of or found guilty of illegal practices, it must notify all of its customers that it has engaged in such a practice. Reliant and TXU-REP proposed language to clarify the rule in this regard. TXU-REP suggested reference to the customer protections afforded by PURA.

CSW-REP supported the language requiring that customers be informed of their rights and avenues available to pursue complaints. However, CSW-REP interpreted the "illegal practices" phrase contrary to the clarification discussed above, and therefore posited arguments to delete that part of the requirement.

The commission agrees that the proposed language could be ambiguous and amends subsection (h)(3) to reference the customer protection provisions listed in PURA §39.101 rather than make reference to "illegal practices."

Subsection (h)(7)

TXU-TDU stated that, consistent with the notion that the REP is to be the primary point of contact with the retail customer, subsection (h)(7) should be modified to require a REP to maintain adequate customer service staff to handle customer inquiries, complaints, and report power outages. Retailers opposed TXU-TDU's proposal and recalled a workshop in Project Number 22187 where parties agreed that a REP may automatically forward all outage calls if it maintains current customer information with the TDU. Accordingly, Retailers said that the parties have already resolved this issue in that proceeding and there is no need to place such a requirement on REPs in this rulemaking.

The commission concludes that subsection (h)(7) is intended only to address customer inquiries and complaints. As Retailers noted, the commission is considering options for dealing with outage calls, the particulars of which will be addressed in Project Numbers 22187 and 22255. The commission does not limit the considerations of those projects with paragraph (7), but simply underscores the REP's obligation to address it according to applicable commission rules.

§25.107(i), Requirements for reporting and for changing the terms of a REP certificate.

Subsection (i)(3)

TXU-TDU noted that subsection (i)(3) of the proposed rule requires a REP to notify the commission within 30 days after a material change in the REP's status concerning subsection (f), financial requirements, and subsection (g), technical conditions, relied upon by the commission in certifying the REP. TXU-TDU further noted that this 30-day period is inconsistent with the requirement in subsection (f)(1)(F) that a REP provide alternative financial evidence within ten days of a credit downgrade, and therefore recommended that the 30-day period in subsection (i)(3) should be changed to the same ten-day period provided for in subsection (f)(1)(F).

The commission agrees that the time periods for notification are inconsistent between subsections (i)(3) and (f)(1)(F) and modifies the rule accordingly.

Subsection (i)(4)

TXU-TDU suggested that REPs should also be required to report the amount, if any, paid by the REP to the system benefit fund, as required by subsection (e)(3)(B)(iii), in order to provide a mechanism to verify compliance with that payment requirement, and proposed language to that effect.

The commission agrees and adds amounts paid to the system benefit fund to the reporting requirement list.

Subsection (i)(8)

In order to provide some minimal assurance that a REP will not cease operations without paying its outstanding transmission and distribution service charges, TXU-TDU suggested that REPs should also be required to file proof of the payment of any amounts owed to TDUs, and proposed language to that effect.

The commission declines to adopt TXU-TDU's proposed language. The commission finds that the financial requirements offer the appropriate commission guidance to ensure against the insolvency of REPs. The commission concludes that a REP is obligated to pay transmission and distribution costs to TDUs, and that sufficient legal procedures exist to resolve payment disputes between REPs and TDUs.

Subsection (j), Suspension and revocation

According to TXU-REP and Retailers, subsection (j)(10) should identify only the suspension or revocation of any other aggregation registration, certification, or license, since some state and federal licenses are insignificant or purely administrative, and proposed language to that effect. With respect to subsection (j)(3) and (j)(4), TXU-REP and Retailers maintained that a one-time accidental or inadvertent switch of a customer's REP or the billing of an unauthorized charge should not be considered a significant violation; rather, a pattern of such behavior should be used as a significant violation justifying suspension or revocation.

The commission concurs with TXU-REP and Retailers that some certificate revocations are not associated with providing aggregation services, but clarifies that the list of violations cited in adopted subsection (j) is not intended to be automatic cause for revocation; rather the commission will address suspension or revocation on a case-by-case basis. For this reason, the commission declines to adopt TXU-REP's and Retailers' language.

TXU-TDU stated that the rule should include a requirement that the commission issue a final order within 90 days after giving notice to the REP in any case involving allegations of a violation of or a failure to maintain minimum financial resources, a failure to meet financial obligations (including bankruptcy or insolvency), or a failure to observe scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established by the IO. TXU-TDU expressed concern that,

in situations involving a REP with financial difficulties, a long revocation process could expose the utility to significant financial losses, to the ultimate detriment of other customers.

While the commission recognizes TXU-TDU's concerns about the expeditious resolution of suspension and revocation proceedings, the commission declines to include a deadline. It is possible that these proceedings will occasionally involve resolution of factual issues at the State Office of Administrative Hearings, in which case a lengthier timeline will be necessary. While retaining the flexibility to take such time as justice requires, the commission intends these proceedings to be handled as expeditiously as possible, and expects commission staff and SOAH ALJs to aggressively manage these cases to that end. Similarly, the parties to such cases are expected to work for an expeditious resolution of suspension or revocation of certificates. The commission retains flexibility to issue necessary procedural orders if such an event occurs.

Retailers stated that the commission should make any penalty provisions subject to the provisions of PURA Chapter 15, governing proceedings for suspension and revocation.

The commission understands the need for specific guidelines to guide the revocation and suspension process, but declines to subject such a process to PURA Chapter 15, which prescribes the legal parameters for assessing administrative penalties. PURA Chapter 15 does not address suspension or revocation of certification. The commission concludes that an administrative penalty may lead to or result from a revocation or suspension proceeding. The commission also concludes that there are notice requirements in connection with assessment or appeal of administrative penalties, and these might impact the timeline of a revocation or suspension proceeding. However, the commission concludes that the PURA Chapter 15 process should not be substituted for the revocation process.

The commission finds that revocation or suspension of a certificate pursuant to PURA Chapter 39 is controlled by §39.003; unless specifically provided otherwise, each commission proceeding under PURA Chapter 39, other than a rulemaking proceeding, report, notification, or registration, shall be conducted as a contested case. Furthermore, given that the certification approval process is a contested case, the commission concludes that the same formalities should apply to suspension or revocation of that certificate. The commission declines to adopt Retailers' proposed language.

§25.108

Utility.com proposed that the credit requirement in §25.108 only apply to those REPs who have defaulted on payments to the bond servicer.

The commission declines to accept Utility.com's suggestion as such a change would make §25.108 in conflict with previously issued financing orders.

Reliant, OPUC, TIEC, Shell, Enron, NewEnergy, the State of Texas, TRA, Occidental, and EGS filed joint comments with proposed changes to §25.108 to reflect the agreements reached by the parties in Docket Number 21665, *Application of Reliant Energy, Inc. for a Financing Order to Securitize Regulatory Assets and Other Qualified Costs*. These parties stated that the modifications proposed do not substantively change the standards in §25.108 or the Financing Orders issued in Docket Numbers 21527 and 21528, but instead clarify some of the language and materially reduce the likelihood of future disputes arising.

The commission agrees that the proposed changes do not materially change the standards adopted in previously issued financing orders, will minimize the potential for future disputes about the standards, and are more complete than the standards in the financing orders, and therefore adopts the changes. Furthermore, because the changes suggested by these parties are not in conflict with those adopted in the financing orders, §25.108 will serve to provide additional detail and clarification to the standards adopted in the securitization proceedings. Because no bonds have been issued to date and the changes to the standards will not affect the ratability of the transition bonds, the commission finds it is unnecessary to implement the conforming procedure referenced in the financing orders. Section 25.108 is revised accordingly.

CPS notes that to the extent transmission providers bill REPs directly for transmission service, municipally-owned utilities and electric cooperatives that have not yet chosen to participate in customer choice will have a financial relationship with every REP in ERCOT, regardless of the geographic area in which the REP is providing service. CPS states that it is appropriate for the commission to articulate in its rules that payment by REPs for other non- bypassable charges is expected and required, regardless of whether or not the REP receives payment for such services from its retail customers. CPS proposes that, at a minimum, the commission include REP standards for the payment of transmission and distribution charges, remedies on default, and a process for dispute resolution. TEC supported CPS's comments in its reply comments.

TXU argued that the standards related to the billing and collection of charges other than securitized charges will be established in Project Number 22187 and that that rulemaking should not simply adopt the standards proposed in §25.108.

The commission notes that the details of how transmission providers in ERCOT will bill transmission charges has been addressed in Docket Number 22344, *Generic Issues Associated with Applications for Approval of Unbundled Cost of Service Rates Pursuant to PURA §39.201 and Public Utility Commission Substantive Rule §25.344* and that the resolution of that issue will not require the relationship noted by CPS. The commission agrees with TXU that the standards for billing and collecting non-bypassable charges other than securitized charges are properly addressed in Project Number 22187, but makes no judgment at this time as to whether or not the same standards as those proposed in §25.108 should apply to the other charges.

TXU also suggested that the terms "servicer," "transition bonds," "indenture trustee," "Servicing Agreement," and "Special Purpose Entity" should be defined to avoid later confusion.

The commission agrees with TXU that these terms should be defined in order to avoid confusion at a later date. Additionally, the commission defines "financing order" and "transition charges." A definitions subsection is therefore added to §25.108.

Proposed §25.108(a) Application

TXU-TDU stated that the financial standards in §25.108 should apply to all entities responsible for billing and collecting transition charges and, therefore, the rule should be applicable to electric cooperatives or municipal corporations that serve retail customers in the service areas of TDUs who hold a commission financing order. TXU cites Ordering Paragraph Number 40 from the Financing Order issued in Docket Number 21527, *Application of TXU Electric Company for a Financing Order to Securitize Regulatory Assets and Other Qualified Costs*, which states

that the Financing Order is binding upon each REP or "any other entity responsible for billing and collecting transition charges on behalf of the SPE". (SPE is "special purpose entity").

The commission agrees with TXU that, the financing orders issued to date require any entity responsible for the billing and collection of transition charges to meet the security and payment obligations in those financing orders. The commission recognizes that use of the term "REP" does not necessarily encompass electric cooperatives or municipal corporations; however, this rule is not intended to do so. The commission will address the applicability of these standards to all entities providing competitive retail service in standard tariff developed in Project Number 22187.

Proposed §25.108(c)(6)

CSW-REP notes that the reference to the "… amount of the penalty detailed in paragraph (5)…" should be a reference to paragraph (4).

The reference has been corrected.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

These sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2000) (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 §39.352 which requires the commission to grant certificates to applicants who demonstrate sufficient qualification to provide retail electric service; §39.356, which grants the commission authority to establish terms under which the commission may suspend or revoke a retail electric provider's certification, and §39.357, which grants the commission authority to impose an administrative penalty for violations of §39.356.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 15.023, 39.352, 39.356, and 39.357.

§25.107. Certification of Retail Electric Providers (REPs).

(a) Application. This section applies to all persons who seek to provide electric service to retail customers in Texas on or after the date of customer choice, as established by Public Utility Regulatory Act (PURA) Chapter 39, or as a provider of retail electric service in the Customer Choice Pilot Projects, as established under PURA §39.104 and 39.405.This section does not apply to the state, political subdivisions of the state, electric cooperatives or municipal corporations, or to electric utilities subject to PURA §39.102(c) until the end of the utility's rate freeze. An electric cooperative or municipally owned utility participating in customer choice may offer electric energy and related services at unregulated prices directly to retail customers who have customer choice without obtaining certification as a REP. The statutory mandate for certification of persons who provide retail electric service in this state, provided by PURA §39.352(a), is interpreted to address business functions as follows:

(1) Persons who purchase, take title to, and resell electricity must register as REPs. Persons who do not purchase, take title to, or resell electricity, but perform a service pursuant to a contract with the REP do not need to become certificated as REPS.

(2) A REP may contract to outsource functional requirements specified in this section or other commission rules, however:

(A) the REP remains accountable to applicable laws and commission rules for all activities conducted on its behalf by any subcontractor, agent, or any other entity;

(B) the REP and any of its agents are sellers and seller's agents and may not represent themselves as agents of the buyer's interests; and

(C) all REPs are responsible for providing or contracting for all of the elements necessary to provide continuous and reliable electric service to retail customers as required by commission rules.

(b) Definitions. The following words and terms when used in this section shall have the following meaning unless the context indicates otherwise:

(1) Continuous and reliable electric service - Electric power service provided at retail by a retail electric provider (REP), consistent with the customer's terms and conditions of service, uninterrupted by unlawful or unjustified action or inaction of the REP.

(2) Customer - Any entity who has applied for, has been accepted, or is receiving retail electric service from a REP for use on an end-use basis.

(3) Person - Includes an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation, but does not include an electric cooperative or a municipal corporation.

(4) Retail electric provider - A person that sells electric energy to retail customers in this state. As provided in PURA §31.002(17), a retail electric provider may not own or operate generation assets. As provided in PURA §39.353(b), a REP is not an aggregator.

(5) Revocation - The cessation of all REP business operations in the state of Texas, pursuant to commission order.

(6) Suspension - The cessation of all REP business operations in the state of Texas associated with obtaining new customers, pursuant to commission order.

(c) Application for REP certification.

(1) After the date of customer choice, or as a participant in the Customer Choice Pilot Projects, a person, including an affiliate of an electric utility, may not provide retail electric service in the state unless the person is certified by the commission as a retail electric provider in accordance with PURA §39.352 and this section.

(2) A retail electric provider may apply for certification any time after September 1, 2000. A certificate granted pursuant to this section is not transferable without prior approval by the commission.

(3) An application for certification shall be made on a form approved by the commission, verified by oath or affirmation, and signed by an applicant's owner or partner, or an officer of the applicant. Applications may be obtained in the Central Records division of the Public Utility Commission of Texas during normal business hours, or from the commission's Internet site. Each applicant shall file its application with the commission's Filing Clerk in accordance with the commission's Procedural Rules, Chapter 22, Subchapter E, of this title (relating to Pleadings and Other Documents).

(4) The applicant may identify certain information or documents submitted that it believes to contain proprietary or confidential information. Applicants may not designate the entire application as confidential. Information designated as proprietary or confidential will be treated in accordance with the standard protective order issued by the commission for use with applications for certification as a REP.

If and when a public information request is received for information designated as confidential, the applicant or REP has the burden of establishing that information filed pursuant to this rule is proprietary or confidential.

(5) Except where good cause exists to extend the time for review, the presiding officer shall issue an order stating whether an application is deficient or complete within 20 days of filing. Deficient applications and those without necessary supporting documentation will be rejected without prejudice to the applicant's right to reapply.

(6) While the application is pending, an applicant shall inform the commission of any material change in the information provided in the application within ten days of any such change.

(7) The commission will make an effort, where the facts of the case permit, to insure that applications filed simultaneously are resolved simultaneously. Except where good cause exists to extend the time for review, the commission shall enter an order approving, rejecting, or approving an application with modifications within 90 days of filing an application.

(8) A certificate granted pursuant to this section shall continue in force until further order of the commission.

(9) A certificate granted pursuant to this section shall not be construed to vest exclusive service or property rights in and to the area for which the certificate is granted.

(d) REP certification requirements based on service area. As a requisite for obtaining and maintaining certification, a REP must designate a service area defined by either paragraph (1)or (2) of this subsection, and meet the certification requirements designated therein.

(1) Option 1. For REPs defining service areas by geography:

(A) A REP must designate one of the following categories as its geographical service area:

(i) The geographic area of the entire state of Texas; (indicating the zip codes applicable to that area); or

(ii) The service area of specific transmission and distribution utilities, and/or municipal utilities or electric cooperatives in which competition is offered; or

(iii) The geographic area of Electric Reliability Council of Texas (ERCOT) or territory of another independent organization to the extent it is within Texas.

(B) A REP with a geographical service area is subject to all subsections of this section, including those pertaining to administration, financial, technical and managerial, customer protection, and reporting requirements, as applicable.

(C) The commission shall decide whether to grant a certificate to an applicant proposing to provide retail electric service to a geographical service area in Texas based on:

(i) Provision of all of the information required of the applicant in the form, *Application for a Certificate to Provide Retail Electric Service*, approved by the commission.

(ii) Whether the applicant has met the business name, office, and threshold residential service level requirements specified in subsection (e) of this section.

(iii) Whether the applicant has demonstrated that it possesses the financial and technical resources to provide continuous and reliable electric service to its customers in the area for which certification is sought and the technical and managerial ability to supply electricity at retail in accordance with customer contracts, pursuant to subsections (f) and (g) of this section.

(iv) Whether the applicant has demonstrated that it possesses the resources needed to meet the customer protection requirements, disclosure requirements, and marketing guidelines as specified in subsection (h) of this section.

(v) Whether the configuration of the proposed geographic area, if any, would discriminate in the provision of electric service to any customer because of race, creed, color, national origin, or any other basis prohibited by law or by subsection (h)(1) of this section.

(D) If the presiding officer determines that an applicant does not possess resources sufficient to serve the geographical area designated by the applicant, the presiding officer shall notify the applicant of the deficiencies and allow the applicant to designate a different geographical service area commensurate with its resources. If the applicant designates no suitable area within a reasonable time, the application shall be denied.

(2) Option 2 - For REPs defining service areas by customers. As an alternative to a geographical service area, a REP may define a service area by a specific list of customers, each of whom contract for one megawatt or more of capacity. The applicant shall be certified as a REP only for purposes of serving the named customers.

(A) To obtain certification under this paragraph, an applicant must file with the commission a signed, notarized affidavit from each individual retail customer with which it has contracted to provide one megawatt or more of capacity. The affidavit shall state that the customer is satisfied that the REP meets the financial, technical and managerial, and customer protection standards prescribed in subsections (f)(2), (g), and (h) of this section. The one-megawatt threshold may not be met by aggregation of individual electricity customers.

(B) A REP whose service area is defined by customers shall meet the administrative requirements specified in subsection (e) of this section.

(C) A REP whose service area is defined by customers shall meet the financial requirements for billing and collection of transition charges pursuant to subsection (f)(3) of this section, if applicable.

(D) The commission will grant a certificate to an applicant under this paragraph upon a finding that the affidavits for each designated customer have been received and that all requirements of this paragraph are met.

(E) A REP certified pursuant to this paragraph may be authorized to serve additional customers by amending its certificate pursuant to subsection (i)(6) of this section.

(F) A REP certified pursuant to this paragraph is subject to reporting requirements specified in subsection (i) of this section.

(e) Administrative requirements. As a requisite for obtaining and maintaining certification, a REP must meet the following requirements concerning business names, office access, and percentage of electricity sold to residential customers.

(1) Names on certificates. All retail electric service shall be provided in the names under which the certificate was granted. If the applicant is a corporation, the commission shall issue the certificate in the corporate name of the applicant.

(A) No more than five assumed names may be authorized for use by any one REP at one time.

(B) Business names shall not be deceptive, misleading, vague, otherwise contrary to §25.272 of this title (relating to Code of

Conduct for Electric Utilities and Their Affiliates), or duplicative of a name previously approved for use by an existing REP certificate holder.

(C) The commission shall review any names in which the applicant proposes to do business. If the commission determines that any requested name does not meet the requirements of subparagraph (B) of this paragraph, it shall notify the applicant that the requested name may not be used by the REP. A REP will be required to amend its application to provide at least one suitable name in order to be certificated.

(2) Office requirements. A REP shall continuously maintain an office located within Texas for the purpose of providing customer service, accepting service of process, and making available in that office books and records sufficient to establish the retail electric provider's compliance with the requirements of PURA Chapter 39, Subchapter H, and applicable commission rules. The office satisfying this requirement for a REP shall have a physical address that is not a post office box and shall be a location where the above three functions can occur. To evaluate compliance with requirements in this paragraph, the commission's authorized representative may visit the office of a certificated REP at any time during normal business hours on the same basis available to an electric customer. An applicant shall submit the following information with an application:

(A) Evidence that it has made arrangements for an office located in Texas, including the physical address of the office; or

(B) An affidavit stating that the applicant will obtain an office located within Texas meeting the requirements of this paragraph, and will notify the commission of its physical address, after certification but before providing retail electric service to customers in Texas.

(3) Threshold residential service requirement. For 36 months after retail competition begins, if a REP serves an aggregate load in excess of 300 megawatts within Texas during a given year, not less than 5.0% of the REP's load for the year in megawatt hours must consist of residential customers, pursuant to PURA §39.352(g). For the purposes of this paragraph, "residential customers" shall include any customers classified as residential by the applicable transmission and distribution utility tariff or, in the absence of a residential rate class, those customers that are primarily end users consuming electricity for personal, family or household purposes and who are not resellers of electricity.

(A) The 300 megawatt aggregate load threshold shall be calculated by averaging the highest average hourly demand for each of the months of June, July, August, and September. REPs shall use the sum of the amount of generation scheduled at the relevant independent organization(s) to serve the REP's customers for determining the demand to be used in this calculation.

(B) If the calculation made under subparagraph (A) of this paragraph is in excess of 300 megawatts, the certificate holder shall:

(i) demonstrate that not less than 5.0% of the total quantity of megawatt hours it sold in the calendar year was supplied to residential customers, or

(ii) demonstrate that another REP served sufficient qualifying residential load on its behalf, or

(iii) make the necessary calculations and pay an amount into the system benefit fund equal to $1 multiplied by a number equal to the difference between the number of megawatt hours it sold to residential customers and the number of megawatt hours it was required to sell to such customers.

(C) The calculations in subparagraph (B) of this paragraph are subject to the following limitations:

(i) An affiliated REP shall pay $1 multiplied by a number equal to the difference between the number of megawatt hours sold to residential customers outside of the electric utility's service area and the number of megawatt hours it was required to sell to such customers outside of the electric utility's service area.

(ii) For purposes of subparagraph (B)(ii) of this paragraph, "qualifying residential load" may not include customers served by an affiliated retail electric provider in its affiliated electric utility's service area.

(iii) The requirements of this paragraph apply only to the portion of an affiliated REP's load that is outside the electric utility's service area. With respect to that "outside" load, any residential customers counted to meet the 5.0% threshold of residential customers must also be outside the electric utility's service area.

(iv) Where several REPs belong to a common owner, their loads will be combined for purposes of evaluation under this subsection. If the common owner is an electric utility, only loads served outside the electric utility's service area will be used in the calculations under this paragraph.

(f) Financial requirements. As a requisite for obtaining and maintaining certification, a REP must meet the financial resource standards established by this subsection. The standards established by paragraphs (1), (2), and (3) of this subsection are additive.

(1) Financial standards required for credit quality. A REP shall fulfill the following financial qualifications listed below concerning its underlying credit quality:

(A) Minimum credit standards for REP certification. In order to be certified by the commission, a REP or its parent corporation or controlling shareholder providing a guaranty to its REP under subparagraph (D) of this paragraph must demonstrate and, as a condition of continued certification, maintain:

(i) An investment grade credit rating as provided for under subparagraph (F) of this paragraph; or

(ii) Assets in excess of liabilities, *i.e.*, equity, of at least $50,000,000 on its most recent balance sheet; or

(iii) Unused cash resources of at least $100,000, which will allow the REP to incur in Texas up to $250,000 in total monthly billings (excluding transition charges billings) from TDUs. In the event of surpassing the $250,000 per month level of total billings from TDUs in Texas, the REP shall maintain this same ratio of unused cash resources to TDU billings on an ongoing basis. Within 90 days of surpassing the $250,000 billing threshold, the REP shall file with the commission a sworn affidavit demonstrating compliance with this clause. The REP shall thereafter include demonstration of its compliance with this clause in its annual reports. The cash resources under this clause shall be used to first address all commission penalties and then credit obligations to the TDU, if any, in the event of the REP's default.

(B) Utility credit standards for REPs. With the exception of the credit standards provided for in paragraph (3) of this subsection, a transmission and distribution utility shall not impose any additional or separate credit conditions on a REP, unless the REP has defaulted on one or more payments to the utility for services provided by the utility. A transmission and distribution utility may impose credit conditions on a REP that has defaulted to the extent specified in its tariff and allowed by commission rules.

(C) Financial evidence. A REP shall be permitted to use any of the financial instruments listed below, as well as any other financial instruments approved in advance by the commission, in order to satisfy the cash requirements established by this rule.

(i) Cash or cash equivalent, including cashier's check or sight draft;

(ii) A certificate of deposit with a bank or other financial institution;

(iii) A letter of credit issued by a bank or other financial institution, irrevocable for a period of at least 15 months;

(iv) A line of credit or other loan issued by a bank or other financial institution, including a bond in a form approved by the commission, irrevocable for a period of at least 15 months;

(v) A loan issued by a subsidiary or affiliate of the applicant or a corporation holding controlling interest in the applicant, irrevocable for a period of at least 15 months;

(vi) A guaranty issued by a shareholder or principal of the applicant; a subsidiary or affiliate of the applicant or a corporation holding controlling interest in the applicant; irrevocable for a period of at least 15 months.

(D) Loans or guarantees. To the extent that it relies upon a loan or guaranty described in subparagraph (C)(v) or (vi) of this paragraph, the REP shall provide financial evidence sufficient to demonstrate that the lender or guarantor possesses the cash or cash equivalents needed to fund the loan or guaranty.

(E) Unencumbered resources. All cash and other instruments listed in subparagraph (C) of this paragraph as evidence of financial resources shall be unencumbered by pledges for collateral. These financial resources shall be subject to verification and review prior to certification of the REP and at any time after certification in which the REP relies on the cash or other financial instrument to meet the requirements under this subsection. The resources available to the REP must be authenticated by independent, third party documentation.

(F) Credit ratings. To meet the requirements of this paragraph, a REP may rely upon either its own investment grade credit rating, or a bond, guaranty, or corporate commitment of an affiliate or another company, if the entity providing such security is also rated investment grade. The determination of such investment grade quality will be based on the credit ratings of Standard & Poor's (S&P), Moody's Investor Services (Moody's), or any other nationally recognized rating agency, including Fitch for financial institutions and Best for insurance companies. Minimum investment credit ratings include "BBB-" for S&P or "Baa3" for Moody's, or their financial equivalent. If the investment grade credit rating of either S&P or Moody's is suspended or withdrawn, the REP must provide alternative financial evidence included under subparagraphs (C) - (E) of this paragraph within ten days of the credit downgrade.

(2) Financial standards required for customer protection. A REP shall maintain records on an on-going basis for any deposits or advance payments received from customers. Financial obligations to customers shall be payable to them within 30 calendar days from the date the REP notifies the commission that it intends to withdraw its certification or is deemed by the commission not able to meet its current customer obligations. Customer obligations shall be settled before the REP withdraws its certification or ceases doing business in Texas. A REP must meet the following financial qualifications concerning its receipt of customer payments:

(A) Financial obligations to customers. The REP must maintain and provide evidence of financial resources equal to the sum of its obligations to customers for any deposits or other advance payments received from customers, subject to the following conditions.

(i) Financial resources required under this paragraph shall be maintained at levels sufficient to demonstrate that the REP can cover all deposits or other advance payments that are outstanding at any given time.

(ii) The REP shall file with the commission a sworn affidavit demonstrating compliance with this paragraph within 90 days of receiving the first deposit or other advance payment from customers for its services.

(iii) Financial resources required pursuant to this subsection shall not be reduced by the REP without the advance approval of the commission.

(B) Financial evidence. A REP shall be permitted to use any of the financial instruments and conditions set out in paragraph (1)(C) - (F) of this subsection to demonstrate that its resources are adequate for customer protection.

(C) External notice. Any party providing the financial resources necessary to protect customers under this provision of the rule, either directly or indirectly, shall be provided a copy of this rule by the REP.

(3) Financial standards required of REPs for the billing and collection of transition charges. If a REP serves customers in the service area of a transmission and distribution utility that is subject to a financing order pursuant to PURA §39.310, the REP shall comply with any additional standards specified in §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges).

(4) Credit support by affiliates. To the extent it relies on an affiliated transmission or distribution utility for credit, investment, or financing arrangements pursuant to this subsection, the REP shall demonstrate that any such arrangement complies with §25.272(d)(7) of this title.

(5) Reporting requirements. A REP certified under this subsection is subject to the ongoing annual financial requirements of subsection (f) of this section and any other applicable requirements of subsection (i) of this section.

(g) Technical and managerial resource requirements. As a requisite for providing retail electric service, a REP must have technical resources to provide continuous and reliable electric service to customers in its service area and technical and managerial ability to supply electric service at retail in accordance with its customer contracts. Technical and managerial resource requirements include:

(1) Capability to comply with all scheduling, operating, planning, reliability, customer registration and settlement policies, rules, guidelines, and procedures established by the ERCOT independent system operator (ISO), or other independent organization, if applicable, including any independent organization requirements for 24 hour coordination with control centers for scheduling changes, reserve implementation, curtailment orders, interruption plan implementation, and telephone number, fax number, and address where its staff can be directly reached at all times.

(2) Capability to comply with the registration and certification requirements of the ERCOT ISO or other independent organization and its system rules, or contracts for the purchase of power from entities registered with or certified by the ERCOT ISO or independent organization and capable of complying with its system rules.

(3) Purchase of capacity and reserves, or other ancillary services, as may be required by the ERCOT ISO or other independent organization to provide adequate electricity to all the applicant's customers in its certificated area.

(4) Compliance with all renewable energy portfolio standards in accordance with §25.173 of this title (relating to Goal for Renewable Energy), whether by money or by deed.

(5) At least one principal or employee experienced in the retail electric industry or a related industry.

(6) Adequate staffing and employee training to meet all service level commitments.

(7) The capability and effective procedures to be the primary point of contact for retail electric customers for distribution system service in accordance with applicable commission rules, including procedures for relaying outage reports to the transmission and distribution utility on a 24 hour basis.

(8) A customer service plan that describes how the REP complies with the commission's customer protection and anti-discrimination rules.

(9) The following information submitted in an initial application:

(A) Prior experience of the applicant or one or more of the applicant's principals or employees in the retail electric industry or a related industry.

(B) Any complaint history and compliance record during the three calendar years prior to the filing of the application regarding the applicant, applicant's affiliates that provide utility related services such as telecommunications, electric, gas, water, or cable service, the applicant's predecessors in interest, and principals with public utility commissions, attorney general offices, or other applicable regulatory agencies in other states where the applicant is doing business or has conducted business in the past or with the Texas Secretary of State, Texas Comptroller's Office, or Office of the Texas Attorney General. Relevant information shall include, but is not limited to, the type of complaint, status of complaint, resolution of complaint and the number of customers in each state where complaints occurred. The Office of Customer Protection shall review any similar complaint information on file at the commission.

(C) A summary of any history of bankruptcy, dissolution, merger or acquisition of the applicant or any predecessors in interest in the three calendar years immediately preceding the application; and

(D) A statement indicating whether the applicant is currently under investigation, or has been penalized, by an attorney general or any state or federal regulatory agency, either in this state or in another state or jurisdiction for violation of any deceptive trade or consumer protection laws or regulations.

(E) Disclosure of whether the applicant, a predecessor, an officer, director or principal has been convicted or found liable for fraud, theft or larceny, deceit, or violations of any customer protection or deceptive trade laws in any state;

(F) An affidavit stating that the applicant will register with or be certified by the ERCOT ISO or other independent organization and will comply with the technical and managerial requirements of paragraphs (1)-(4) of this subsection; or that all entities with whom the applicant has a contractual relationship to purchase power are registered with or certified by the independent organization and will comply with all system rules and standards established by the independent organization; and

(G) Other evidence, at the discretion of the applicant, supporting the applicant's plans for meeting requirements listed in paragraphs (1) - (5) of this subsection.

(h) Customer Protection requirements. As a requisite for obtaining and maintaining certification, a REP shall comply with any customer protection requirements, disclosure requirements, marketing guidelines and anti-discrimination rules adopted by the commission. In the absence of other commission rules, certificated REPS shall be held to the general standards listed below. An applicant for certification as a REP shall provide a sworn affidavit, as specified in the application form approved by the commission, that it will comply with this section and any other applicable customer protection rules, disclosure requirements, marketing guidelines, and anti-discrimination rules approved by the commission.

(1) A REP may not refuse to provide retail electric service or otherwise discriminate in the provision of electric service to any customer because of race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, or familial status; or refuse to provide retail electric service to a customer because the customer is located in an economically distressed geographic area or qualifies for low-income affordability or energy efficiency services.

(2) A REP shall inform its customers whom to contact and what to do in the event of power outage or other electricity-related emergency.

(3) A REP shall inform its customers of the customer's rights and avenues available to pursue a complaint against the REP as afforded by PURA §39.101.

(4) A REP shall not switch, or cause to be switched, the retail electric provider for a customer without first obtaining proper authorization from the customer.

(5) A REP shall not bill, or cause to be billed, an unauthorized charge to a customer's retail electric service bill.

(6) A REP shall respond in good faith when notified by a customer of a complaint.

(7) A REP shall maintain a customer service staff adequate to handle customer inquiries and complaints.

(8) A REP may not release proprietary customer information to any person unless the customer authorizes the release in a manner approved by the commission.

(i) Requirements for reporting and for changing the terms of a REP certificate. The ongoing maintenance of a REP certificate is dependent upon keeping the certification information up to date, pursuant to the following requirements:

(1) The certificate holder shall notify the commission within 30 days of any change in its office address, business address, telephone number(s), or other contact information.

(2) A certificate holder that has met certain certification requirements of this rule by affidavit shall supply information to the commission to show compliance with the requirement as follows:

(A) A REP who met the Texas office requirement pursuant to subsection (e)(2)(B) of this section shall supply the commission with the physical office address on or before the date of commencing retail electric service in Texas.

(B) A REP that demonstrates that it can meet the technical requirements of subsection (g)(9)(G) of this section by means of

an affidavit shall supply the commission with evidence that it has the capability to comply with subsection (g)(1)-(4) on or before the 21st day prior to commencing retail electric service in Texas.

(3) If any of the following events occur, the holder of a REP certificate must be prepared, if necessary, for re-certification by the commission and shall notify the commission :

(A) within 30 days of a material change in any of the technical conditions presented pursuant to subsection (g) of this section as the basis for the approval of the applicant's initial certification; or,

(B) within ten days of a material change in any of the financial requirements presented pursuant to subsection (f) of this section as the basis for approval of the applicant's initial certification, with a material financial change defined as the loss of investment grade or a 5.0% decline in either the $50 million equity standard or the $100,000 cash standard;

(4) All REP certificate holders shall file updated information set forth in this subsection on an annual basis on a report form approved by the commission. The annual report is due on June 1 each year for the preceding calendar year. A company's first annual report is due in the year following the calendar year in which it is awarded a certificate. The following information, at a minimum, shall be reported annually:

(A) Any changes in addresses, telephone numbers, authorized contacts, and other information necessary for contacting the certificate holder.

(B) If certificated for a service area defined by geography, identification of areas where the REP is providing retail electric service to customers in Texas compiled by zip code.

(C) For 36 months after retail competition begins, the result of the calculation and proof of threshold residential service requirements and the amount paid into the system benefit fund, if applicable, pursuant to subsection (e)(3) of this section.

(D) A list of aggregators with whom the REPs have conducted business in the reporting period, including commission registration verification for each.

(E) A sworn affidavit that the certificate holder is not in material violation of any of the requirements of its certificate.

(5) The holder of a REP certificate shall file with the commission notice of changes to the organizational structure or to the material facts represented in its application, including, but not limited to any change in name, service area, facilities ownership or affiliation upon which the commission relied in approving the REP's application. The commission may require the REP to file an amendment to its certificate if it determines that the changes warrant a reevaluation of the REP's basis for certification.

(6) The holder of a REP certificate for a service area defined by specific customers may amend its certificate to add additional specified customers by submitting to the commission the affidavit required by subsection (d)(2) of this section from the additional customers on or before the commencement of electric service to those customers.

(7) A REP certificate shall not be transferred without prior commission approval. Approval for transfer shall be obtained by petition to the commission. The transferee must complete and file with the commission an application form for certification that demonstrates the transferee's financial and technical fitness to render service under the transferred certificate.

(8) No REP certificate holder shall cease operations as a REP without prior notice to the commission, to each of the REP's customers to whom the REP is providing service on the proposed date of cessation of business operations, and other affected persons, including the independent operator, transmission and distribution utilities, electric distribution cooperatives, municipally owned utilities, generation suppliers, and providers of last resort. The REP shall file with the commission proof of refund of any monies owed to customers. Upon the effective cessation date, a REP's certificate will be deemed suspended. If, within 24-months of cessation, a REP demonstrates compliance with certification requirements, the certificate will be reinstated.

(9) If a REP files a petition in bankruptcy, is the subject of an involuntary bankruptcy proceeding, or in any other manner becomes insolvent, it shall notify the commission within ten days of this event and shall provide the commission a brief summary of the nature of the proceedings. The commission shall have the right to proceed against any financial resources that the REP relied on in obtaining its certificate, to satisfy unpaid administrative penalties or payments owed to customers.

(j) Suspension and revocation. Pursuant to PURA §39.356, certificates granted pursuant to this section are subject to suspension and revocation for significant violations of PURA, commission rules, or reliability standards adopted by an independent organization. The commission may also amend the certificate or impose an administrative penalty for a significant violation. The commission or any affected person may bring a complaint seeking to suspend or revoke a REP's certificate. Significant violations include, but are not limited to, the following:

(1) Providing false or misleading information to the commission;

(2) Engaging in fraudulent, unfair, misleading, deceptive, or anti-competitive business practices or unlawful discrimination;

(3) Switching, or causing to be switched, the retail electric provider for a customer without first obtaining the customer's permission;

(4) Billing an unauthorized charge, or causing an unauthorized charge to be billed to a customer's retail electric service bill;

(5) Failure to maintain continuous and reliable electric service to its customers pursuant to this section;

(6) Failure to maintain the minimum level of financial resources set out in subsection (f) of this section;

(7) Bankruptcy, insolvency, or the inability to meet financial obligations on a reasonable and timely basis;

(8) Failure to timely remit payment for invoiced charges to a transmission and distribution utility pursuant to the terms of the statewide standardized tariff adopted by the commission;

(9) Failure to observe any scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established by the independent organization;

(10) A pattern of not responding to commission inquiries or customer complaints in a timely fashion;

(11) Suspension or revocation of a registration, certification, or license by any state or federal authority;

(12) Conviction of a felony by the certificate holder or principal employed by the certificate holder, of any crime involving fraud, theft or deceit related to the certificate holder's service;

(13) Not providing retail electric service to customers within 24 months of the certificate being granted by the commission;

(14) Failure to serve as a provider of last resort if required to do so by the commission pursuant to PURA §39.106(f); and

(15) Failure, or a pattern of failures to meet the conditions of this section or other commission rules or orders.

§25.108. Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges.

(a) Application. This section applies to any retail electric provider (REP) or any other entity responsible for billing and collecting transition charges serving customers in a transmission and distribution utility (TDU) service area subject to a financing order issued by the commission under Public Utility Regulatory Act (PURA) §39.303.

(b) Definitions.

(1) Financing order - An order of the commission adopted under PURA §39.201 or §39.262 approving the issuance of transition bonds and the creation of transition charges for the recovery of qualified costs.

(2) Indenture trustee - An entity that administers the indenture related to transition bonds.

(3) Servicer - The entity responsible for carrying out obligations related to transition bonds under a servicing agreement.

(4) Servicing agreement - The agreement that details the obligations of the servicer related to the imposition, collection, and remittance of transition charges.

(5) Special purpose entity (SPE) - An entity formed by an electric utility, pursuant to a financing order, for the limited purpose of acquiring transition property, issuing transition bonds, and performing other activities relating thereto or otherwise authorized by a financing order.

(6) Transition bonds - Bonds, debentures, notes, certificates, of participation or of beneficial interest, or other evidences of indebtedness or ownership that are issued by an electric utility, its successors, or an assignee under a financing order, that have a term not longer than 15 years, and that are secured or payable from transition property.

(7) Transition charges - Nonbypassable amounts to be charged for the use or availability of electric services, approved by the commission under a financing order to recover qualified costs, that shall be collected by an electric utility, its successors, an assignee, or other collection agents as provided for in a financing order.

(c) Applicability of REP standards. Beginning on the date of customer choice for any retail customers, the servicer of the transition bonds will bill the transition charges for those customers to each retail customer's REP and the REP will collect transition charges from its retail customers. The standards in this section are the most stringent that can be imposed on REPs by any servicer of transition bonds . The standards relate only to the billing and collection of transition charges authorized by a financing order and do not apply to the collection of any other non-bypassable charges, or any other charges. The standards apply to all REPs other than REPs that have contracted with the transmission and distribution company to bill and collect transition charges from retail customers. REPs may contract with parties other than the transmission and distribution company to bill and collect transition charges from retail customers, but such REPs shall remain subject to the standards in this section.

(d) REP standards. The REP standards for transition charges are:

(1) Rating, deposit, and related requirements. A REP that does not have or maintain the requisite long-term, unsecured credit rating may select which alternate form of deposit, credit support, or combination thereof it will utilize, in its sole discretion. The indenture trustee shall be the beneficiary of any affiliate guarantee, surety bond or letter of credit. The provider of any affiliate guarantee, surety bond, or letter of credit must have and maintain a long-term, unsecured credit ratings of not less than "BBB-" and "Baa3" (or the equivalent) from Standard & Poor's ("S&P") and Moody's Investors Service ("Moody's"), respectively. Each REP must:

(A) have a long-term, unsecured credit rating of not less than "BBB-" and "Baa3" (or the equivalent) from S&P and Moody's , respectively; or

(B) provide:

(i) a deposit of two months' maximum expected transition charge collections in the form of cash,

(ii) an affiliate guarantee, surety bond, or letter of credit providing for payment of such amount of transition-charge collections in the event that the REP defaults in its payment obligations, or

(iii) a combination of clause (i) and (ii) of this subparagraph.

(2) Loss of credit rating. If the long-term, unsecured credit rating from either S&P or Moody's of a REP that did not previously provide the alternate form of deposit, credit support, or combination thereof or of any provider of an affiliate guarantee, surety bond, or letter of credit is suspended, withdrawn, or downgraded below "BBB-" or "Baa3" (or the equivalent), the REP must provide the alternate form of deposit, credit support, or combination thereof, or new forms thereof, in each case from providers with the requisite ratings, within ten business days following such suspension, withdrawal, or downgrade. A REP failing to make such provision must comply with the provisions set forth in paragraph (5) of this subsection.

(3) Computation of deposit. The computation of the size of a required deposit shall be agreed upon by the servicer and the REP, and reviewed during the first month of each calendar quarter to ensure that the deposit accurately reflects two months' maximum collections. If the REP provides a cash deposit, then within ten business days following such review, the REP shall remit to the indenture trustee the amount of any shortfall in such required deposit, or the servicer shall instruct the indenture trustee to remit to the REP any amount in excess of such required deposit. If the REP provides security in the form of a letter of credit or surety bond then within ten business days following such review, the REP shall submit replacement letters of credit or surety bonds in the amount determined pursuant to the review. A REP failing to so remit any such shortfall or failing to submit replacement letters of credit or surety bonds, as applicable, must comply with the provisions set forth in paragraph (5) of this subsection. REP cash deposits shall be held by the indenture trustee, as a collateral agent for the REP and the indenture trustee (in its capacity as indenture trustee) and shall be maintained in a segregated account which shall not be part of the trust estate, and invested in short-term high quality investments, as permitted by the rating agencies rating the transition bonds. Investment earnings on REP cash deposits shall be considered part of such cash deposits so long as they remain on deposit with the indenture trustee. At the instruction of the servicer, cash deposits will be remitted with investment earnings to the REP at the end of the term of the transition bonds unless otherwise utilized for the payment of the REP's obligations for transition bond payments. Once the deposit is no longer required, the servicer shall promptly (but not later than 30 calendar days) instruct the

indenture trustee to remit the amounts in the segregated accounts to the REP.

(4) Payment of transition charges. Payments of transition charges less the charge-off allowance described in paragraph (9) of this subsection are due 35 calendar days following each billing by the servicer to the REP, without regard to whether or when the REP receives payment from its retail customers. The servicer shall accept payment by electronic funds transfer, wire transfer, and/or check. Payment will be considered received the date the electronic funds transfer or wire transfer is received by the servicer, or the date the check clears. A 5.0% penalty is to be charged on amounts received after 35 calendar days; however, a ten calendar-day grace period will be allowed before the REP is considered to be in default. A REP in default must comply with the provisions set forth in paragraph (5) of this subsection. The 5.0% penalty will be a one-time assessment measured against the current amount overdue from the REP to the servicer. The "current amount" consists of the total unpaid transition charges existing on the 36th calendar day after billing by the servicer. Any and all such penalty payments will be made to the indenture trustee to be applied against transition charge obligations. A REP shall not be obligated to pay the overdue transition charges of another REP. If a REP agrees to assume the responsibility for the payment of overdue transition charges as a condition of receiving the customers of another REP that has decided to terminate service to those customers for any reason, the new REP shall not be assessed the 5.0% penalty upon such transition charges; however, the prior REP shall not be relieved of the previously-assessed penalties.

(5) Remedies upon default. After the ten calendar-day grace period (the 45th calendar day after the billing date) referred to in paragraph (4) of this subsection, the servicer shall have the option to seek recourse against any cash deposit, affiliate guarantee, surety bond, letter of credit, or combination thereof provided by the REP, and to avail itself of such legal remedies as may be appropriate to collect any remaining unpaid transition charges and associated penalties due the servicer after the application of the REP's deposit or alternate form of credit support. In addition, a REP that is in default with respect to the requirements set forth in paragraphs (2), (3), or (4) of this subsection shall select and implement one of the options listed in subparagraphs (A), (B), or (C) of this paragraph. If a REP that is in default fails to immediately select and implement one of these options or, after so selecting one of the options, fails to adequately meet its responsibilities thereunder, then the servicer shall immediately implement the option in subparagraph (A) of this paragraph. Upon re-establishment of compliance with the requirements set forth in paragraphs (2), (3), or (4) of this subsection, and the payment of all past-due amounts and associated penalties, the REP will no longer be required to comply with this paragraph.

(A) Allow the Provider of Last Resort ("POLR") or a qualified REP of the customer's choosing to immediately assume the responsibility for the billing and collection of transition charges.

(B) Immediately implement other mutually suitable and agreeable arrangements with the servicer. It is expressly understood that the servicer's ability to agree to any other arrangements will be limited by the terms of the securitization Servicing Agreement and requirements of each of the rating agencies that have rated the transition bonds necessary to avoid a suspension, withdrawal, or downgrade of the ratings on the transition bonds.

(C) Arrange that all amounts owed by retail customers for services rendered by the REP be timely billed and will immediately be paid directly into a lock- box controlled by the servicer with such amounts to be applied first to pay transition charges and other non-bypassable delivery charges before the remaining amounts are released to the REP. All costs associated with this mechanism will be borne solely by the REP.

(6) Billing by providers of last resort. The initial POLR appointed by the commission, or any commission-appointed successor to the POLR, must meet the minimum credit rating or deposit/credit support requirements described in paragraph (1) of this subsection in addition to any other standards that may be adopted by the commission. If the POLR defaults or is not eligible to provide such services, responsibility for billing and collection of transition charges will immediately be transferred to and assumed by the servicer until a new POLR can be named by the commission or the customer requests the services of a certified REP. If the POLR or a qualified REP assumes responsibility for billing and collecting transition charges under paragraph (5) of this subsection or servicer assumes such responsibility under this paragraph, the POLR, replacement REP, or servicer, as applicable shall bill all transition charges which have not been billed as of the date it assumes such responsibility and shall be subject to the provisions of the financing order. (For example, if a REP which bills on a calendar month basis goes into default and is replaced by the POLR on April 20, the initial transition charge bill rendered by the POLR would cover all transition charges attributable to periods since March 31, the last date for which the original REP had rendered bills). Retail customers may never be re-billed by the successor REP, the POLR, or the servicer for any amount of transition charges they have paid their REP (although future transition charges shall reflect REP and other system-wide charge-offs). Additionally, if the amount of the penalty detailed in paragraph (4) of this subsection is the sole remaining past-due amount after the 45th calendar day, the REP shall not be required to comply with paragraph (5)(A), (B) or (C) of this subsection, unless the penalty is not paid within an additional 30 calendar days.

(7) Dispute resolution. In the event that a REP disputes any amount of billed transition charges, the REP shall pay the disputed amount under protest according to the timelines detailed in paragraph (4) of this subsection. The REP and servicer shall first attempt to informally resolve the dispute, but if they fail to do so within 30 calendar days, either party may file a complaint with the commission. If the REP is successful in the dispute process (informal or formal), the REP shall be entitled to interest on the disputed amount paid to the servicer at the commission- approved interest rate. Disputes about the date of receipt of transition charge payments (and penalties arising thereof) or the size of a required REP deposit will be handled in a like manner. It is expressly intended that any interest paid by the servicer on disputed amounts shall not be recovered through transition charges if it is determined that the servicer's claim to the funds is clearly unfounded. No interest shall be paid by the servicer if it is determined that the servicer has received inaccurate metering data from another entity providing competitive metering services pursuant to PURA §39.107.

(8) Metering data. If the servicer is providing the metering, metering data will be provided to the REP at the same time as the billing. The REP will be responsible for providing the servicer accurate metering data (including meter identification information) for all REP's customers whose meters are not read by the servicer at the time the data is provider to the independent organization (as defined in PURA §39.151(b)) under the independent organization's protocols for settlement.

(9) Charge-off allowances. The REP will be allowed to hold back an allowance for charge-offs in its payments to the servicer. Such charge-off rate will be recalculated each year in connection with the annual true-up procedure. In the initial year, REPs will be allowed to remit payments based on the same system- wide charge-off percentage then being used by the servicer to remit payments to the indenture trustee for the holders of transition bonds; thereafter the

charge-off percentage will be calculated based upon each REP's prior year charge-off experience. On an annual basis in connection with the true-up process, the REP and the servicer will be responsible for reconciling the amounts held back with amounts actually written off as uncollectible in accordance with the terms agreed to by the REP and the servicer, provided that:

(A) The REP's right to reconciliation for charge-offs will be limited to customers whose service has been permanently terminated and whose entire accounts (*i.e.*, all amounts due the REP for its own account as well as the portion representing transition charges) have been written off.

(B) If the REP's actual charge-offs are greater than the allowance for charge-offs, the REP may collect the difference, with interest, from the date the review was completed, in 12 equal monthly installments beginning in the month that the transition charges are adjusted to reflect the new charge off percentages. The REP's recourse will be limited to a credit against future transition charge payments unless the REP and the servicer agree to alternative arrangements, but in no event will the REP have recourse to the indenture trustee, the "SPE" or the SPE's funds for such payments and the indenture trustee and SPE shall not be liable for such amounts. If the REP's actual charge-offs are less than the allowance for charge-offs, the REP shall pay the difference, with interest, from the date the review was completed, in 12 equal monthly installments beginning in the month that the transition charges are adjusted to reflect the new charge-off percentages. The interest rate on amounts due to or from the REP under this paragraph shall be the interest rate in effect pursuant to Texas Utilities Code §183.003 on the date the annual reconciliation is made. REP and servicer shall each have the unilateral right to prepay any amounts due hereunder and thus avoid continued accrual of interest.

(C) The REP shall provide ' the servicer a list of all charge-offs qualifying for reconciliation under subparagraph (A) of this paragraph, and documentation permitting servicer to verify that service to the customer has been terminated and all amounts due the REP from such customers have been written off. The information shall be provided not later than 30 days prior to the date on which the annual true-up adjustment is to be filed and shall cover the most recent 12-month period for which data is available at the time of submission. The information to be provided by the REP shall include data demonstrating that the REP has not collected any amounts the REP claimed as charge-offs in prior periods, or, if any amount previously charged-off has been collected, quantifying the revenues. The REP's rights to credits will not take effect until adjusted transition charges reflecting the REPs charge-off experience have been implemented.

(10) Service termination. In the event that the servicer is billing customers for transition charges, the servicer shall have the right to terminate transmission and distribution service to the end-use customer (or if the servicer is not the transmission and distribution utility to direct the transmission and distribution utility to terminate service to the end-use customer) for non-payment by the end- use customer pursuant to applicable commission rules. In the event that a REP or the POLR is billing customers for transition charges, the REP shall have the right to transfer the customer to the POLR (or to another certified REP) or to direct the transmission and distribution utility to terminate transmission and distribution service to the end-use customer for non-payment by the end-use customer pursuant to applicable commission rules. In the event that the POLR is billing customers for transition charges, the POLR shall have the right to direct the transmission and distribution utility to terminate transmission and distribution service to the end-use customer for non-payment by the end-use customer pursuant to applicable commission rules.

(11) Precedence and modifications of REP standards in a financing order.

(A) Compliance with financing order standards. If the REP standards in the applicable financing order are in direct conflict with the standards in this section, then the REP must comply with the REP standards stated in the financing order, instead of the standards stated in this section, unless the standards of the financing order have been modified and approved according to subparagraph (B) of this paragraph.

(B) Commission modification of standards. The commission may impose standards on REPs that are different from those in the applicable financing order but only if the commission receives prior written confirmation from each rating agency that rated the transition bonds authorized by that financing order that the proposed modifications will not cause a suspension, withdrawal, or downgrade of ratings on the transition bonds.

This agency 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 July 26, 2000.

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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7308

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CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS
SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §26.25

The Public Utility Commission of Texas (commission) adopts the repeal of §26.25 relating to Issuance and Format of Bills with no changes to the proposed text as published in the April 7, 2000, *Texas Register* (25 TexReg 2882). The commission has adopted a new §26.25 relating to Issuance and Format of Bills, to implement the mandates of the Public Utility Regulatory Act (PURA) §§55.012, 17.003(c), and 17.004(a)(8), and the Federal Communications Commission's (FCC) Truth-in-Billing Guidelines. Due to the extensive changes to new §26.25 from the existing section, publishing an amendment to the existing rule was not practical. This repeal was adopted under Project Number 22130.

The commission received no comments on the proposed repeal.

This repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2000) (PURA) which provides the 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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The Public Utility Commission of Texas (commission) adopts new §26.25 relating to Issuance and Format of Bills, with changes to the proposed text as published in the April 7, 2000, *Texas Register* (25 TexReg 2882). The rule is necessary to decrease the confusion associated with the proliferation of charges on residential customers' telephone bills for separate services and products and of related surcharges, fees, and taxes. The new section requires certificated telecommunications utilities (CTUs) to comply with minimum bill information and format guidelines, and to clarify information disseminated to residential customers in order to reduce complaints of slamming and cramming. New §26.25 implements these requirements pursuant to the mandates set forth in the Public Utility Regulatory Act (PURA) §55.012, Telecommunications Billing; in PURA §17.003(c) and §17.004(a)(8); and in the Federal Communications Commission's (FCC) Truth-in-Billing rules (47 C.F.R. §64.2000 and §64.2001 (1999)). This new section was adopted under Project Number 22130.

A public hearing on the proposed section was held at commission offices at 9:00 a.m. on May 2, 2000. Representatives from the following entities attended the hearing and provided comments: Consumers Union Southwest Regional Office (CU); Office of Public Utility Counsel (OPC); AT&T Communications of Texas, L.P. (AT&T); Southwestern Bell Telephone Company (SWBT); GTE Southwest Incorporated and GTE Communications Corporation (collectively GTE); Sprint Communications Company L.P., United Telephone Company of Texas doing business as Sprint, and Central Telephone Company of Texas doing business as Sprint (collectively Sprint); Texas Telephone Association (TTA); Texas Statewide Telephone Cooperative, Inc.; Focal Communications Corp. of Texas (Focal); and a coalition of competitive local exchange carriers (CLEC Coalition) (comprising Birch Telecom of Texas Ltd., L.L.P.; CCCTX, doing business as Connect!; Excel Telecommunications, Inc.; Global Crossing Local Services, Inc.; Intermedia Communications, Inc.; JATO Operating Corp.; NEXTLINK Texas, Inc.; Teligent Services, Inc.; Time Warner Telecom, L.P.; and Winstar Wireless, Inc.). To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received initial written comments on the proposed new section from TTA, SWBT, CU/OPC (filing jointly), Focal, GTE, Sprint, TSTCI, AT&T, and the CLEC Coalition. All of these parties except TSTCI and Focal also submitted reply comments. The parties' comments are summarized below.

As a result of parties' written comments and oral comments made at the public hearing, the rule has been revised, with certain provisions renumbered. As appropriate, discussion of the comments and commission responses will refer to the provisions of the rule as published and will note the new location of any affected provision.

TTA observed that the new PURA §55.012 does not direct the commission to promulgate a bill-format rule, and opined that no such rulemaking is necessary. TSTCI also questioned the need for a new rule. CU/OPC, on the other hand, contended that Senate Bill 560 (SB 560) and Senate Bill 86 (SB 86), 76th Legislative Session, "recognized that consumers are frustrated with their telephone bills, and both pieces of legislation gave the commission authority and directive to design readable, understandable, consumer-friendly bills."

AT&T, SWBT, Sprint, GTE, TTA, TSTCI, and the CLEC Coalition protested that the proposed rule represents an attempt by the commission to micromanage the bill format of CTUs. AT&T, which submitted the most extensive comments, offered a representative response. AT&T stated that adopting the detailed, prescriptive requirements of the proposed rule "could preclude the development of nationwide billing systems and thwart the ability of CTUs in Texas to implement billing systems that comply with such common billing standards. In addition, such requirements also would limit the ability of CTUs to use their bills as a basis on which they could compete with other CTUs by providing higher quality service to their customers." Indeed, the CLEC Coalition and Sprint cautioned that the billing requirements of the proposed rule may discourage many smaller and/or multi-state CLECs from operating in Texas because of significant compliance costs. Because the bill itself is a significant aspect of a provider's competitive strategy, AT&T concluded, "to the extent the commission imposes requirements that limit the ability to use this crucial tool, the commission will harm competition." AT&T recommended that the commission instead minimize the extent to which it goes beyond the express requirements of PURA and the FCC's Truth-in-Billing guidelines and rely on competitive forces to encourage CTUs (especially non-dominant ones) to use clear and concise bill formats; companies failing to do so are more likely to go out of business as customers "vote with their feet."

As explained later in this preamble, the commission is granting carriers considerably more flexibility than was reflected in the published version of §26.25. With this greater flexibility, the rule implements the specific requirements of PURA §55.012(c) and the general requirements of PURA §17.003(c) and §17.004(a)(8) without inappropriately micromanaging the bill formats of CTUs.

Whereas AT&T expressed its support for the commission's intent to apply the rule "only to CTUs," the CLEC Coalition presented an argument, summarized below, that "the proposed rule should not be applied in its entirety to all CTUs." The CLEC Coalition pointed out that PURA §55.012(c) applies to local exchange companies (LECs) only. The CLEC Coalition protested that the commission lacks the authority to apply the provisions of the rule implementing PURA §55.012(c) to service provider certificates of operating authority (SPCOA) holders, which are not included in the definition of a LEC given in PURA §51.002(4).

In support of its position, the CLEC Coalition offered a number of cases that it claims illustrate its contention that the commission has overstepped its authority in imposing portions of this rule on SPCOA holders. The CLEC Coalition specifically objected to including SPCOA holders in the summarization portion of proposed §26.25(e). This objection is based on the CLEC Coalition's conclusion that the commission's general grant of authority under PURA cannot overcome the specific exemption contained in PURA §55.012(c) regarding SPCOA holders. The

CLEC Coalition asserted that a specific statutory provision normally controls over a general statutory provision. (Code Construction Act, Texas Government Code Annotated §311.026 (Vernon 1999)).

Among the many cases cited by the CLEC Coalition was the holding by the Court of Appeals in Austin in *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas* (Southwestern Bell Telephone Co. v Public Utility Commission of Texas, 888 S.W.2d 921 (Tex. App.-Austin 1994, writ ref'd n.r.e.)). In that case, the Austin Court held as settled law that an agency rule may not impose additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions. The CLEC Coalition pointed out that this Court further noted that "If there is no specific express authority for enacting a particular rule, and if the rule is inconsistent with a statutory provision or ascertainable legislative intent, then the agency has exceeded its grant of statutory authority."

The CLEC Coalition further stated that it has also been long held that every word of a statute is presumed to have been used for a purpose and every word excluded must also be presumed to have been excluded for a purpose. (Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 844, 849 (Tex. 1981).) Moreover, the CLEC Coalition argued that the commission's attempt to use PURA §17.003 to trump the exemption of SPCOA holders in §55.012(c) would render the exemption useless, in violation of the Texas Supreme Court's holding in *Hunter v Ft. Worth Capital Corp.* (Hunter v Ft. Worth Capital Corp., 620 S.W.2d 547, 551 (Tex. 1981).) In that case, the Court held that it should not be presumed that the Legislature would perform a useless act when promulgating legislation.

The CLEC Coalition proposed a compromise by suggesting that the proposed rule create *guidelines* for SPCOA holders that require bills to be presented in a clear, readable format and easy-to-understand language, but *do not* require the summarization provisions.

The CLEC Coalition further argued that the imposition of §55.012(c) upon SPCOA holders would be costly and contrary to the public interest of promoting diversity among carriers and fostering competition. (PURA §51.001(b).) It also contended that the commission's action runs counter to the State's policy of eliminating regulatory barriers to competition and the goal of ensuring that entry into the market is based on economically rational factors. (PURA §58.202(6)).

No party specifically responded to the CLEC Coalition's argument. CU/OPC, however, recommended no change to subsection (a), which applied the section to all CTUs.

The commission acknowledges the CLEC Coalition's argument. Nevertheless, the commission concludes that PURA §17.003(c) and §17.004(a)(8) confer sufficient authority to the commission to allow it to apply PURA §55.012(c) to all CTUs. The commission must strike a balance between avoiding undue barriers to competition and the need to protect customers of all CTUs, including SPCOA holders. As a matter of policy, the commission determines that it is reasonable to apply these provisions uniformly to all providers of local service, including SPCOA holders. The distinction between certificate of operating authority (COA) holders and SPCOA holders has blurred over time, so that now most facilities-based competitors have the option of operating under an SPCOA, rather than a COA. Moreover, applying these requirements to all CTUs will extend protections to customers of SPCOA holders, which constitute the large majority of competitive local carriers. Such protections include increased clarity, as well as information necessary to make informed choices regarding telecommunications carriers, consistent with PURA §17.003. In addition, as explained below, the commission is granting considerably more flexibility to CTUs in their compliance with the requirements of PURA §55.012(c) than was allowed in the published version of §26.25; consequently, the burden on SPCOA holders should be much less onerous.

In addition to commenting on provisions in the proposed new section, parties responded to several matters raised in the preamble of the proposed section. These questions dealt with the proposed effective date, billing over the Internet, and whether the footnoted or asterisked references associated with the subtotal for basic local telecommunications service must state the actual amount of the fees or surcharges, or whether a listing of the fees or surcharges would suffice. Several parties also commented on the costs of implementing the proposed section. Finally, certain parties addressed the topic of focus groups, including information already gleaned from focus groups and other consumer research on making telephone bills more customer-friendly.

Implementation Costs

Most commenters estimated the proposed rule would cost between $650,000 and $5 million. TSTCI and TTA commented that while they did not have firm estimates of cost, preliminary indications from billing vendors suggest that these changes could potentially cost small companies a hundred dollars or more per access line.

SWBT, GTE, TSTCI, and TTA stated they had already incurred significant expenses, in some cases in excess of $1 million, to make their bills Y2K-compatible and to comply with requirements imposed by SB 560, SB 86, and the FCC's Truth in Billing guidelines, and asserted that this was not a good time to mandate additional costly billing changes.

Sprint estimated that to implement the rule as published would cost "between $3 million and $5 million for Texas alone." Sprint also reported that it had already spent $12 million to design a new bill format.

GTE estimated that the cost of changing to a larger-size paper would exceed $2 million, and said that "the costs of the system changes would be excessive as well." GTE further stated that the cumulative costs incurred by all providers to make changes in the billing system will ultimately be passed on to Texas customers with no benefit to them.

The CLEC Coalition stated that one member recently contracted for a $10 million billing system that does not currently have the capability of conforming to the commission's proposed rule. The CLEC Coalition claimed that because its members are relative newcomers to the Texas market, the cost of modifying the billing system cannot be spread over a massive customer base, such as incumbent local exchange companies (ILECs) have. The cost instead must be borne by a small group of customers, so CLEC customers will see a more significant price increase than will ILEC customers. The CLEC Coalition also commented that the enormous cost of imposing a detailed regulatory burden on competitive providers would have a very negative effect on the development of competition in Texas.

Without giving a dollar estimate, AT&T noted in its initial comments that if the commission deferred adopting any bill-format requirements pending the development of a model national bill-format rule, the cost attributable to Texas requirements would be less. In its reply comments, AT&T estimated that to implement the rule as published would cost approximately $3 million, or $2.5 million if the term "initial page" is interpreted to mean "first page of the appropriate section." AT&T estimated that "to implement the necessary system changes for a less prescriptive approach, but … that is nonetheless consistent with the requirements of PURA §55.012 and is reflected in AT&T's Mock Bill," would be roughly $800,000. AT&T also commented that the imposition of additional system development requirements would divert its resources from the real issue of offering Texans a competitive alternative for their local telecommunications needs.

The commission concludes that the high estimates are based on the published version of §26.25, which required many changes to the first page of the bill. Because the commission has amended the published rule to greatly reduce the number of first-page requirements, the cost of implementation should be significantly less. Some expenses cannot be avoided because of the explicit requirements of SB 560. The timing of these expenses also cannot be avoided. The commission notes that some time has passed since the Y2K compliance expenses were incurred. As for the FCC issues, some amendments are still pending, and it would be difficult to avoid any of the expenses related to the many changes the FCC is considering. The commission understands the concerns expressed regarding national bill-format rule development. However, with the greater flexibility afforded by the amendments to the published version of §26.25, the costs of complying with any future national bill-format rule should be lessened.

Effective Date

Subsection (a) of the published section specified an effective date of November 1, 2000. TSTCI, TTA, GTE and SWBT requested that the effective date be changed to 18 months from the date of adoption of the rule. Sprint commented that it would take approximately 24 months to introduce the necessary system changes the proposed rule would require. AT&T provided two estimates: 24 months if the term "initial page" is interpreted to mean the *first page of the entire bill*, and 22 months if the term "initial page" is interpreted to mean the *first page of the appropriate section*. The CLEC Coalition commented that estimates provided at an early workshop ranged from six to twelve months, and asserted that the commission should allow at least the low end of the range (six months).

TSTCI noted that the majority of its members outsource the billing programming function, and that the turn-around time for programming changes is nine to twelve months. However, due to the significant changes proposed to the first page, TSTCI anticipated that most of its members would be required to request a waiver from this provision because current billing system platforms cannot accommodate all of the proposed changes.

GTE cited bill design, coding, and testing as matters that would need to addressed, and claimed the need for a more reasonable amount of time to achieve compliance. At the public hearing, AT&T cited as reasons for its estimate the need for back-end system development to modify the final presentation of the bill and the need to track revenues and expenditures for remittance to different entities.

AT&T stated that its own less onerous approach to bill format, without extensive changes to the "initial page," would take nine months to fulfill, and anticipated the final estimate for this rule would be significantly longer. AT&T also stated that the system development work could not even begin until after the commission had adopted the rule. AT&T requested the commission to consider deferring adoption of any bill-format rule until the National Association of Regulatory Commissioners (NARUC) releases its draft model rule for bill guidelines sometime in July 2000, because the potential conflict with the model guidelines that could be adopted on a national basis could result in a significant waste of resources. AT&T stated that if the commission decided to continue with a bill format rule, the commission should consider a restrained approach that would facilitate the adoption of more uniform bill format rules in the future.

AT&T also commented that the FCC extended its original compliance date for the Truth-in- Billing rules to provide almost a full year for compliance, and as a result of clarifications by the FCC, the effective date of some of the rules is now undetermined. In light of this national experience, AT&T stated the commission should anticipate that CTUs in Texas may require at least as much, if not more, time to implement the requirements of the new rule. However, at the public hearing, AT&T stated that every FCC requirement in effect has been implemented by AT&T. AT&T also stated that an FCC order released in March 2000 modified some of the requirements of the Truth-in-Billing order, and those modifications have not gone into effect.

In reply comments, CU/OPC stated their opposition to delaying adoption of §26.25. They cited the directives in SB 560 and SB 86 for the commission "to design readable, understandable, consumer-friendly bills." CU/OPC also noted that the Senate Economic Development Committee had held an interim hearing addressing consumers' increasing frustration with disorganized telephone-bill formats and misleading service descriptions.

In reply comments, GTE supported the waiver requirements suggested by TSTCI, Sprint, and AT&T, while CU/OPC proposed an amendment to allow waivers from the rule if the requirements are in violation of the Truth in Billing order.

The commission acknowledges the concerns expressed regarding the need for additional time to comply with this section, and extends the compliance date to six months from the effective date of the section. The commission notes that the lengthy time estimates requested by parties for compliance are based on the published version of §26.25, which mandated many changes to the first page of the bill. However, the amendments to the published rule that reduce the number of first-page requirements, coupled with the extended compliance date, should address these concerns to a significant degree. The commission also notes that companies may apply for good-cause waivers pursuant to §26.3. Thus the commission finds it unnecessary to add a specific waiver provision to this section. The commission further notes that §26.25 as a whole reflects legislative intent, and certain provisions mirror specific legislative requirements; therefore, granting waivers to this section, particularly such mirroring provisions, may conflict with a clear legislative directive.

Additionally, while the commission acknowledges that NARUC is considering the adoption of national bill-format guidelines, the commission notes that these guidelines will be voluntary. Moreover, amendments to the published rule should provide sufficient flexibility to carriers that wish to comply with the national guidelines.

Issues Related to Internet Billing

AT&T commented that due to the early-stage development of this new service, the commission should refrain from imposing any mandatory bill-format obligations that could limit creativity currently being explored. AT&T noted that customers are interested in functionality, such as sorting bill detail information and receiving information in various useful formats, and recommended that the commission avoid adopting a rule that would eliminate or significantly restrict the availability of such functionality. AT&T also stated that mandating a bill format on the Internet may be meaningless or overly restrictive, if the end result eliminates the ability of a customer to choose the format in which he would like to view his charges.

GTE commented that any new or existing rules should provide the greatest amount of flexibility to enable providers to offer customers choices. GTE said it currently provides on-line billing; however, GTE recognized that not all customers wish to establish electronic service relationships, and deemed it inappropriate to require carriers to provide customer billing using this vehicle only. Thus, GTE opposed rules that limit customer choices and rules that limit a carrier's ability to offer choices.

TSTCI, TTA, and SWBT supported allowing companies the option of providing billing through the Internet or any other means mutually agreeable. However, TSTCI emphasized that Internet billing should not be mandated by the rule.

TTA commented that the rule needs to be flexible to allow the greatest amount of customer service and company innovations while still meeting the spirit of the bill format requirements. TTA noted customers who may choose the Internet billing option may be more knowledgeable regarding telecommunications services and may not require the level of detail that is proposed. TTA asserted that if Internet billing is an option offered, customers who select that option understand that a different level of detail may be provided. TTA stated that it believes these alternative arrangements should be allowed.

CU and OPC did not object to customers' choosing Internet billing so long as it is simply an option and such customers are afforded the same rights and protections of their other customers. CU and OPC stated there should be no reduction in information or customer protection on the Internet bills. Additionally, companies must inform customers of the protections they have in place to ensure that Internet transactions are secure.

The commission concludes that the published rule, as amended in subsection (d), allows sufficient flexibility for providers to offer Internet billing while ensuring that the appropriate information is easily and initially discernible.

U.S. Mail Option

In initial comments, Focal proposed that the method of bill delivery be left to the marketplace. Focal cited the long-distance market as an example where different on-line billing options have already been introduced and stated that CTUs should be permitted to follow the lead of long-distance providers; it asserted that the rule as drafted would deny providers the benefit of striking bargains with customers. Focal proposed that §26.25(d)(1) be narrowed to state, "when necessary, a customer who has chosen electronic billing may receive a printed bill via the United States mail upon arrangement with the appropriate CTU." Focal commented that customers who prefer a traditional paper bill could simply shop around for a carrier who would provide one.

The CLEC Coalition commented that Internet billing is becoming prevalent in many industries and creating many customer conveniences, including permitting ongoing tallies of charges throughout the month, cost savings, and electronic storage of billing information. The CLEC Coalition stated that the commission's rules should facilitate the provision of bills over the Internet and should permit companies to bill only over the Internet or require payment of costs associated with a paper bill if the customer requires a paper bill.

AT&T recommended that the commission refrain from requiring all CTUs to provide customers the option of receiving bills via United States mail or prohibit CTUs from billing only over the Internet. AT&T stated that the commission should recognize that a CTU offering service that allows for only Internet billing may result in lower costs for customers. Customers who select such a service would willingly choose to forgo the option of receiving a paper bill in exchange for lower rates. At the public hearing, AT&T stated it concurred with Focal's written comments about bargain benefits and maintained that customers wanting to switch from Internet billing to paper bills should incur additional charges.

AT&T commented that at this early stage in the development of such offers, it is unlikely that any person would be forced into a situation where his or her only option for local telephone service is to accept Internet-only billing. AT&T stated that it supports the language in subsection (d)that allows a customer to receive a bill in a manner other than via United States mail.

CU/OPC commented that billing exclusively over the Internet should not be allowed as it effectively redlines customers who do not have access to computers and/or the Internet. CU/OPC noted discrimination against rural customers because of less availability of advanced services in rural areas and against low-income customers due to the requirement of a credit card for Internet billing. CU/OPC stated that the effect of billing exclusively over the Internet would be to further alienate lower income and rural customers by denying them the potential benefits of competitive choice. In reply comments, CU/OPC reiterated that Internet-only billing denies competitive options to customers who do not have access to the Internet or computers.

CU/OPC did not object to the option of Internet billing so long as customers could choose to switch from Internet billing to paper bills without penalty.

In reply comments, AT&T disagreed with CU/OPC's suggestion that customers who choose the option of Internet billing should be able to switch to paper billing without penalty. AT&T claimed that if providers were subject to such prohibitions, the result would be that customers in Texas would loose the ability to pay less for service.

Sprint commented that it is appropriate for a CTU to provide web billing for its customers if the CTU has the capability; however, it should be the option of the customer to receive a bill via the Internet or one via regular mail.

The commission agrees to modify subsection (d)(1) by substituting the following language for the language in the published version: "All residential customers shall receive their bills via the United States mail, unless the customer agrees with the CTU to receive a bill through different means, such as electronically via the Internet." The commission determines that this approach strikes a reasonable balance between the need not to inhibit the development of a competitive market and the need, emphasized by CU and OPC, to protect the interests of customers who lack

ready access to the Internet. The language does not prohibit a holder of a service provider certificate of operating authority (SPCOA) from promoting itself as a company that bills via the Internet only. A company that operates under a certificate of convenience and necessity (CCN) or a certificate of operating authority (COA), however, may not condition the provision of service on a residential customer's willingness to receive bills by a means other than via the United States mail. This conclusion is based on PURA §55.007(a), which requires holders of a CCN or a COA to provide local exchange telephone service to any customer in its service area who requests service. Therefore, a holder of a CCN or a COA must be willing to send bills via the United States mail to customers who want to receive paper bills.

Internet First Page Requirements

SWBT stated there should be no first-page mandates regardless of whether the bill is by mail or over the Internet.

The CLEC Coalition commented that for Internet billing, the commission could simply make clear that the "first-page" information should be presented first on the Internet bill. If it will not fit on the first screen, the customer could merely scroll to the rest of the information.

Sprint commented that the formatting of a web bill should not be constrained with some of the stated rules because information available on the web is very different from information on a paper page.

AT&T commented that to the extent customers will have the ability to determine their own unique format for receiving bills, customers will determine what will be the first screen of information they view. According to AT&T, to mandate the information that a CTU must ensure a customer see first would restrict the flexibility the customer might otherwise enjoy.

Focal stated the commission should not require overly rigid adherence of electronic bills to the format prescribed for traditional paper bills. Focal noted that the options for on-line billing are unlimited, and the concept of a first page loses significance because an electronic page can contain more information than an entire paper bill due to scrolling and hypertext links. Given these possibilities, Focal noted that electronic bills could be easier to navigate than traditional formats, and recommended that the commission allow CTUs the flexibility to design electronic bills that take full advantage of potential formats. Focal proposed that §26.25(e)(1) be revised so that the initial page requirements of the paper bill would only be required to be readily discernible by the customer on the electronic bill. Focal commented that as proposed, §26.25(e)(1) would unduly restrict CTUs utilizing electronic billing from presenting information in a meaningful fashion and undermine the intent for full disclosure.

CU/OPC stated that the bill-content requirements proposed for the first page of the paper bill could be required for the first "screen" of an Internet bill. CU/OPC also stated there should be no reduction in customer protection information on Internet bills.

In reply comments, GTE disagreed with CU/OPC and pointed to Focal's comments stating that the first page loses significance in electronic bills. GTE also agreed with AT&T that mandating a specific bill format hinders creativity and prohibits providers from offering customers a multitude of choices in viewing their bills.

The commission agrees with Focal that the concept of a first page loses significance for on- line billing, due to the availability of such features as scrolling and hypertext links. Therefore, the commission agrees to modify the published rule by inserting at the start of subsection (e) a statement that bills sent via the Internet shall provide the specified information in a readily discernible manner. The commission concludes that such a requirement will allow sufficient flexibility for providers to offer Internet billing while ensuring that customers can easily view the appropriate information.

Footnotes and Asterisks

AT&T stated that while it understands the intent of the requirement for footnotes or asterisks, CTUs should be allowed the option of whether, in addition to identifying the relevant fees and surcharges, they state the actual amounts charged for each identified fee or surcharge.

Sprint stated that it would prefer to make references to the information that is proposed to be asterisked or footnoted in its "Important Information Section" of the bill, and not include additional asterisk references to the bill presentation. Sprint also stated that more keys and legends would frustrate customers, and it has striven to remove cryptic presentations from its bills.

SWBT opined that there should be no requirement that any fees, surcharges, or assessments be asterisked or footnoted and commented that its system cannot currently accommodate footnotes that have changing numerical values. At the public hearing, SWBT stated it has no problem with listing the amounts of surcharges on bills, but simply has a problem with listing dollar amounts in footnotes.

The CLEC Coalition commented that the intent of creating a simple summary bill would be complicated with multiple footnotes corresponding to proposed subsection (e)(4). The footnoting mechanism would actually highlight all the charges relating to state and municipal regulations and lead to customer confusion about why they are being assessed so many "different" fees. The CLEC Coalition recognized the commission's attempt to reconcile various code requirements, but stated that the commission's proposed rule would require all telecommunications providers to spend millions of dollars to conform with a rule that necessarily produces an awkward result. The CLEC Coalition noted that should the legislature correct the problem in the future, then providers will be required to spend additional monies again to implement a clearer format. The CLEC Coalition requested a solution for SPCOA holders by exempting them from the rigid requirements of this rule and substituting the principles that guided the legislature to enact the amendments in the last session.

In reply comments, the CLEC Coalition opined that both AT&T and Sprint admirably demonstrated that the requirements for multiple footnoting and division of surcharges is more likely to confuse customers than to help them. In addition, the CLEC Coalition stated that footnoting certain surcharges that are required by law to be separately identified will give the appearance of duplicative charges or cause customers to hunt through their bill to find the footnoted reference.

CU/OPC stated that both the aggregated subtotal and the itemization of fees and surcharges are essential to customers' reading, understanding, and verifying their bills, and asserted that there is no reason to make customers investigate the amount of charges. In addition to listing the charges, CU/OPC requested that the footnoted or asterisked portion of the bill be in legible type size and on the first or second page of the bill. They noted that a footnote or asterisk is a sham if customers cannot easily find or easily read the information referenced and recommended amendments to subsection (e)(4) to require legible font.

In reply comments, CU/OPC stated that using footnotes or asterisks is not their preference, but was a better option for customers than the strict reading of PURA §55.012 offered in an earlier "strawman" that prohibited CTUs from listing anything other than aggregated local charges. At the public hearing, CU opined that it is not as important where the information is placed, so long as it is there and can be found; accordingly, CU recommended that the footnote be legible and not tiny. CU stated that it does not believe the carrier should have the discretion to determine whether to identify these charges.

The commission's published rule was intended to give customers a clearer picture of what customers must pay to receive local phone service. The commission does not intend to confuse customers or hide relevant information. The commission finds, however, that state statutes require that certain fees and surcharges a phone company chooses to pass on to customers be line-itemized and/or labeled in a particular way. (In fact, the 911 service fee and the 911 equalization surcharge must be separately shown.) The commission recognizes that requiring the identification of these fees and surcharges included in local-service subtotals by footnotes or asterisks may conflict with the design plans of some CTUs' bills. Therefore, the commission amends the proposed rule to allow companies to use a footnote, asterisk, or "other conspicuous statement" to denote the fees and surcharges included in the subtotals for basic local service and optional local services. The commission also notes that amendments to the published rule no longer require the identification of these fees and surcharges on the first page of the bill.

With respect to whether CTUs should be required to display the actual amounts of fees and surcharges they are authorized to collect by a governmental entity, the commission determines it is appropriate to grant some discretion to CTUs. Specifically, the CTU shall either display these amounts, or if it does not, the CTU must clearly state on the bill a toll-free method, including a toll-free telephone number, by which the customer may obtain information regarding such amounts and their methods of calculation. This provision is contained in new paragraph (8) of subsection (e). In addition, the commission modifies subsection (c) to allow customers to request and receive, with the agreement of the CTU, recurring bills with more detailed information, including actual amounts of fees and surcharges, if the CTU does not display such amounts on the bill.

Focus Group Development

TSTCI and TTA stated that their members are interested in listening to their customers' opinions, and said if the commission is interested in pursuing customer focus group input they would support these efforts and coordinate with commission staff. However, TSTCI and TTA opined that it would best serve the process to facilitate these customer focus groups before the commission moves forward with the proposed rulemaking. TTA also invited representatives of the Office of Customer Protection (OCP) to meet with members' customer service representatives to hear what they are hearing from customers.

TTA also observed, at the public hearing, that some of its members had already conducted focus groups. TTA stated it would be advantageous for the facilitation of other focus groups to allow time for customers to adjust to the Truth in Billing changes before visiting with them on the proposed state changes. TTA also noted that focus groups conducted by providers and OCP showed there is no consensus on what each customer wants on his or her bill.

In reply comments, TTA stated that the majority of its members believe the focus group meeting could be planned and executed with at least two weeks notice for planning and communication with customers about the event. TTA anticipated that OCP, CU, and/or OPC would also provide the focus group with preferred customer-invitees.

At the public hearing, AT&T stated that it had utilized focus groups to develop its current bill format, and although the illustrative proposed format provided in their initial comments had not been reviewed by a focus group, AT&T felt the proposed format was consistent with the findings of the prior focus group testing. AT&T also commented that another round of focus groups could be conducted before the rule is adopted, but that doing so would take a fair amount of time and be a relatively expensive process. It estimated that additional costs of approximately $125,000 would be needed to survey 500 customers and approximately $42,000 would be needed to conduct eight focus groups.

In reply comments, AT&T stated its support for the concept of using focus groups to assist in the development of a bill format used, but expressed concern with the apparent notion that focus groups alone are sufficient to determine whether a particular bill format is clear and whether that format should be mandated on all providers. AT&T asserted that focus groups alone do not provide definitive market research analysis and will not provide statistically valid data on the views of Texas consumers as a whole because focus groups are designed to provide a qualitative look at information. AT&T noted that limiting the development of customer research data to the use of focus groups alone would not provide the commission with the level of information that would substantively facilitate this rulemaking. For these reasons, AT&T stated it is important to couple qualitative results with quantitative results because in the absence of quantitative analysis, the reliance on focus groups could lead to invalid conclusions and hence detrimental actions. AT&T suggested that 500 customers would need to be surveyed to obtain the needed quantitative results, and the survey would take six to eight weeks to complete.

AT&T also expressed concern that the interest in relying only on the feedback received from new focus groups fails to recognize the significant efforts that providers have already expended in their market research. AT&T stated the commission could take into account the results of research already conducted to evaluate whether the bill format that would result from the proposed rule would achieve the goal of increasing customer understanding.

AT&T's focus groups and other market research yielded the following conclusions:

(1) Customers did not readily understand a more aggregated bill format.

(2) Customers preferred a bill format similar to the "mock bill" provided with AT&T's initial comments to a bill with a more aggregated, less segmented format. AT&T concluded that an aggregated bill format would be more likely to generate customer questions about both bill content and specific charges.

(3) Most customers review the total on the front page and then check the detailed charges.

Based on the results of its own research, AT&T commented that the bill format resulting from the proposed rule would fail to achieve the commission's goals, as the mandated format would be contrary to customers' desires for a clear, useful bill.

Sprint reported that it had spent at least 52 hours in focus groups and received input from service representatives before putting out its new bill. Based on the results of its focus groups, Sprint said that the requirements of the proposed rule would cause customers dissatisfaction and would counter the work Sprint has done over the last two years. Therefore, Sprint strongly urged the commission to consider a good-cause waiver to companies who have demonstrated their willingness to re-design their bill formats according to their customers' needs and expectations.

However, at the public hearing, Sprint stated that it would be willing to participate in focus groups for this rulemaking, but believed it would need to present something definite to customers. Sprint suggested that the commission take all comments and develop a final proposal and, after review by commissioners, issue an order to conduct focus groups before final adoption of the proposal.

At the public hearing, SWBT also suggested having customer focus groups before the commission launches into a strict bill formatting rule. In its reply comments, SWBT estimated it would take four to five months from inception to the production of a final report on the focus groups. SWBT's estimate is based on producing discussion guides and bill samples, selecting various cities (at least three), conducting the focus groups (about 12), compiling and analyzing data, and preparing the report. SWBT suggested that the focus groups would be necessary only if the commission continues to mandate what the first page of the bill should look like.

In reply comments, the CLEC Coalition noted the discussions of AT&T and Sprint and asserted that to cast aside input based on an assumption that the rule's proposed format will better satisfy customers is unwarranted. The CLEC Coalition noted that while the commission is rightfully concerned about the delay in implementation, it should not force providers to spend millions of dollars without a demonstration that customers will prefer the format proposed in the rule.

GTE commented that it supports the commission's pursuit of data from customer focus groups and believes that these activities are worthwhile, given customers' sensitivity to their telecommunications bills. GTE noted that studies reveal that significant changes in a customer's bill can create confusion and generate significant increases in billing inquiries.

In its reply comments, GTE noted it had already spent a considerable amount of time and resources gathering input from its customers, and had made significant changes to its billing system in order to provide customers bills that are easy to understand.

In supplemental comments, GTE provided more details of the qualitative research it conducted in 1998. GTE's research produced the following conclusions:

(1) Customers are generally satisfied with their bill.

(2) The level of detail is important to customers.

(3) Customers view their bills in varying degrees of detail.

(4) Most participants said the summary information and the itemized long-distance calls were the most important parts of the bill.

The commission finds that since at most minimal changes will be mandated for the first page, there is no need to require providers to undergo the expense of conducting focus groups. The essence of this rule can be achieved within the context of the existing bill formats and without additional bill-format focus groups or other market research.

In both initial and reply comments, AT&T advocated applying the rule not to all services included in a bundled bill, as in the published proposal, but rather applying it to only the portion of the bill related to charges for local exchange telephone service. AT&T stated that its market research indicates that mandating the further aggregation of charges for different services "is inconsistent with the goal of clarifying bills for consumers." Furthermore, AT&T claimed that the plain language of PURA §55.012(c) clearly evidences a legislative intent that its requirements apply to charges for local exchange telephone service only: "a monthly bill from a local exchange company for *local exchange telephone service* shall include…" (emphasis added by AT&T). SWBT supported AT&T's recommendation in its reply comments, also citing the language of PURA §55.012(c).

The commission agrees with AT&T and SWBT that the provisions of new §26.25 implementing PURA §55.012(c) should apply to only those portions of the bill associated with local exchange telephone service. These provisions are found in paragraphs (1), (2), (5), (6), and (8) of subsection (e). Other provisions of §26.25, however, apply more generally to bills of CTUs, including portions dealing with non-local services, provided the bills contain charges for local services (as noted in subsection (b)). The commission concludes that PURA §17.003(c) and §17.004(a)(8), along with the FCC's Truth-in-Billing Guidelines, grant the commission sufficient authority to so apply these provisions.

AT&T also recommended amending subsection (a) to emphasize that the rule applies only to bills for residential customers. Without singling out subsection (a) for amending, the CLEC Coalition also urged expressly limiting the rule to residential bills. To do so and to limit its application to local service, AT&T proposed adding the following second sentence to this subsection: "The provisions of this section apply only to residential customer bills and only to the portions of such bills related to the provision of local exchange telephone service."

CU/OPC, while not opposing the application of the rule to residential-customer bills, did not recommend changing the wording of subsection (a).

The commission agrees to state the residential-customer limitation in this subsection, consistent with the commission's proposed language in subsection (b). The commission declines to adopt AT&T's suggestion to limit the application of the entire section to only the portions of a customer's bill that relate to local exchange telephone service. As explained above in more detail, the commission is applying certain provisions of subsection (e), which implement PURA §55.012(c), to local exchange telephone service only. However, other sections of the rule apply to portions of customers' bills that relate to non-local services as well.

CU/OPC recommended adding to subsection (b) the following sentence: "Charges should be simplified into general categories to the extent that simplification is consistent with providing customers sufficient information about the charges included in the bill to understand the basis and source of the charges."

The commission finds it unnecessary to adopt CU/OPC's recommended addition, because implementing the entire rule should result in a bill format that provides customers with sufficient information to understand the basis and source of charges for telecommunications services purchased by the customer.

AT&T, TTA, and CU/OPC addressed proposed subsection (c), on billing frequency. TTA suggested substituting the clause "unless

through mutual agreement between the company and the customer a less frequent billing interval is established" for the clause "the customer specifically requests a less frequent billing interval," to clarify that the CTU is not obligated to offer less frequent billing as an option. CU/OPC supported TTA's recommended language. AT&T suggested allowing a customer to request a more frequent billing interval as well.

In addition, AT&T suggested adding a second sentence to subsection (c) to state that a customer and CTU are free to agree that the customer will receive a less detailed bill than the rule otherwise would require.

The commission accepts the recommendations of TTA, CU/OPC and AT&T regarding billing frequency, and amends subsection (c) accordingly. It also accepts AT&T's suggestion regarding a less detailed billing option. Another possibility is that a customer and a CTU may agree on a more detailed option. Accordingly, the commission will add to subsection (c) the following sentence: "Through mutual agreement with the CTU, a customer may request and receive a bill with more detailed or less detailed information than otherwise would be required by the provisions of this section if the CTU also will provide the customer with detailed information on request."

AT&T expressed support of proposed subsection (d), with one minor change. It recommended that the term "billing cycle" replace "monthly" in the first sentence of subsection (d)(3), so that there will be no conflict between an agreement that a CTU has with its customer for non-monthly billing and the requirement to maintain "monthly billing records."

SWBT also proposed modifying subsection (d)(3), by adding the condition that a copy of a customer's billing records may be obtained upon request "and payment of the cost to reproduce."

The commission accepts AT&T's recommended change to subsection (d)(3). The commission declines to make the change to subsection (d)(3) recommended by SWBT. The commission notes that the current language does not preclude a CTU from charging a customer for such billing records. A dominant CTU, however, may charge only tariffed rates for reproducing such billing records.

All of the telecommunications utilities commenting on the proposed rule strongly objected to requiring that all of the information specified in proposed subsection (e)(1) be included on the first page of a customer's bill. In fact, SWBT, GTE, TTA, and TSTCI indicated that these first- page requirements constitute their primary concern with the proposed rule. The objecting carriers argued that including all of the required information would necessitate time-consuming and costly changes in their billing systems and would be contrary to the wishes of most consumers. TTA, TSTCI, GTE, and SWBT observed that PURA §55.012 contains no such mandate, and TTA asserted that including such "an inordinate amount of information" on the first page would be infeasible "for technical, financial, and customer-specific reasons." TTA, TSTCI, GTE, SWBT, and AT&T urged that companies be allowed to continue treating the first page as a summary page, with most companies including some information on a "tear off and return portion" of the page. Subsequent pages of a customer's bill would contain the listing of charges "consistent with the legislatively required information for the local exchange service portion of the bill," in TTA's words. In its reply comments, TTA reiterated these views, and noted that forcing so much information onto a page already limited in available space by the customer-return portion would be "contrary to what some companies have already received as preferred format from customer focus groups." Similarly, GTE asserted that the first-page requirements are contrary to the wishes its customers have communicated through focus groups, opinion research tools, and conversations relating to bill inquiries: "Repeatedly, customers tell GTE to 'keep the first page simple.' … Customers have told GTE that they turn directly to the summary information on *page one* to review the total amount due, the previous payment received, and the summary of charges." In its reply comments, GTE also stated its opposition to requiring service providers to list separately each long-distance carrier and each carrier's total charges on the first page.

SWBT and TSTCI offered the same criticisms of mandating the substitution of a detailed billing page for a summary page. TSTCI warned that this mandate would require small ILECs to revamp their billing systems, possibly at costs of over $100 per access line; consequently, TSTCI stated, "most of its member companies would be required to request a waiver from this provision." Similarly, SWBT asserted that it would be practically impossible to fit all the required information onto one page when a customer has multiple lines, services, and providers. In addition, SWBT claimed that attempting to compress the specified information onto the first page would "require a complete bill redesign for SWBT," requiring at least 18 months and costing "many more hundreds of thousands, if not millions, of dollars" in addition to the $1,150,000 SWBT has already spent to comply with the FCC's Truth-in-Billing requirements for deniable/non-deniable charges and the requirements in SB 560 and SB 86 for aggregating amounts for basic local services and fees, optional services, and taxes. Moreover, SWBT stated that it knows of no empirical data, including customer focus-group data, supporting the first-page mandate of proposed subsection (e)(1).

Sprint had no objection to the requirements in proposed subsection (e)(1)(E) and (F), to show on the first page of the bill the grand total amount due and the billing period or billing end date. AT&T did not object to the former requirement, but objected to having to show a billing period or billing end date on the first page, on the grounds that charges from carriers other than the billing CTU may be based on a different period.

Both Sprint and AT&T strongly objected to requiring that most of the other information in proposed subsection (e)(1) appear on the first page of the bill. In AT&T's words, "Such a requirement would necessitate a substantial redesign of the first page of the bill and a significant number of systems used to generate the bill." However, AT&T stated that it has no objection to an alternative interpretation of the "initial page" requirement, namely, requiring most of this information on the first page of the section of the bill dealing with *local exchange telephone service*. AT&T offered three exceptions. First, it recommended requiring the payment-due date to be shown only on the actual first page of the bill. Second, it opposed requiring CTUs to show, on either the first or the "initial" page, the minimum amount the customer must pay to maintain basic local telecommunications service. In support of the latter position, AT&T noted that the FCC recently imposed a requirement for carriers to distinguish between "deniable" and "non-deniable" charges on bills, but had chosen to give carriers flexibility in the manner of their compliance. Additionally, it observed that the commission, in Project Number 21030, *Amendments to Substantive Rule §§26.23, 26.24 and 26.28 regarding Limitations on Local Telephone Services Disconnections*, recently required that carriers send customers this specific information in a notice of suspension or disconnection;

in AT&T's view, there has been no indication that such notice has provided customers insufficient protection.

Apparently agreeing with the essence of AT&T's argument, Sprint contended that its new bill format complies with the FCC's requirements concerning deniable and non-deniable charges by using symbols and an explanatory message. On the other hand, SWBT and TTA, in recommended rule language attached to their initial comments, included the requirement that a subsequent page identify the total amount the customer must pay to maintain basic local telecommunications service.

AT&T stated that its third objection to the alternative version of the "initial page" mandate is to subsection (e)(1)(H), requiring CTUs to provide on the initial page "a clear and conspicuous notification of any change in service provider, including notification to the customer that a new provider has begun providing service." AT&T noted that the FCC's Truth-in-Billing order did not mandate a specific placement for this notification, and reported that it had developed a format in which such notification appears at the end of the bill. To require that such notification be provided on the "initial page" would "cause significant problems, and, indeed, not improve the customer's notification of this information."

Sprint expressed the belief that its new bill format complies with the change-in-service- provider requirement by means of a reference on the first page to a "Change in Service" section elsewhere in the bill. Sprint also noted that services provided by a dial-around carrier do not warrant this type of special customer notification.

Unlike TTA's recommended rule language, SWBT's language included the requirement that some page of the bill provide "a clear and conspicuous notification of any change in service provider, including notification to the customer that a new provider has begun providing service." In addition, SWBT proposed including the following statements: "For purposes of this subsection, 'new service provider' means a service provider that did not bill the subscriber for service during the service provider's last billing cycle. This definition shall include only providers that have continuing relationships with the subscriber that will result in periodic charges on the subscriber's bill, unless the service is subsequently canceled."

Sprint opposed the specific requirements of subsection (e)(1)(A)-(D), based in part on the results of over 52 hours of customer focus groups and from input received from its service representatives. With respect to subparagraphs (A) and (B), it noted its experience that "customers prefer to see charges by carrier, and do not understand regulatory categorization of charges as indicated in the proposed rule for basic and optional services." To comply with these provisions, Sprint said it would have to "completely redefine the bill organization and hierarchy exclusively for the state of Texas." Similarly, Sprint contended that its approach of listing applicable fees and surcharges, as well as taxes, on the detailed bill pages for each carrier would satisfy the intent of subparagraphs (C) and (D), and would be less confusing to customers than the categorization required by these subparagraphs.

Several carriers, including SWBT, also argued that the first-page mandate "is entirely at odds with the FCC's approach in its Truth-in-Billing guidelines," which "recognized the importance of flexibility in allowing providers to differentiate themselves in the marketplace in designing customer-friendly bills."

In their initial comments, CU/OPC supported the basic requirements set forth in the proposed rule. At the APA public hearing and in reply comments, however, CU/OPC expressed sympathy for carriers' concerns that the proposed rule required too much information to be packed onto the first page of a bill, and agreed that not all of this information has to be shown on the first page. Specifically, CU/OPC proposed that subsequent pages must include an itemization of the services and related charges included in the "basic local telecommunications" subtotal and in the "other services" (provided by that CTU) subtotal, as well as clear descriptions of services provided by the CTU. In addition, such later pages would include a similar itemization and service descriptions associated with charges being billed on behalf of other providers. CU/OPC also proposed that the total payment required for the customer to maintain basic local service, and a notification of any change in service provider, need not appear on the first page; instead, such information would be required to "be clearly and conspicuously displayed on the bill in a prominent location and in bold and legible type size."

The most important difference remaining between CU/OPC and the commenting carriers (most notably AT&T) involves whether the aggregate charges for basic local service and optional services provided by the billing CTU must appear on the first page. CU/OPC supported such a requirement; the carriers opposed it. Most of the carriers did not object to including these totals on a page specifically devoted to local exchange service, as AT&T recommended. An exception is Sprint, which, as noted above, claimed that customers "do not understand regulatory categorization of charges … for basic and optional services." Sprint asserted that, in presentations in other states, its redesigned bill had been found to be clear to customers, and urged that the commission consider granting a good-cause waiver to "companies who have demonstrated their willingness to redesign their bill formats according to their customers' needs and expectations."

At the public hearing, CU and OPC offered three reasons for including on the first page the aggregate charges for basic local service and optional services provided by the billing CTU. First, OPC asserted that the intent of the Texas Legislature in 1999 had been to prohibit disconnection of basic local service for non-payment of charges for optional local services. Second, CU concluded that the Legislature, by specifically mandating the inclusion in a customer's bill of the charges for these groups of services, indicated that listing them on the first page provides useful information to the customer. In addition, CU opined that consumers would benefit by receiving as much information on the first page as possible without being overwhelmed with detail.

AT&T and SWBT disputed these points. At the public hearing, AT&T noted that the commission's Project Number 21030 (in which P.U.C. Substantive Rule §26.28, Suspension or Disconnection of Service, was adopted) prohibited disconnection of a residential customer's basic local service for non-payment of only long-distance charges, not charges for optional local services. Addressing the second contention in its reply comments, SWBT argued that the Texas Legislature implicitly had declined to mandate the inclusion of the aggregate-charge information on the first page. It contrasted PURA §55.012(c) with PURA §55.011(a), which explicitly did require a LEC to print on the first page of a bill the name of the customer's primary interexchange carrier (IXC) if the LEC bills on behalf of that IXC. Additionally, AT&T, SWBT, GTE, Sprint, and TTA said that focus groups and

other customer input indicated that many customers prefer a simpler first page, with local service charges broken out on subsequent pages.

CU/OPC and SWBT disagreed on an additional point: whether the first page must include the "amount of charges billed by the CTU on behalf of other providers, listed by provider or as the aggregated amount of charges billed by the CTU on behalf of other providers," in CU/OPC's words. At the public hearing, SWBT explained that it did not oppose disclosing this information in the bill, but objected to having to provide it on the first page. In particular, SWBT stated that it prefers to list each carrier and its charges, in part because such itemization assists customers in detecting slamming. But if the customer used a number of other providers, confining the specification of each carrier and its charges to the first page could be infeasible.

The commission is persuaded that CTUs should have some discretion concerning the location in the bill of most of the information required by the published version of §26.25(e) to be shown on the first page. Specifically, the commission will require that only the following information be clearly and conspicuously shown on the first page of the bill: the grand-total amount due for all services being billed; the payment-due date; a notification of any change in service provider, including notification to the customer that a new provider has begun providing service; and the customer's main telephone number or account number. (If possible, the first page also should list any other applicable telephone numbers or account numbers for which charges are being summarized on the bill; otherwise, such numbers must be clearly identified on subsequent pages.) The commission concludes that requiring the notification of a change in service provider to be shown on the first page is justified because such display will help customers to detect instances of slamming. The commission notes additionally that including such identification on the first page should be easily coordinated with the PURA §55.011(a) requirement referenced by SWBT.

The commission also agrees with SWBT regarding the need to clarify the meaning of "new service provider." Accordingly, the commission modifies proposed subsection (e)(1)(H) (now renumbered as (e)(1)(C)) to clarify this meaning, and to require that the notification include the identity of the new service provider and a description of the provider's relationship with the customer. The commission observes that the clarified definition of "new service provider" excludes a provider charging the customer for services billed solely on a per-transaction basis, such as dial-around long-distance service and directory-assistance services.

The subtotals related to local service (basic local service, optional services, and taxes) shall be clearly and conspicuously displayed on either the first page or in a subsequent section dealing with local exchange telephone service. These requirements are now set forth in subsection (e)(2).

Other important information, including charges for non-local services provided by the billing CTU and charges for services provided by parties other than the billing CTU, must be clearly and conspicuously displayed on the bill. In addition, the CTU shall clearly and conspicuously identify on the bill those charges for which non-payment will not result in disconnection of basic local telecommunications service, or identify those charges that must be paid for the customer to retain basic local service. In either case, the CTU also must include an explicit statement that failure to pay the identified charges will or will not (depending on the option selected) result in the loss of basic local service. Such a requirement is consistent with 47 C.F.R. §64.2001(c). The requirement also allows a carrier to identify the total amount that must be paid for a customer to retain basic local service. The commission additionally notes that, under Project Number 21423, *Rulemaking regarding Telephone Customer Service and Protection*, proposed P.U.C. Substantive Rule §26.28(a)(7)(E) and (b)(6)(E) require dominant CTUs and non-dominant CTUs, respectively, to "indicate the specific amount owed for tariffed local telephone services required to maintain basic local telephone service" in any suspension or disconnection notice sent to a residential customer. Taken together, these provisions should provide appropriate information and protection to residential customers.

The above requirements relating to non-local services are now included in subsection (e)(3).

The commission concludes that the decisions described above provide residential customers with worthwhile information in an appropriate format, pursuant to PURA §55.012(c), PURA §17.003 and §17.004, and the FCC's Truth-in-Billing rules, while not imposing undue burdens on CTUs.

Consistent with the interpretation that PURA §55.012(c) applies to only the part of a telephone bill relating to local service, in its reply comments AT&T strongly recommended that subsection (e)(1)(D) be modified to require displaying only the total amount of taxes related to local service. (To do so, it suggested deleting the word "total" in this subparagraph.) AT&T objected to interpreting this provision so as to require displaying the total amount of taxes for *all* services presented on the bill, including non-local services. Following the latter interpretation, AT&T alleged, would necessitate a summing of tax subtotals, thereby delaying the processing of bills and their issuance to customers. Moreover, AT&T asserted, "a customer is more likely to be concerned with the additional expense associated with each service (including the associated taxes) than a total amount of taxes that are being paid in conjunction with a particular bill."

No other party specifically addressed this point in its comments.

The commission accepts AT&T's recommendation to require displaying in the section dealing with local service only those taxes related to local service. Taxes related to non-local services, however, shall be shown in a section detailing such services.

In initial comments and at the public hearing, AT&T also recommended that the aggregate- charge requirements in subsection (e)(1) apply only to monthly recurring charges. AT&T contended that "a mandate that would require non-recurring charges, such as charges for use of directory assistance, automatic call return, and operator assisted calls, to be included in one of the three 'buckets' provided in PURA §55.012(c) would cause significant volatility in the per month expense of each bucket and cause significant customer confusion." Instead, AT&T recommended presenting such charges separately on a customer's bill.

No party specifically addressed this recommendation in reply comments. The suggested language contained in the reply comments of CU/OPC did not include such limiting language, however.

The commission concludes that the issue of whether non-recurring charges should be included in the aggregate charges for "basic local telecommunications service" and "optional services" shall be left to the discretion of the carrier. Such non-recurring charges related to local services, however, should be displayed

in the section dealing with local exchange telephone service. Thus a service installation charge may be included in the basic-local charge, or it may be shown separately in the section dealing with local service. Similarly, per-use local charges may be included in the "optional" charge, or they may be shown separately in the section dealing with local exchange telephone service. If these non-recurring charges are included in the aggregate charges for basic local service and optional services, however, they must be clearly identified in a more detailed itemization elsewhere in the section of the bill dealing with local exchange telephone service.

The commission adds new subsection (e)(6) to address the listing of non-recurring charges.

The CLEC Coalition proposed that subsection (e)(2) of the published rule be amended to duplicate the wording of the corresponding provision in the FCC's Truth-in-Billing rule, 47 C.F.R. §64.2001(b). Such an exact tracking, the CLEC Coalition stated, would "allow carriers to know that their compliance with the FCC's rules will guarantee compliance with this part of the commission's rule, without wondering whether the commission's wording means something different from the FCC rule."

The commission declines to make the change suggested by the CLEC Coalition. The commission concludes that published subsection (e)(2) will accomplish the same objective as the FCC's provision, namely, to enable customers to ascertain whether they are being billed for services they requested. The commission assures parties that the language in published subsection (e)(2), which is now in subsection (e)(4), should be interpreted as being consistent with 47 C.F.R. §64.2001(b).

Sprint, TTA, and SWBT opposed the requirement in subsection (e)(4) that the Texas Universal Service Fund (TUSF) assessment be allocated to all telecommunications services on a proportionate basis. SWBT stated that its customers are used to seeing a single TUSF assessment for all of their services; under the proposed rule, some customers will think "they are being double or triple billed, or worse." Sprint agreed with SWBT that such a proportionate allocation would increase confusion among customers: "With the Federal USF, the customer could have up to four USF charges on the bill." Sprint also defended its new nationwide policy of lumping local service-related surcharges, including the TUSF, together with taxes, rather than in an aggregate basic local charge or split between that charge and separate charges for optional local services, long-distance, and other services. TTA urged the commission to exercise as much flexibility as possible regarding the TUSF assessment. It observed that although the billing systems of some of its member companies are already equipped to apportion and display the TUSF assessment across service categories, other companies' systems are "programmed to roll the assessment up to a single displayed number on the customers' bills." TTA concluded that complying with the proposed allocation requirement would present such companies with a need to undertake a massive reprogramming effort. TTA also cited two other reasons for not requiring the allocation of the TUSF assessment. First, in some billing systems the mathematical "rounding" caused by multiple TUSF assessments could prevent those assessments from summing to the correct total TUSF assessment. Second, because new P.U.C. Substantive Rule §26.28 deems the TUSF assessment one that a customer must pay to retain basic local service, some companies modified their billing systems "to accommodate the roll-up calculation of that amount into the total due for basic service."

GTE stated in its reply comments that although it had modified its billing systems to calculate and display the TUSF assessment for each service category, it supported TTA's recommendation that the commission allow as much flexibility as possible in displaying the assessment.

AT&T's offered a compromise position, under which the TUSF assessment (and other fees and surcharges assessed as a percentage of revenue) would have to be allocated only between charges for local services and those for long-distance services. The former charges could be displayed as part of the aggregate charge for basic local service. AT&T cited two of the reasons other commenters adduced to oppose requiring a split of these revenue-based assessments between basic local telecommunications service and optional local services: the increased potential for customer confusion and anger stemming from multiple appearances of the same surcharge and assessment, and "the significant danger of bill errors" due to rounding. Additionally, AT&T asserted that PURA §55.012(c) does not require such an allocation: "the plain language of the statute indicates that all fees, assessments, and surcharges may be included in the charge for basic local telephone service." Finally, AT&T observed that its compromise solution "would go a long way towards the apparent goal of allowing CTU marketers to quote a price for basic local service that will not vary significantly from month to month" for a given customer; any variation in the listed subtotal for basic local service would be due to changes in purchases of optional local services, including per-use services.

Consistent with its recommendation not to require the allocation of revenue-based assessments between the local-service subtotals, AT&T proposed deleting the phrase "and any applicable fees or surcharges authorized by a governmental entity" from proposed subsection (e)(1)(B)-(C).

In their reply comments, CU/OPC agreed to accept inclusion of that part of the TUSF assessment related to local service with the *basic* local service total. In fact, their proposed rule language would require this inclusion. SWBT, in reply comments, stated that AT&T's proposal is preferable to the further allocation among local services required by subsection (e)(4). Nevertheless, SWBT argued that because PURA §55.012(c) applies only to "local exchange telephone service," the fees related to long-distance services (including the poison-control and 911 equalization surcharges and that part of the TUSF assessment associated with long distance) are not required to be aggregated into a long-distance component. TTA, at the public hearing, indicated that it preferred for carriers to have the option of including *all* assessments in the aggregate charge for basic local service.

This provision in the published version of §26.25, which required that the TUSF assessment be allocated to all telecommunications service on a proportionate basis, rested on a two-part rationale. First, such an allocation is consistent with the manner in which this assessment is levied, as a percentage of all taxable telecommunications receipts. Second, such an allocation would enable a CTU's marketers to quote a set amount for basic local telecommunications service that includes all associated fees and surcharges, whereas if the TUSF assessment is lumped into the basic local subtotal, such a quoted subtotal would vary by customer and by month, depending on optional services used and long-distance calls made. This sort of variation could be confusing to customers.

On the other hand, the commission recognizes that commenting parties make valid points regarding the possibilities for rounding errors and for customer confusion created by multiple listings of a "TUSF assessment," as well as the significant costs to some CTUs to modify their billing systems to reflect such an allocation. (The commission notes, however, that some CTUs already list multiple "TUSF assessments" on their bills.) Consequently, the commission determines that the portion of the TUSF assessment *related to local exchange telephone service* may be included in the basic local service subtotal, or be split proportionately between the subtotals for basic local service and optional local services. The same ruling applies to any other percentage-of-revenue-based assessments related to local exchange telephone service. The portion of the TUSF assessment and other percentage-of-revenue-based assessments related to non-local service, however, may *not* be included in either subtotal for local service. This ruling is consistent with proposed P.U.C. Substantive Rule §26.28(a)(4)(D) and (b)(4)(D), as well as existing P.U.C. Substantive Rule §26.28(d)(5). These provisions, while not addressing the TUSF assessment, prohibit a residential customer's basic local service from being disconnected for non-payment of long-distance charges. (Neither the proposed version nor the existing version of P.U.C. Substantive Rule §26.28 prohibits disconnection of basic local service for non-payment of optional local charges.) In addition, a given customer's quoted subtotal for basic local telecommunications service, while depending on optional services purchased, will not vary on the basis of long-distance calls made.

In accordance with the above ruling, the commission is inserting the phrase "consistent with paragraph (8) of this section" in new subsection (e)(2)(A)-(B). The new subsection (e)(8) is a modified version of proposed subsection (e)(4).

With respect to the portion of the TUSF assessment and other percentage-of-revenue-based assessments associated with non-local charges, the commission determines that carriers may use their discretion as to whether to include such portion in a subtotal. In fact, as stated in new subsection (e)(3)(A)-(B), carriers shall have discretion in the use of subtotals for any non-local services, including services provided by other carriers. If such subtotals are shown, an asterisk, footnote, or other statement of any inclusion of the relevant part of the TUSF assessment and other percentage-of-revenue-based assessments (and any other long-distance-specific surcharge, such as the poison-control surcharge and the 911 equalization surcharge) must be provided, consistent with subsection (e)(8) of the new section. If the specific amounts of such assessments are not shown on the bill, the CTU must clearly indicate on the bill a toll-free method, including a toll-free telephone number, by which the customer may obtain information regarding such amounts and their methods of calculation. This provision is contained in subsection (e)(8). In addition, the commission modifies subsection (c) to allow customers to request and receive, with the agreement of the CTU, recurring bills with more detailed information, including actual amounts of fees and surcharges, if the CTU does not display such amounts on the bill.

In connection with subsection (e)(1)(G), CU/OPC urged that "it should be made clear that the total amount a customer must pay to maintain basic local telecommunications service is only the basic service charge, which does not include the costs of optional services." CU/OPC claimed that legislators intended to prohibit disconnection of basic local service so long as the customer pays the charge for basic local service. Additionally, CU/OPC asserted that such a policy is in the public interest.

The commission declines to adopt CU/OPC's recommendation. First, issuing such a declaration would be beyond the scope of this rulemaking. The commission notes that neither the proposed version nor the existing version of P.U.C. Substantive Rule §26.28 prohibits disconnection of a residential customer's basic local service for nonpayment of optional local charges, though both versions prohibit disconnection for nonpayment of long-distance charges. Second, the commission fails to find clear evidence in either PURA §55.012, Limitations on Discontinuance of Basic Local Telecommunications Service (added by SB 86), or PURA §55.013, Limitations on Discontinuance of Basic Local Telecommunications Service (added by SB 560), to support CU/OPC's assertion regarding legislative intent. Subsection (a) in each of these sections in PURA specifically forbids a provider of basic local telecommunications service from disconnecting a residential customer's basic service for nonpayment of long-distance charges, but does not address disconnecting such service for nonpayment of optional local charges.

Sprint urged the commission to exempt from proposed subsection (e)(3), which requires the bill to provide a description of services included in a bundled package, carriers whose customers sign an agreement regarding the bundled services they purchase. Sprint cited as an example its new Integrated On-Demand Network services.

The commission declines to issue a blanket exemption in advance to CTUs whose customers sign an agreement to receive a package of specific services. The commission notes, however, that modified subsection (c) allows a CTU, through mutual agreement with a customer, to provide a bill with less detailed information if the CTU also will provide the customer with detailed information on request.

Finally, AT&T recommended that the commission delete the phrase, "and clearly reference a subsequent page where the customer's additional numbers are plainly identified" from proposed subsection (e)(7). AT&T pointed out that some numbers may be unique to providers other than the billing CTU, in which case specifying on which page a particular phone number will appear would (at least in AT&T's case) amount to a "very onerous and expensive" proposition.

The commission agrees to accept the substance of AT&T's recommendation. Specifically, the commission moves the provision in question to new subsection (e)(1)(D) and rewords the provision to read as follows: "If possible, the first page of the bill shall list each applicable telephone number or account number for which charges are being summarized on the bill. If such inclusion is not possible, the first page shall show the main telephone number or account number, and subsequent pages shall clearly identify the additional numbers."

Finally, the commission is aware that some CTUs may want to seek input from the commission as to whether their contemplated bill formats comply with the requirements of this section. To accommodate this desire, the commission will allow CTUs to seek review from the commission of sample bills that are intended to comply with such requirements. As stated in new subsection (f), CTUs should seek such review within 45 days of the effective date of the section. Such review will be conducted under Project Number 22130.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2000) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §17.003 and §17.004, which grant the commission the authority to require a CTU to provide bills that present clear, uniform, and understandable information to customers about rates, services, customer rights, terms, and other necessary information that the commission deems appropriate; and PURA §55.012, Telecommunications Billing, which seeks to simplify and clarify bills issued by local exchange companies (LECs).

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.003, 17.004, and 55.012.

§26.25. Issuance and Format of Bills.

(a) Application. The provisions of this section apply to residential-customer bills issued by all certificated telecommunications utilities (CTUs). CTUs shall comply with the changes required by this section within six months of the effective date of the section.

(b) Purpose. The purpose of this section is to specify a user-friendly, simplified format for residential customer bills that include charges for local exchange telephone service.

(c) Frequency of bills and billing detail. Bills of CTUs shall be issued monthly for any amount unless the bill covers service that is for less than one month, or unless through mutual agreement between the company and the customer a less frequent or more frequent billing interval is established. Through mutual agreement with the CTU, a customer may request and receive a bill with more detailed or less detailed information than otherwise would be required by the provisions of this section if the CTU also will provide the customer with detailed information on request.

(d) Billing information.

(1) All residential customers shall receive their bills via the United States mail, unless the customer agrees with the CTU to receive a bill through different means, such as electronically via the Internet.

(2) Customer billing sent through the United States mail shall be sent in an envelope or by any other method that ensures the confidentiality of the customer's telephone number and/or account number.

(3) A CTU shall maintain by billing cycle the billing records for each of its accounts for at least two years after the date the bill is mailed. The billing records shall contain sufficient data to reconstruct a customer's billing for a given month. A copy of a customer's billing records may be obtained by the customer on request.

(e) Bill content requirements. The following requirements apply to bills sent via the U.S. mail. Bills rendered via the Internet shall provide the information specified in this subsection in a readily discernible manner.

(1) The first page of each residential customer's bill containing charges for local exchange telephone service shall include the following information, clearly and conspicuously displayed:

(A) the grand total amount due for all services being billed;

(B) the payment due date; and

(C) a notification of any change in service provider, including the identity of the new service provider and notification to the customer that a new provider has begun providing service. The notification should describe the nature of the relationship with the customer, including the description of whether the new service provider is the presubscribed local exchange or interexchange carrier. For purposes of this subparagraph, "new service provider" means a service provider that did not bill the customer for services during the service provider's last billing cycle. This definition shall include only providers that have continuing relationships with the customer that will result in periodic charges on the customer's bill, unless the service is subsequently canceled.

(D) If possible, the first page of the bill shall list each applicable telephone number or account number for which charges are being summarized on the bill. If such inclusion is not possible, the first page shall show the main telephone number or account number, and subsequent pages shall clearly identify the additional numbers.

(2) Each residential customer's bill shall include the following information, clearly and conspicuously displayed, on the first page or in a subsequent section dealing with local exchange telephone service:

(A) the total amount being charged for basic local telecommunications service, including any charges for mandatory extended/expanded calling scope services and, consistent with paragraph (8) of this subsection, any applicable fees or surcharges authorized by a governmental or regulatory entity;

(B) the service description and total amount being charged for any optional local services provided by the billing CTU, including charges for any optional extended/expanded calling scope services and, consistent with paragraph (8) of this subsection, any applicable fees or surcharges authorized by a governmental or regulatory entity; and

(C) the total amount being charged for taxes related to subparagraphs (A) and (B) of this paragraph.

(3) Each residential customer's bill also shall include the following information, clearly and conspicuously displayed:

(A) the service descriptions and charges, including any applicable fees or surcharges authorized by a governmental or regulatory entity, for non- local services provided by the billing CTU. In addition, the charges for such non-local services may be displayed as a subtotal in a manner that is consistent with paragraph (8) of this subsection;

(B) the service description, service provider's name, and charges, including any applicable fees or surcharges authorized by a governmental or regulatory entity, for any services provided by parties other than the billing CTU, with a separate line for each different provider. In addition, the charges for services provided by other parties may be displayed as a subtotal or subtotals in a manner that is consistent with paragraph (8) of this subsection;

(C) taxes associated with the charges required by subparagraphs (A) and (B) of this paragraph, stated separately or as a combined charge if such combination is stated;

(D) the billing period or billing end date; and

(E) an identification of those charges for which nonpayment will not result in disconnection of basic local telecommunications service, along with an explicit statement that failure to pay these

charges will not result in the loss of basic local service; or an identification of those charges that must be paid to retain basic local telecommunications service, along with an explicit statement that failure to pay these charges will result in the loss of basic local service.

(4) Charges must be accompanied by a brief, clear, non-misleading, plain-language description of the service being rendered. The description must be sufficiently clear in presentation and specific enough in content to enable customers to accurately assess the services for which they are being billed. Additionally, explanations shall be provided for any non-obvious abbreviations, symbols, or acronyms used to identify specific charges.

(5) Charges for bundled-service packages that include basic local telecommunications service are not required to be separated pursuant to paragraph (2)(A)-(B) of this subsection; however, a brief, clear, non-misleading, plain-language description of the services included in a bundled-service package is required to be provided either in the description or as a footnote.

(6) Non-recurring local charges, such as service-installation charges and per-use charges, may be included in the totals required by paragraph (2)(A)-(B) of this subsection; alternatively, such charges may be displayed as a separate category(ies) in the section dealing with local exchange telephone service. If the totals required by paragraph (2)(A)-(B) of this subsection include such charges, the CTU shall so state and identify the charges in a more detailed itemization elsewhere in the section dealing with local exchange telephone service.

(7) Each customer's bill shall include specific per-call detail for time-sensitive charges, itemized by service provider and by telephone or account number (if the customer's bill is for more than one such number). Each customer's bill shall include the rate and specific number of billing occurrences for per-use services, itemized by service provider and by telephone or account number. Additionally, time-sensitive charges and per-use charges may be displayed as subtotals in summary sections of the bill.

(8) Flat monthly fees or surcharges, including the 911 service fee, the Federal Communications Commission's subscriber-line charge, and the number- portability charge, related to governmental or regulatory actions shall be included in the amount for basic local telecommunications service described in paragraph (2)(A) of this subsection; the portion of the Texas Universal Service Fund (TUSF) assessment and other percentage-of-revenue-based assessments related to local exchange telephone service may be included in the amount for basic local telecommunications service or may be allocated to basic local telecommunications services and optional local services on a proportionate basis. The portion of the TUSF assessment and other percentage-of-revenue-based assessments related to non-local services shall not be included in either subtotal for local service. Each subtotal for local service, and any subtotal for non-local services, must clearly indicate by an asterisk, footnote, or other conspicuous statement any such assessments included in the subtotal. Similarly, if federal law or regulation requires that a charge be separately stated, using standardized labels, that requirement may be satisfied by use of an asterisk or footnote reference, or other conspicuous statement. If the specific amount of each assessment is not shown on the bill, the CTU must clearly indicate on the bill a toll-free method, including a toll-free telephone number, by which the customer may obtain information regarding such amount and its method of calculation.

(9) Bills shall provide a toll-free number that a customer can call to resolve disputes and obtain information from the CTU. If the CTU is billing the customer for any services from another service provider, the bill shall identify the name of the service provider and provide a toll-free number that the customer can call to resolve disputes or obtain information from that service provider.

(f) Compliance review of bills. Within 45 days of the effective date of this section, CTUs may seek review from the commission of sample bills that are intended to comply with the requirements of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 936-7308

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16 TAC §26.34

The Public Utility Commission of Texas (commission) adopts new §26.34 relating to Telephone Prepaid Calling Services with changes to the proposed text as published in the April 7, 2000, *Texas Register* (25 TexReg 2884). The new rule is necessary to implement provisions of the Public Utility Regulatory Act (PURA) §§14.002, 15.023, 17.004, 17.051, 17.052, 55.253, 64.051, and 64.052 (Vernon 1998, Supplement 2000), which grant the commission authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, impose administrative penalties against an entity for violation of a rule adopted under PURA, adopt and enforce rules as necessary and appropriate to establish adequate customer protection standards, adopt registration requirements for all non-dominant telecommunications carriers, require registration as a condition of doing business in Texas as well as to establish customer service and protection standards, and grant the commission all necessary jurisdiction to adopt rules regarding the information a prepaid calling services provider must disclose to customers in relation to the rates and terms of service for prepaid calling services offered in Texas. This new section is adopted under Project Number 21424.

A public hearing on the proposed section was held at the commission offices at 10:00 a.m. on Friday, May 26, 2000. Representatives from Southwestern Bell Telephone Company (SWBT), MCI Worldcom (MCI), AT&T Communications of Texas, L.P. (AT&T), JD Services, Inc., International Telecard Association (ITA), Sprint Communications Company L.P. (Sprint), Office of Public Utility Counsel (OPUC), and Consumers Union attended the hearing and provided comments. To the extent such comments differ from the submitted written comments, such comments are summarized herein.

The commission received comments on the proposed section from Sprint, SWBT, AT&T, OPUC, MCI, JD Services, Inc., Americatel Corporation (Americatel), Consumers Union and Texas Legal Services Center (collectively Consumers), Telecommunications Resellers Association and Southwest Competitive Telecommunications Association (collectively the Associations), and GTE Communications Corporation (GTECC).

General Comments

Consumers supported the published rule and favored the registration requirement noting it is necessary for compliance and enforcement. Consumers also noted the rule makes it easier for customers to shop for calling cards and impacts nearly all customers in the state

AT&T stated the commission should concern itself with developing rules which protect customers, establish broad disclosure requirements, and determine technical standards while not hindering the efforts of legitimate providers. AT&T supported the customer protection and registration requirements, but stated the rules should allow legitimate companies the flexibility to market their products as they choose. AT&T expressed concern that the proposed rules micro-manages prepaid services companies and may impede competition. AT&T stated a reasonable rule should not deny providers the ability to make decisions about marketing, packaging, and disclosure in the manner best suited to the company. JD Services noted it supported all of the comments submitted by AT&T.

The Associations commented that the rules were overreaching and inappropriate for discretionary services emerging in a competitive market and urged the commission to recast several provisions more generally. The Associations asserted the specificity of the rule would be costly to providers who have national platforms, card, and programs. The Associations and AT&T argued the specific obligations would burden legitimate providers while providing negligible benefits to customers.

Nevertheless, the Associations agree that customers do have a right to know what they are purchasing before they buy and should be fully informed about the service they receive. The Texas Resellers Association's *Prepaid Calling Cardholder's Bill of Rights* offers providers latitude in how these obligations are implemented. The Associations suggested the commission's rule use the same approach. The Associations and JD Services also stated the key to protecting the public is education and enforcement.

At the public hearing, ITA noted its industry enforcement efforts which utilize a consumer hotline to attempt to resolve customer disputes before they are forwarded to state commissions, the Federal Communications Commission (FCC) or the Federal Trade Commission (FTC). ITA stated it also sends out scam alerts to members and recently adopted voluntary disclosure guidelines for its members.

Consumers argued against companies' assertions that prepaid calling services are highly competitive and discretionary. Consumers noted that while many prepaid calling services companies exist, the market is not effectively competitive if customers cannot evaluate their purchase options. Consumers noted Senate Bill 1020, 76th Legislative Session (SB1020), intended to facilitate customer choice and stated that once customers can compare information, the market can begin to compete on price rather than confusion. Consumers also noted that households without phone service must rely on prepaid calling cards, therefore these services are not discretionary to these customers.

The commission concludes that the proposed rule is not overreaching. Problems in the current market resulted in the legislation the commission is required to implement. The commission has used other state rules to model the published rule and afforded national providers' ample opportunity to participate in this proceeding. Additionally, the commission agrees with parties' assertion that education is important in customer protection, and notes that education would be fruitless if customers did not have the disclosure necessary to protect themselves.

Subsection (d)

ITA commented that the definition of a prepaid calling services company is too broad. ITA noted distributors who distribute their own cards with personal identification numbers (PINs) purchased from a prepaid services company should not be subject to this rule since the prepaid services company, and not the distributor, provides the time that will fulfill the PINs.

The commission declines to amend the definition of a prepaid calling services company and determines that a distributor as described by ITA is subject to this rule. A distributor producing calling cards must be in compliance with the disclosure requirements of this rule and a distributor purchasing PINs from a prepaid calling services company is responsible for ensuring the calling cards are functional.

Sprint, AT&T and ITA commented that a customer generally does not pay a prepaid calling services company directly, but rather pays a retailer and suggested the definition of prepaid calling services account should be adjusted to account for the transaction between the retailer and the customer. Consumers agreed with this assessment.

The commission agrees with parties about the role of a retailer and modifies this definition to account for the transaction between a retailer and a customer.

Americatel recommended the definition of prepaid calling card be modified to include the entire item a customer receives upon purchase of a prepaid calling service including packaging. Americatel contended this would ensure that all relevant information is provided to customers without costly duplication.

The commission declines to implement the proposal for the definition of prepaid calling card, and notes it is often left to the discretion of a retailer to determine what information is available to customers; therefore, a calling card company cannot ensure that packaging or any other disclosure will be provided to customers. Additionally, many commenters noted customers do not keep packaging materials. In order to ensure adequate disclosure is readily available, the commission makes no change to the definition of calling card.

ITA suggested the requirement to disclose recharge rates should include a disclosure for new surcharges.

The commission agrees with ITA and modifies the definition of recharge accordingly.

Subsection (e)

Americatel, the Associations, and AT&T believed disclosure requirement for billing increments in three places was excessive. Americatel and AT&T stated providers should be given the flexibility to determine where information is provided.

Consumers disagreed with companies' suggestion that providers be allowed to determine where rate information should be disclosed. Consumers noted the displays may not be adequate and noted AT&T's comments that customers are unlikely to take notes at the point of sale.

The commission agrees with Consumers and notes several providers' comments regarding the difficulty in ensuring adequate disclosures are provided to customers, including comments that customers discard packaging and that point of sale displays are subject to a retailer's discretion. Therefore,

the commission makes no changes to the requirement of subsection (e)(1).

AT&T proposed the requirement to disclose billing increments on cards be deleted due to the finite space of a calling card.

The commission finds information on billing increments is important for customers to determine the true value of the card they are purchasing. Some companies bill calls at an increment that does not reflect the actual amount of time on the call. Other companies bill calls at increments that exceed one minute. This information is absolutely relevant in determining the true value of a card and the true cost of a call.

ITA commented that a circuit is open as soon as the access number is dialed and customers should not be charged at this point.

Sprint commented that unanswered calls should be considered open circuits and be billed accordingly.

Consumers disagreed with Sprint and noted that customers expect not to be charged for unanswered calls.

The commission determines that unanswered calls should not be charged against a prepaid calling services account, and amends the subsection to indicate only completed calls may be charged against a prepaid calling services account.

AT&T recommended the requirement to maintain published tariffs be omitted for international calls due to the volatility of the international long distance market. AT&T stated maintaining international rates in tariffs would make it administratively burdensome and suggested only the toll-free customer rate information telephone number be the only source required to maintain accurate international long distance rates.

The commission acknowledges the volatility of the international long distance market, and amends proposed §26.34(e)(4) to indicate only domestic rates and domestic and international surcharges must be kept current in commission filings. The commission adds new §26.34(e)(5) to address international rates. The new section requires companies to maintain records of international rates and ensure the information is available to customers through a toll-free telephone number. New §26.34(e)(5) continues to require an annual update of international rates to the commission.

Sprint commented recharge rates should remain consistent to avoid confusing customers and add additional administrative burdens to providers. AT&T disagreed and noted some rates change over time.

The commission allows sufficient flexibility in this rule to allow providers discretion in determining whether or not they want to change recharge rates and submit updated tariffs. The rule continues to allow changes in recharge rates, so long as domestic recharge rates are filed with the commission.

ITA requested the commission include a definition of call detail records.

The commission concludes that the description of call detail information is sufficient so no need exists for a definition of call detail records.

SWBT commented routing/signaling identifiers are used internally by prepaid calling services companies in daily business operations and should not be included in call detail data information as they are not beneficial to customers.

The commission agrees with SWBT and deletes the request for access identifier from the call detail data information.

AT&T recommended only the area code and exchange of the called telephone number be provided in response to requests for call detail information in order to protect the privacy of customers. AT&T commented it was unable to identify whether a legitimate prepaid calling services customer is making the request; therefore, prepaid calling services companies should not be required to provide full telephone numbers. AT&T asserted service providers should be allowed to develop their own policies for verifying the legitimacy of the source requesting that proprietary information be divulged.

MCI supported AT&T's request and noted the expectation of customers purchasing prepaid calling cards is that they and who they call are relatively anonymous. MCI also stated that going back five calls and providing only area code and exchange information is reasonable enough to allow a customer to determine whether they have been charged correctly.

The commission concludes that the call detail provided to customers upon request shall include the full telephone number dialed. The reduction in value of a prepaid calling services account is equivalent to long distance charges billed to a customer's home or business phone. If the value of a customer's prepaid calling services account is reduced, the customer is entitled to know to what phone number the charge was attributed. No amendment is made to proposed §26.34(e)(5)(B), which is now §26.34(e)(6)(B). Additionally, the rule allows sufficient flexibility for a provider to develop its own policies for verifying the legitimacy of the source requesting the information.

ITA and JD Services recommended the commission require detail records be maintained for three years to establish consistency with federal requirements.

Americatel recommended the two-year period for maintaining call detail information be reduced to one year from the date of purchase of the card. Americatel's experience showed customers do not request such information after two months from the purchase of the card.

Consumers noted other commission rules require billing records be kept for two years.

The commission currently requires other billing records be retained for two years, and the rule does not prohibit a company from maintaining records for a longer period, if required federally. Therefore, the commission makes no changes to this requirement.

Subsection (f)(1):

Americatel noted that imposition of font sizes and requirements for disclosure of taxes and billing increments are overly constrictive and may be impractical given the physical card size and the amount of information that already appears on cards by convention. JD Services noted that the specificity of this rule could create unreasonable costs for providers who may be forced to create different cards for each state.

The commission determines this rule is consistent with other state requirements and notes its use of existing rules in other states as a model for this rule. The commission also reviewed the national voluntary guidelines provided by ITA and has amended the rule in several areas to be consistent with those guidelines. The commission addresses Americatel's concerns later in this preamble.

AT&T, the Associations, GTECC, and MCI recommended elimination of the eight-point font requirement and requested the term "legible" be substituted.

SWBT expressed concern that the font size requirement would limit the ability of companies to market bilingual prepaid calling cards in Texas and suggested a waiver of this requirement for bilingual calling cards so providers could determine the font size necessary for legibility and meeting the disclosure requirements. SWBT stated its six-point font size is legible and commonly used on credit cards and driver's licenses and should be acceptable for prepaid calling cards. Internal "demo" calling cards produced by SWBT showed the rule requirements could not be made for bilingual cards, but some modifications could be made in single language cards. SWBT also noted it did not believe font size to be an issue in the abuses that have been discussed.

In response to SWBT, Consumers provided a visual comparison of eight and six-point font to refute the claim that font sizes smaller than eight-point can be legible.

At the public hearing, AT&T noted that copying machines reduce the size of a font and made the example provided by consumers union inaccurate in portrayal. AT&T presented an actual card using a font smaller than eight points and noted its legibility.

AT&T, JD Services, and SWBT commented the font size would make it impossible for providers to fit all the required information on a card without enlarging the size of a card to something that would not fit in a wallet. JD Services provided a sample printing which indicated a need for a border, reducing the amount of available space on a calling card.

Finally, JD Services noted a list of requirements from the Federal Communications Commission (FCC) that must be met and felt the information on its cards meets federal mandates. In reply comments AT&T and SWBT researched this issue and did not discover any FCC regulations for calling cards.

ITA noted the font requirement would eliminate hierarchy of importance for information on calling cards. AT&T noted information on some cards is made to stand out by using different font sizes and noted that very prescriptive font sizes could be problematic.

In supplemental comments AT&T noted that the Washington rule, a model for discussions about bonding requirements, adopted a "legibly printed" standard in its rule. MCI also noted the commission used a legible standard in the slamming rules (§26.130) that allows the commission to determine what is legible in enforcement proceedings.

At the public hearing, Consumers asked industry participants if they would oppose requirements that only certain, instead of all, information be in a specified font size. In supplemental comments, Consumers suggested the commission should at minimum, impose eight-point font requirements on the price, access numbers, and pin numbers. Consumers noted that the samples distributed at the public hearing did have such information in significantly larger type sizes.

The commission modifies the font size requirement to mandate that only toll-free customer numbers, maximum rates, and identification of inactive cards be provided in a minimum of eight-point font. Font size minimums for other information are set at five-point. The commission notes, no party indicated a need for a font size smaller than five. Additionally, the commission adds the stipulation that the font selected must be legible. In establishing minimum font sizes, the commission still provides prepaid calling services companies some flexibility while ensuring information is properly disclosed to customers.

In discussions about font size requirements, JD Services also commented that the front of the card is unavailable for the purposes of complying with this rule because the front of the card is determined by contractual agreements with distributors and generally is used for logos and artwork.

In supplemental comments, AT&T recommended the commission not adopt a rule that would require moving some information to the front of the card and noted this would conflict with industry standards and confuse customers.

The commission's response to font size should alleviate the concerns about information spilling over to the front of the card. However, the commission notes, there is no restriction to providing some of this information on the front of the card.

AT&T commented the rule's requirement that all information on a card be in the same language as that in which a card is marketed may significantly limit the availability and marketing of calling cards to some Texans. AT&T noted that the rule would prohibit all cards, advertisements, or anything related to calling cards from having more than one language as two languages would automatically violate the rule and calling card companies would be punished for trying to reach a broader base of customers. AT&T recommended the commission omit the first sentence of subsection (f)(1) or limit its applicability to marketing efforts where 30% of the marketing effort has been translated into another language.

JD Services commented that the font requirements would make it impossible to create bilingual cards and pointed out that retailers prefer bilingual cards due to difficulty in selling cards available in only one language.

The commission has amended the font size requirements and amends subsection (f)(1) to clarify that bilingual cards are permissible so long as all the information is available in both languages.

The Associations commented that the requirement to disclose applicable taxes is virtually impossible to comply with because of the portability of prepaid calling cards. AT&T suggested a general disclosure that services, surcharges, fees and taxes may be applied and a toll-free customer service number for customers to call for more detailed information.

At the public hearing, JD Services provided an extensive list of taxes it is responsible for and noted it would be impossible to print them all. JD Services noted the rule is unclear as to which fees and taxes must appear on the calling card.

The commission clarifies the confusion as to which fees, surcharges, and taxes must appear on a calling card by providing a definition for surcharges. The definition is crafted from the voluntary guidelines provided by ITA.

Americatel commented that the value of the card in minutes depends on the destination called and that the requirement for cards to contain "the value of the card, including charges for all services, surcharges, fees, and taxes, if applicable, expressed in minutes" is impractical, if not impossible, to achieve and should be eliminated.

ITA commented that variable fees would make this proposal impossible to fulfill and noted that requiring the value of a card to be

expressed in minutes is only informative if there are no other surcharges. ITA recommended the value of the card be expressed in dollars or units with information about other charges.

AT&T objected to the requirement that the value of the card be expressed in minutes because AT&T offers customers a choice of purchasing prepaid cards in minute, unit, or dollar valuations. AT&T also objected to the specific line placement requirements for per call charges. AT&T suggested the rule allow the value of the card to be expressed in minutes, units or dollars, and companies be allowed flexibility to disclose per call charges wherever a provider chooses. AT&T further suggested that this subsection of the rule apply only to domestic calls due to the constant fluctuation of international rates.

GTECC's experience showed no complaints relating to customers not being aware of rates, and applicable surcharges and fees and recommended that all charges other than the face value of the card be printed on the card packaging in lieu of the card itself.

Consumers disagreed with Americatel's request and stated that the dollar value of a card tells customers nearly nothing. Consumers argued rate information must be expressed in minutes in order to be compared to other cards. Consumers also disagreed with GTECC and noted the actions taken by the Office of the Attorney General against Sam's Club for falsely advertising 120 minutes of calling time and a rate of 15 cents per minute, and for failure to disclose pay phone surcharges. Consumers stated that due to the retailer's discretion for making available point of sale information, rate information must be printed on the card, or in the alternative, on the packaging.

The commission amends subsection (f)(1)(A) to allow providers to choose how to express the value of a card. However, the valuation of the card and any applicable surcharges must be expressed in the same format. For example, a card whose value is expressed in units must also list any applicable surcharges on the card in units. The commission anticipates this will provide customers some assistance in determining the true value of a calling card. Additionally, cards whose value is identified in minutes must indicate on the same line or the line immediately below whether the minute value is based on domestic or international calls.

Americatel requested clarification on whether the requirement to disclose the maximum cost per minute for local, intrastate and interstate calls requires the disclosure of the first minute which often includes a connection charge or just the maximum per minute rate.

Consumers replied that if the initial minute cost is different from the rate per minute, it should be disclosed to customers.

The commission finds that if the cost of a one-minute call is higher than the rate per minute, the minimum cost of a call must also be printed on the card in order to indicate to customers whether calls have a minimum greater than one minute.

GTECC noted that the value of printing the maximum cost per minute only exists in the absence of the packaging or point of sale information.

The Associations commented that the commission does not have jurisdiction to require the disclosure of interstate and international calls and stated providers should have discretion about where to post rate information due to the size of the card. Sprint suggested the toll-free number for obtaining International call prices be printed on the packaging rather than the card.

Consumers disagreed with the Associations and noted that SB1020 and Senate Bill 86, 76th Legislative Session (SB86) granted the commission broad authority to prevent misleading and fraudulent marketing practices by telecommunications providers. Consumers also disagreed with Sprint and noted that customers do not keep packaging and will not have a way to determine call rates before a call is made.

The commission finds that price disclosure is essential and must be readily available at all times. Therefore, the commission does not amend this provision in proposed subsection (f)(1)(D). However, due to font requirements, this section now appears as subsection (f)(1)(A)(2). As previously noted, prepaid calling services providers have little control on what the retailer presents to the customer outside of the card itself due to space constraints and simple choice. Because of this lack of control of the distribution of other informational material, the commission concludes such information must be printed on the calling card. Additionally, while the commission has limited authority regarding international rates, the commission does have authority over the disclosure of information on calling cards.

GTECC suggested it would be appropriate to have the access telephone number and PIN printed on the card. Consumers agreed with GTECC's suggestion.

The commission concludes this information must be disclosed as part of the instructions on how to use a calling card correctly.

AT&T objected to the requirement that a calling card without an expiration date be active indefinitely and stated this could impose significant costs due to the tens of millions of cards already in circulation without expiration dates. AT&T noted it reuses PINs and mandating cards without expirations dates to remain in effect into perpetuity would eliminate AT&T's ability to reuse PINs. AT&T suggested the commission adopt language similar to the Florida Public Service Commission rule which sets a one year minimum activation for cards without an expiration date.

ITA suggested that an expiration policy instead of an expiration date should apply and agree that the omission of this policy should be considered as making the card active indefinitely.

The commission amends proposed subsection (f)(1)(F) (now (f)(1)(B)(iv)) to allow for an expiration date or policy to be stated on calling cards. The commission acknowledges the concerns of providers who are currently circulating calling cards without expiration dates and has amended subsection (l) to allow six months for cards currently in circulation to come into compliance. However, the commission does expect that cards produced and distributed after the adoption of this rule will be in compliance with this rule. Additionally, the commission will use its discretion in investigating some complaints of non-compliance.

GTECC suggested it is sufficient to print the indication that a card is inactive on only one side of the card.

The commission finds it is important for customers to know a card is inactive before purchasing the card. Because displays cannot guarantee the appropriate information will be displayed to customers before purchasing cards, the commission has required this information be visible on both sides of a card.

Subsection (f)(2):

AT&T stated mandating the publication of identical information in three locations was overreaching. AT&T and GTE proposed

the rule be amended to allow providers to disclose the required information on the packaging or in the point of sale display.

Americatel requested clarification on whether these requirements applied to both packaging and posters or other materials displayed prominently at the point of sale or whether disclosure in one or the other is sufficient.

JD services argued that the requirements for packaging and point of sale displays may not be relevant since most customers rip the packaging apart or do not stop to read and take note of point of sale displays. Additionally, JD Services noted that some vendors do not provide point of sale displays or packaging for their cards due to limited counter space.

Consumers opposed parties' suggestion that disclosures only occur in one place and suggested the commission adopt the Washington state requirement that calling card companies contract with retailers to ensure that information required at the point of sale will be visibly displayed.

Subsection (f)(2) is written using the conjunction "and" therefore packaging and point of sale displays must both be in full compliance. The commission notes the rule does not mandate that packaging and point of sale displays be made available to customers, but simply notes the disclosures that must be made if these materials are provided. Because several commenters noted that packaging or point of sale displays may not be available to customers, the commission requires this provision on both materials to ensure that whichever is provided has adequate disclosures. While the requirements may be irrelevant if packaging or point of sale displays are not available, the requirements are relevant to ensuring that where packaging or point of sale displays is available, proper disclosure is made.

AT&T and ITA suggested the font requirement for the packaging be removed. AT&T suggested the requirement be replaced with the term "legibly printed."

The commission declines to remove the font requirement from the packaging material because there is no size limitation on packaging material that would prevent a prepaid calling services company from complying with this section. Packaging material can be folded to the size of the card itself.

AT&T commented the proposed rule already requires the value of the card be placed on the calling card and should not be required to be placed in packaging or point of sale displays.

The commission removes the requirement to place the value of cards on packaging and point of sale displays in order to allow providers to mass-produce these informational materials without having to specialize materials for each denomination of card. However, a list of applicable surcharges must be provided on all packaging and point of sale displays.

ITA commented that a statement of liability regarding loss or theft is condescending to customers.

The commission disagrees and notes the provision actually relieves providers of liability due to loss or theft.

AT&T commented customers are well aware of the contact information for the Public Utility Commission due to notice inclusion in every telephone bill and directory and stated there is no need to require this information in packaging where there is limited space or point of sale. AT&T also noted a lack of control of displays by vendors and retailers and stated this information may not be conveniently located to be useful. AT&T suggested this requirement be stricken as customers would not be prejudiced or deprived without this contact information in the packaging or point of sale display.

Consumers disagreed with AT&T and noted that many prepaid calling card users do not have home phones, therefore do not have telephone directories and do not receive phone bills.

As Consumers noted, many customers utilizing prepaid calling cards do not have phone service and have no other way of obtaining commission information. In general comments, parties stated education is important in helping to protect customers. Customers must be educated about the commission's new authority to assist customers in resolving complaints with prepaid calling services companies. This education of customers is the responsibility of the commission and providers. Therefore, the commission makes no changes to this requirement.

Subsection (g)

ITA suggested the verbal disclosure requirement not be effective until a valid PIN is provided. ITA recommended the value be allowed to be stated in domestic minutes, units or dollars to avoid misrepresentation to customers.

The commission concludes that a call cannot begin without accessing the provider and providing account information first. The commission declines to require a valid PIN before providing verbal disclosures as some accounts do not use PINs. However, the commission modifies subsection (g) to allow account information to be expressed in dollars, billing increments, or domestic minutes.

Subsection (i)

The Associations supported the revisions made to this subsection between the strawman and the published version.

AT&T requested the commission clarify whether "inquiry" includes both customer questions and complaints and proposed language to extend the deadline of ten working days indefinitely for resolving an inquiry or complaint. JD Services supported AT&T's comments and noted that some complaints are not easily resolved because it is difficult to contact customers due to incomplete information and the anonymity of prepaid callings services customers.

ITA commented that the ability of a customer to request a response to complaints in writing may be used as a form of blackmail to extort "free" time from a company since the expense of providing a written response is more than that of issuing a new card.

The commission concludes that the very definition of an inquiry implies a question. However, the commission does amend subsection (i) to address complaints as well and adopts part of AT&T's proposal. However, resolution time is restricted to 21 working days from the date of receipt of a customer complaint.

Subsection (j)

The Associations stated customers should first verify they purchased service by providing the personal identification number (PIN) associated with the card and customers should only be able to receive refunds or equivalent service while the card remains active. The Associations asserted that without these conditions, the commission may inadvertently open providers to unnecessary abuses and scams.

The commission's policy on customer refunds for all services entitles customers to receive refunds for however long the customer's records indicate a refund is due. In cases where the

customer must obtain records from a provider, a provider is only required to retain records for two years.

Subsection (k)

GTECC recommended deleting the requirement in subsection (k)(1)(A) that a prepaid calling services company terminating operations in Texas notify customers whose address is on file with the company of the date of termination and how they can receive refunds. GTECC argued most prepaid calling services companies have no way of knowing who purchased their card.

GTECC also suggested deleting the "billing" reference requiring prepaid calling services companies to provide the commission with a list of known names and identification numbers used for billing and debit purposes because the nature of prepaid services is advance payment and a customer is not billed.

Finally, GTECC recommended that companies be allowed to report unused services to the commission in minutes, units or dollars.

The commission declines to change any of the language in subsection (k). The requirement that prepaid calling services companies provide addresses indicates the requirement is only applicable to companies who have some customer addresses on file. Additionally, some prepaid calling service companies have a continuing relationship with customers and bill customers; therefore service is only prepaid after a customer is billed. Finally, the report submitted to the commission requires reporting in minutes (if applicable) and dollars. The commission determines it is unnecessary to request any other units, so long as the ultimate dollar amount is reported.

Subsection (l)

AT&T, ITA and MCI proposed that existing cards, packaging, and point of sales displays be grandfathered for an additional 90 days after the effective date of the rule to allow companies to phase in the production of new cards. AT&T also noted that some cards may never be in compliance with the new rules since customers continue to recharge their cards.

As noted previously, the commission acknowledges the concerns of providers who are currently circulating calling cards that are non-compliant and has amended subsection (l) to allow six months for cards currently in circulation to come into compliance. However, the commission does expect that cards produced and distributed after the adoption of this rule will be in compliance with this rule. Additionally, the commission will use its discretion in investigating some complaints of non-compliance. The commission notes that customers who are content with service enough to continue to recharge cards are not likely to have problems with the current disclosures on their cards and less likely to file complaints about the card.

Bonding Requirements

At the public hearing, Consumers raised the issue of bonding. Consumers noted that SB86 provided the commission authority to ensure that telecommunications providers have the technical and financial resources to provide adequate service in Texas. Consumers stated some providers must already meet such requirements at the commission, and suggested that other prepaid calling services providers who were not already captured by some commission financial requirement should be required to meet financial standards as well.

In supplemental comments, OPUC and Consumers stated customers must be able to protect themselves from future mass defaults with some form of financial assurance and supported the application of financial requirements such as those imposed upon aggregators in the electric industry. Consumers also supported the use of the Washington state rule as a model for establishing financial standards for prepaid calling services companies.

AT&T noted the commission must consider whether or not bonding issues could be introduced into this project without creating problems with the Administrative Procedures Act (APA). AT&T also noted contractual issues between providers may be a factor in the bonding issue. AT&T asserted that PURA §55.253 makes no mention of bonding issues and the scope of the original notice for this project does not include this issue. AT&T suggested more time and discussion was needed on this issue.

MCI stated the commission does not have authority to require prepaid calling companies to post a performance bond and noted the commission had not provided sufficient notice to promulgate such a requirement in this project.

However, AT&T and MCI stated they did not object to the commission's adoption of a requirement that is consistent with the requirements of Washington state which allows companies with a corporate debt rating according to Standards & Poor of BBB to be able to rely on that rating in lieu of being required to post a performance bond or establish specific deposit accounts. MCI also noted waivers to bonding provisions would be necessary so national companies would not have to post bonds for 50 states.

AT&T recommended the commission not use the approach of §26.111, Standards for Granting Service Provider Certificates of Operating Authority. While AT&T has been unable to verify whether any of the options provided in §26.111 could have been obtained by Twister, AT&T doubts it could cover a $20 million debt. AT&T stated the commission should avoid a result that penalizes companies that have provided good service due to bad actors.

SWBT stated they did not oppose bonding requirements similar to those used in Washington State as they did not appear to prohibit market entry. However, SWBT noted the following threshold issues that must thoroughly be examined:

(A) What are the exact bonding requirements proposed?

(B) What entity will assume responsibility for the administration of the program?

(C) How will claims against the bond be handled?

SWBT commented that bonding might be an administrative burden for the commission who would have to issue refunds and administer the funds.

The commission determines that additional time is needed to discuss this issue thoroughly. The commission will consider bonding requirements in a future rulemaking.

Informing the commission of possible disconnections

At the public hearing, Consumers proposed that underlying carriers preparing to terminate service to a calling card provider should inform the commission of its intent. Consumers recognized that underlying carriers are not ultimately responsible to customers but noted the larger public interest would be served by this action. In reply comments, Consumers elaborated on this suggestion and recommended the commission notify customers through the media that a company's particular products

are no longer active because without notice customers will continue to buy worthless cards. Consumers cited the recent situation with Twister and noted the commission was not fully informed of the situation until nearly a week after MCI suspended service to Twister.

OPUC supported a requirement that prepaid calling card companies notify the commission after a carrier suspends its service. OPUC noted that retailers and customers should be warned to stop purchasing cards that will soon be useless, but noted the bonding requirement appeared to be a simpler alternative.

Industry participants noted more time was necessary for discussion of this provision.

JD Services was not opposed to this suggestion, but noted this would have to occur before an interexchange carrier (IXC) or provider chose to take legal actions for collections of debts due to the restrictions on public information disclosures for pending legal cases.

AT&T expressed concern about imposing notification obligations that might subject IXCs to continued financial loss and is not aware of any other industry where a wholesale provider is obligated to provide notification to end-use customers on behalf of a client. AT&T also expressed concern about legal liability issues and noted that IXCs may not always know in which states a provider is operating. Finally, AT&T expressed concern that this issue was not properly noticed in this rulemaking proceeding.

MCI asserted the commission does not have authority to require network providers to notify the commission before terminating service to a prepaid calling services company. MCI questioned the purpose that would be served by this process since the network provider has no regulatory obligation to serve the customers. MCI noted that a wholesale provider does not always know if services are being provided to the end users customers and assumed the commission does not intend to obligate resellers to track services offered by wholesalers. MCI also noted that if the commission intended to use this information for public notice, it could result in negative consequences such as tort claims from reselling companies who may have alternate providers lined up.

AT&T and MCI noted this issue was currently covered by proposed subsection (k).

The commission determines that additional time is needed to discuss this issue thoroughly. The commission declines to add this requirement to the rule at this time and will consider this issue in a future rulemaking

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section the commission makes other minor modifications for the purpose of clarifying its intent.

New §26.34 is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2000) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically, §15.023 which grants the commission authority to impose an administrative penalty against an entity for violation of a rule adopted under PURA. PURA §17.004 grants the commission authority to adopt and enforce rules as necessary or appropriate to establish adequate customer protection standards. PURA §17.051 and §64.051 direct the commission to adopt registration requirements for all telecommunications utilities that are not dominant carriers. PURA §17.052 and §64.052 allow the commission to require registration as a condition of doing business in Texas; establish customer service and protection rules; and suspend or revoke certificates for repeated violations of this chapter or commission rules. PURA §55.253 grants the commission all necessary jurisdiction to adopt rules regarding the information a prepaid calling services provider shall disclose to customers in relation to the rates and terms of service for prepaid calling services offered in Texas.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 15.023, 17.004, 17.051, 17.052, 55.253, 64.051, and 64.052.

§26.34. Telephone Prepaid Calling Services.

(a) Purpose. The provisions of this section are intended to prescribe standards for the information a prepaid calling services provider shall disclose to customers about the rates and terms of service for prepaid calling services offered in this state.

(b) Application. This section applies to any "telecommunications utility" as that term is defined in §26.5 of this title (relating to Definitions). This section does not apply to a credit calling card in which a customer pays for a service after use and receives a monthly bill for such use.

(c) Liability. The prepaid calling services company shall be responsible for ensuring, either through its contracts with its network provider, distributors and marketing agents or other means, that:

(1) end-user purchased prepaid calling services remain usable in accordance with the requirements of this section; and

(2) compliance requirements of all disclosure provisions of this section are met.

(d) Definitions. The following terms used in this section shall have the following meanings, unless the context indicates otherwise:

(1) Access telephone number - The number that allows a prepaid calling services customer to access the services of a telecommunications utility to place telephone calls.

(2) Billing increment - A unit of time used to charge customers for prepaid calling services.

(3) Personal identification number (PIN) - A number assigned as an authorization code that ensures system security for a prepaid calling services customer and allows the prepaid calling services company to track minutes used.

(4) Prepaid calling services account - An amount of money paid by a customer in advance to access the services of a telecommunications utility to place telephone calls. When the customer makes completed telephone calls, the value of the account decreases at a predetermined rate.

(5) Prepaid calling card - A card or any other device purchased to establish a prepaid calling services account.

(6) Prepaid calling services - Any telecommunications transaction in which:

(A) a customer pays in advance for telecommunications services;

(B) the customer's prepaid calling services account is depleted at a predetermined rate as the customer uses the service; and

(C) the customer must use a PIN and an access telephone number to use the telecommunications services.

(7) Prepaid calling services company - A company that provides prepaid calling or other telecommunications services to the public using its own telecommunications network or resold telecommunications services, or distributors who purchase PINs or telecommunications services to resell to the end-user customer.

(8) Recharge - A transaction in which the value of the prepaid calling services account is renewed. The customer must be informed verbally or electronically of the new rates and surcharges at the time of recharge.

(9) Surcharge - any fee or cost charged against a prepaid calling services account in addition to a per-minute rate or billing increment, including but not limited to connection, payphone, and maintenance fees.

(e) Billing requirements for prepaid calling services.

(1) Billing increments shall be defined and disclosed in the prepaid calling services company's published tariffs or price list on file with the commission and on any display at the point of sale as well as on any prepaid calling card, or on any prepaid calling card packaging.

(2) A prepaid calling services account may be decreased only for a completed call. Station busy signals and unanswered calls shall not be considered completed calls and shall not be charged against the account.

(3) A surcharge may not be levied more than once on a given call.

(4) Prepaid calling services companies may not reduce the value of a prepaid calling services account by more than the company's published domestic tariffs or price list on file with the commission and any surcharges filed at the commission. Domestic rates and surcharges shall be disclosed at the time of purchase. Current international rates shall be disclosed at the time of purchase with an explanation, if applicable, that these prices may be subject to change.

(5) The prepaid calling services account may be recharged by the customer at a different domestic rate from the original domestic rate or the last domestic recharge rate as long as the new domestic rate and any domestic or international surcharges conform with the company's published tariff or price list on file with the commission at the time of recharge. The customer must be informed of the rates at the time of recharge. A prepaid calling services company shall keep internal records of changes to its international rates and shall provide customers with the appropriate international rate information through a toll-free telephone number. International prepaid calling services rates shall continue to be updated annually in accordance with §26.89 of this title (relating to Information Regarding Rates and Services of Nondominant Carriers.)

(6) Upon verbal or written request, prepaid calling services companies must be capable of providing customers the following call detail data information at no charge:

(A) Dialing and signaling information that identifies the inbound access telephone number called;

(B) The number of the originating telephone;

(C) The date and time the call originated;

(D) The date and time the call terminated;

(E) The called telephone number; and

(F) The PIN and/or account number associated with the call.

(7) Prepaid calling services companies shall maintain call detail data records for at least two years.

(f) Written disclosure requirements for all prepaid calling services.

(1) Information required on prepaid calling cards. Cards must be issued with all information required by subparagraphs (A) and (B) of this paragraph in at least the same language in which the card is marketed. Bilingual cards are permitted as long as all the information in subparagraphs (A) and (B) of this paragraph is printed in both languages.

(A) At a minimum, a card must contain the following information printed in a legible font no smaller than eight-point:

(i) The toll-free number as required by subsection (i) of this section;

(ii) The maximum rate per minute shall be shown for local, intrastate, and interstate calls. International call prices shall be provided to the customer through a toll-free number printed on the card. If the cost for a one minute call is higher than the maximum rate per minute, it must be printed on the prepaid calling card; and

(iii) The words "VOID" or "SAMPLE" or sequential numbers, such as "999999999" on both sides of the card if the card was produced as a "non-active" card so that it is obvious to the customer that the card is not useable. If the card is not so labeled, the card is considered active and the issuing company shall honor it.

(B) At a minimum, a card must contain the following information printed in legible font no smaller than five-point:

(i) The value of the card and any applicable surcharges shall be expressed in the same format (i.e. a card whose value is expressed in minutes shall express surcharges in minutes). If the value of a card is expressed in minutes, the minutes must be identified as domestic or international and the identification must be printed on the same line or next line as the value of the card in minutes;

(ii) The prepaid calling services company's name as registered with the commission. A "doing business as" name may only be used if officially filed with the commission. The language shall clearly indicate that the company is providing the prepaid calling services;

(iii) Instructions on using the card correctly; and

(iv) Expiration date or policy, if the card cannot be used after a date certain. If an expiration date or policy is not disclosed on the card, it will be considered active indefinitely.

(2) Information required at a point of sale. All the following information shall be legibly printed on or in any packaging in a minimum eight point font and displayed visibly in a prominent area at the point of sale so that the customer may make an informed decision before purchase. Bilingual information may be made available as long as all the information below is printed in both languages.

(A) A listing of applicable surcharges;

(B) The company's name as registered with the commission. A "doing business as" name may only be used if officially filed with the commission. The language shall clearly indicate that the company is providing the prepaid calling card services;

(C) The toll-free number as required by subsection (i) of this section;

(D) The billing increment expressed in minutes or fractions of minutes and maximum charge per billing increment for prepaid calling card services for local, intrastate, interstate, and international calls will be provided to the customer through a toll-free number printed on the card;

(E) The expiration policy, if the card cannot be used after a date certain. If an expiration date is not disclosed at the time of purchase, the prepaid calling services will be considered active until the prepaid calling services account is completely depleted;

(F) The recharge policy, if applicable. If an expiration date is not disclosed at the time prepaid calling services are recharged, the services will be considered active until the prepaid calling services account is completely depleted;

(G) The policy for rounding billing increments, if applicable;

(H) A statement that if a customer is unable to resolve a complaint with the company that the customer has the right to contact the state regulatory agency which has jurisdiction within the state where the prepaid calling services were purchased; and

(I) A statement that:

(i) Notifies a customer of the customer's extent of liability for lost or stolen cards, if there is liability; and

(ii) Warns a customer to safeguard the card against loss or theft.

(3) If a customer asks a prepaid calling services company how to file a complaint, the company must provide the following contact information: Public Utility Commission of Texas, Office of Customer Protection, PO Box 13326, Austin, Texas 78711-3326; phone: (512) 936-7120 or in Texas (toll-free) 1-888-782- 8477; fax: (512) 936-7003; e-mail address: customer@puc.state.tx.us; Internet address: www.puc.state.tx.us; TTY: (512) 936-7136; and Relay Texas (toll-free): 1-800-735-2989.

(g) Verbal disclosure requirements for prepaid calling services. Prepaid calling services companies shall provide an announcement:

(1) At the beginning of each call indicating the domestic minutes, billing increments, or dollars remaining on the prepaid calling services account or prepaid calling card; and

(2) When the prepaid account or card balance is about to be completely depleted. This announcement must be made at least one minute or billing increment before the time expires.

(h) Registration requirements for prepaid calling services companies. All prepaid calling services companies shall register with the commission in accordance with §26.107 of this title (relating to Registration of Nondominant Telecommunications Carriers).

(i) Business and technical assistance requirements for prepaid calling services companies. A prepaid calling services company shall provide a toll-free number with a live operator to answer incoming calls 24 hours a day, seven days a week or electronically voice record customer inquiries or complaints. A combination of live operators or recorders may be used. If a recorder is used, the prepaid calling services company shall attempt to contact each customer no later than the next business day following the date of the recording. Personnel must be sufficient in number and expertise to resolve customer inquiries and complaints. If an immediate resolution is not possible, the prepaid calling services company shall resolve the inquiry or complaint by calling the customer or, if the customer so requests, in writing within ten working days of the original request. In the event a complaint cannot be resolved within ten working days of the request, the prepaid calling services provider shall advise the complainant in writing of the status and subsequently complete the investigation within 21 working days of the original request.

(j) Requirements for refund of unused balances. If a prepaid calling services company fails to provide services at the rates disclosed at the time of initial purchase or at the time an account is recharged, or fails to meet technical standards, the prepaid calling services company shall either refund the customer for any unused prepaid calling services or provide equivalent services.

(k) Requirements when a prepaid calling services company terminates operations in this state.

(1) When a prepaid calling services company expects to terminate operations in this state for any reason, the company shall at least 30 days prior to the termination of operations:

(A) Notify the commission in writing:

(i) That operations will be ending;

(ii) Of the date of the termination of operations; and

(iii) That the company certifies that the actions required by this subsection have been completed;

(B) Notify each customer at the address on file with the company, if applicable, that operations will be ending the date of the termination of operations, and explain how customers may receive a refund or equivalent services for any unused services;

(C) Announce the termination of operations at the beginning of each call, including the date of termination and a toll-free number to call for more information; and

(D) Provide to customers via its toll-free customer service number the procedure for obtaining refunds and continue to provide this information for at least 60 days after the date the company terminates operations.

(2) Within 24 hours after ceasing operations, the prepaid calling services company shall deliver to the commission a list of names, if known, and account numbers of all customers with unused balances. For each customer, the list shall include the following:

(A) The identification number used by the company for billing and debit purposes; and,

(B) The unused time, stated in minutes, as applicable, and the unused dollar amount of the prepaid calling services account.

(l) Date of compliance for prepaid calling card services companies. All prepaid calling services offered for sale in the state of Texas and all prepaid calling services companies shall be in compliance with this rule within six months of the effective date of this section.

(m) Compliance and enforcement.

(1) Administrative penalties. If the commission finds that a prepaid calling services company has violated any provision of this section, the commission shall order the company to take corrective action, as necessary, and the company may be subject to administrative penalties and other enforcement actions pursuant to the Public Utility Regulatory Act, Chapter 15.

(2) Enforcement. The commission shall coordinate its enforcement efforts against a prepaid calling services company for fraudulent, unfair, misleading, deceptive, or anticompetitive business practices with the Office of the Attorney General in order to ensure consistent treatment of specific alleged violations.

This agency 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 July 26, 2000.

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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7308

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SUBCHAPTER E. CERTIFICATION, LICENSING AND REGISTRATION

16 TAC §26.107

The Public Utility Commission of Texas (commission) adopts an amendment to §26.107 relating to Registration of Interexchange Carriers, Prepaid Calling Services Companies, and Other Nondominant Telecommunications Carriers with changes to the proposed text as published in the April 28, 2000, *Texas Register* (25 TexReg 3679). The amendment implements the provisions of the Public Utility Regulatory Act (PURA) §§17.051-17.053 and §§64.051-64.053 (Vernon 1998, Supplement 2000) that direct the commission to adopt registration requirements for all telecommunications utilities that are not dominant carriers, allow the commission to require registration as a condition of doing business in the state of Texas, establish customer service and protection rules, suspend or revoke certificates or registrations for repeated violations of PURA or commission rules, and require telecommunications service providers to submit reports concerning any matter over which the commission has authority. This amendment was adopted under Project Number 21456.

A public hearing on the amendment was held at commission offices on May 31, 2000, at 9:00 a.m. Representatives from CLEC Coalition, AT&T Communications of Texas (AT&T), Southwestern Bell Telephone (SWBT), AT&T Wireless Services, and Texas Coalition of Cities For Utility Issues (TCCFUI) attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received comments on the proposed amendment from the Association of Communications Enterprises (ASCENT), Houston Cellular Telephone Company, GTE Communications Corporation (GTE), and AT&T Wireless Services, Inc.

General Comments

Section 26.107 applies to the registration of persons and entities who provide intralata and interlata long distance telecommunications services, prepaid calling services companies, pay telephone service providers, and other telecommunications services that do not require certification as established in the Public Utility Regulatory Act, Chapter 54, Subchapter C. AT&T stated that the rule should not apply to commercial mobile radio service (CMRS) providers as stated in PURA §51.002(10). Houston Cellular wanted wireless and CMRS providers exempted from substantive rule §26.107. Houston Cellular also stated that they wanted PURA §51.002(10) added to the rule for clarification purposes.

The commission agrees with AT&T and Houston Cellular. PURA §51.002(10)(A)(iv) states that CMRS is a "Telecommunications Provider", but the law specifically exempts these entities from regulatory entities for the purpose of Chapters 17 (Customer Protection), 55 (Regulation of Telecommunications Services) or 64 (Customer Protection). The commission agrees that a reference to PURA §51.002(10) should be added to the rule.

ASCENT requested that §26.107 be limited to applying to nondominant applicants who are unaffiliated with incumbents to prevent new incumbent affiliates from escaping appropriate regulatory scrutiny.

The commission feels that PURA does not discriminate against incumbent local exchange carrier (ILEC) affiliates. PURA §54.102 and Chapter 58 discuss limitations between ILECs and their affiliates. The commission has worded this rule to identify inappropriate affiliate relationships.

Section 26.107(c)

GTE believed that requiring information about affiliates was burdensome and not related to the legislative policy of fostering competition in the telecommunications industry. GTE believed that subsection (c)(6) of the proposed rule should be deleted. GTE believed that as an alternative, the information requested should be limited to the legal name of the affiliates that were public utilities or that provided telecommunications services in Texas and a brief description of those affiliates.

The commission continues to suggest that a company provide an organizational chart of "ALL" affiliated public utilities or telecommunications providers (and the state in which they provide service). The commission has also restricted its request for detailed description and relationships to affiliates in Texas.

Section 26.107(d)

GTE stated that the automatic deregistration of an uncertificated nondominant carrier for failure to file an updated registration form by June 30 each year was too harsh. GTE suggested that a notice be sent to the telecommunications provider stating that they have failed to file the required report.

The commission agrees that a notice should be sent to the nondominant carrier stating that if the carrier has not responded within ten working days, a hearing may be convened to deregister the carrier.

AT&T requested the letter filing option that was removed from §26.107(d), be reinstated.

The commission agrees with AT&T's request.

Section 26.107(f)(2)

GTE stated that it believed that due process was being denied to carriers that were subjected to revocation or suspension for repeatedly violating PURA or the commission rules as worded in subsection (f)(2).

The commission feels that GTE is making an assumption that is not consistent with commission practice. The wording in §26.107(f)(2) does not imply that a carrier/registrant will be denied due process, nor does it imply that the commission will not follow the current practice of a notice and hearing for contested dockets.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2000) (PURA) which provides the commission with

the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically §15.023 that grants the commission authority to impose an administrative penalty against an entity for violation of a rule adopted under PURA; §17.004 that grants the commission authority to adopt and enforce rules as necessary or appropriate to establish customer protection standards; §17.051 and §64.051 which directs the commission to adopt registration requirements for all telecommunications utilities that are not dominant carriers; §17.052 and §64.052 which allow the commission to require registration as a condition of doing business in Texas, establish customer service and protection rules, and suspend or revoke certificates or registrations for repeated violations of this chapter or commission rules; and §17.053 and §64.053 which allow the commission to require a telecommunications service provider to submit reports to the commission concerning any matter over which it has authority under this chapter.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 15.023, 17.004, 17.051, 17.052, 17.053, 54.008, 64.051, 64.052, and 64.053.

§26.107. Registration of Interexchange Carriers, Prepaid Calling Services Companies, and Other Nondominant Telecommunications Carriers.

(a) Application. This section applies to the registration of persons and entities who provide intralata and interlata long distance telecommunications services, prepaid calling services companies pursuant to §26.34 of this title (relating to Telephone Prepaid Calling Services), pay telephone service providers pursuant to §26.102 of this title (relating to Registration of Pay Telephone Service Providers), and other telecommunications services that do not require certification as established in the Public Utility Regulatory Act (PURA), Chapter 54, Subchapter C; except as noted in PURA §51.002(10) (relating to Definitions).

(b) Purpose. Through this section, the commission strives to identify, monitor, and protect the public interest against telecommunications entities providing uncertificated telecommunications services. The commission's overall goal is to encourage the development of a competitive marketplace for nondominant telecommunications services, free of unreasonable barriers to entry, that will provide consumers with the best services at the lowest cost.

(c) Each nondominant carrier not holding a certificate of operating authority (COA) or service provider certificate of operating authority (SPCOA) shall file with the commission the information set forth in paragraphs (1)-(10) of this subsection within 30 days of commencing service in Texas. Each registered nondominant carrier shall keep this information updated and current at all times.

(1) Legal name and all assumed names under which the registrant conducts business. A registrant shall use only one name in which to provide telecommunications services to the public per registration;

(2) Address of the principal office and business office;

(3) Principal office and business office telephone number, fax number, website address, E-mail address, and toll-free customer service telephone number. (If the registrant has not obtained a toll-free customer service telephone number at the time of the registration, the registrant must commit to obtaining one before commencing business);

(4) Date service commences/commenced in Texas;

(5) Form of business (*e.g.*, corporation, partnership, sole proprietorship), state in which business was formed, certification/authorization number, and date business was formed;

(6) Provide an organizational chart of the legal name of all affiliated companies that are public utilities or that are providing telecommunications services and the states in which they are providing service. Give a description of all affiliates and explain in detail the relationship between the registrant and its affiliates that operate in Texas.;

(7) FCC Carrier Identification Code (CIC) or National Exchange Carriers Association (NECA) Operating Carrier Numbers (OCNs), if available;

(8) Name, addresses, phone numbers, and e-mail/website address, and office location of each director, officer, or partner (if applicable);

(9) Names, addresses, phone numbers, and e-mail/website address of the five largest shareholders (if applicable); and

(10) Name, address, telephone number, and e-mail/website address of authorized/registered agent who can be contacted by the commission.

(d) By June 30 of each year, each nondominant carrier shall file with the commission an updated registration form or a letter informing the commission that no changes have occurred. An uncertificated nondominant carrier failing to file an updated registration form by June 30 may no longer be considered to be registered with the commission. A letter of notice will be sent requiring reporting compliance within ten working days or a hearing may be set to consider de-registration of the nondominant carrier.

(e) All nondominant carriers shall comply with the reporting requirements in §26.89 of this title (relating to Information Regarding Rates and Services of Nondominant Carriers).

(f) Compliance enforcement.

(1) Administrative penalties. If the commission finds that a registrant has violated any provision of this section, the commission shall order the registrant to take corrective action, as necessary, and the registrant may be subject to administrative penalties and other enforcement actions pursuant to PURA, Chapter 15.

(2) Revocation or suspension. If the commission finds that a registrant is repeatedly in violation of PURA or commission rules, the commission may suspend or revoke a registration pursuant to PURA Chapter 17.

(3) Enforcement. The commission shall coordinate its enforcement efforts of fraudulent, misleading, deceptive, and anticompetitive business practices with the Office of the Attorney General in order to ensure consistent treatment of specific alleged violations.

This agency 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 July 26, 2000.

TRD-200005151
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: August 15, 2000
Proposal publication date: April 28, 2000
For further information, please call: (512) 936-7308

SUBCHAPTER R. PROVISIONS RELATING TO MUNICIPAL REGULATION AND RIGHTS-OF-WAY MANAGEMENT

16 TAC §26.467

The Public Utility Commission of Texas (commission) adopts an amendment to §26.467 relating to Rates, Allocation, Compensation, Adjustments and Reporting with no changes to the proposed text as published in the May 12, 2000 *Texas Register* (25 TexReg 4268). The amendment is necessary to correct an inadvertent error regarding the due date for the first- time filing of the quarterly access line count reports as §26.467 was originally adopted. This amendment is adopted under Project Number 20935.

The commission received comments on the proposed amendment from Mr. Max Wiesen. The focus of Mr. Wiesen's comments was the costs incurred by consumers and the benefits that will be gained by consumers regarding the implementation of §26.467. Mr. Wiesen argues that the recovery of the municipal franchise fees by the certificated telecommunications providers (CTPs) is a rate design issue that the commission has ignored. Specifically, Mr. Wiesen contends that the commission's policy reflected in §26.467 conflicts with the provisions of the Public Utility Regulatory Act (PURA) of 1997. Mr. Wiesen asserts that the commission has permitted a CTP to recover more franchise fees than is authorized under PURA.

Commission Response

This amendment was proposed to correct an inadvertent error in a date within §26.467; this is the only change proposed to §26.467. Mr. Wiesen's comments address issues outside the scope of this proceeding. Proper notice pursuant to Texas Government Code §2001.024 has not been provided in order for the commission to consider any changes based upon Mr. Wiesen's comments.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2000) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure. This proposed rule is also authorized by House Bill 1777, 76th Legislature, Regular Session (1999), Local Government Code §283.55 and §283.058.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, Local Government Code §283.055 and §283.058.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Public Utility Commission of Texas
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For further information, please call: (512) 936-7308

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 74. CURRICULUM REQUIREMENTS

The Texas Education Agency (TEA) adopts amendments to §§74.3, 74.11-74.14, and 74.23-74.29 and new §§74.31 and 74.41-74.44, concerning curriculum requirements. The sections establish definitions, requirements, and procedures related to required curricula, graduation requirements, academic achievement records, special programs, and credit. Amendments to §74.13 and new §74.42 and §74.44 are adopted with changes to the proposed text as published in the June 2, 2000, issue of the *Texas Register* (25 TexReg 4995). Amendments to §§74.3, 74.11, 74.12, 74.14, and 74.23- 74.29 and new §§74.31, 74.41, and 74.43 are adopted without changes to the proposed text as published in the June 2, 2000, issue of the *Texas Register* (25 TexReg 4995) and will not be republished.

Texas Education Code (TEC), §28.002(a), sets forth the required curriculum that each school district must offer. The adopted amendments to §§74.3, 74.11-74.14, 74.23-74.29, and new §74.31 revise 19 TAC Chapter 74 to clarify existing language. These changes include listing the courses that districts may offer under Technology Applications and allowing credit by exam to be administered for students with some prior instruction, according to local policy. New §§74.41-74.44 are adopted to specify graduation requirements for students entering Grade 9 beginning with the 2001-2002 school year. TEC, §39.023(c), as amended by Senate Bill (SB) 103, 76th Texas Legislature, 1999, requires the implementation of a new assessment program no later than the 2002-2003 school year. As specified in SB 103, the exit-level assessment required for graduation will move from Grade 10 to Grade 11 and increase in scope to test English language arts, mathematics, social studies, and science. SB 103 also specifies the inclusion of certain areas of study in these exit-level tests. Language is included in the adopted new sections to designate Geometry as a required mathematics course and to address specific science content requirements. In addition, the adopted new sections address the following three topics: (1) Junior Reserve Officer Training Corps (JROTC) as an approved elective in all three graduation plans; (2) Communication Applications as the only course to satisfy the speech requirement; and (3) additional flexibility in the choice of electives in the Recommended High School Program and the Distinguished Achievement Program.

In response to comments, the following changes have been made to the following sections since published as proposed.

Language in §74.13(a)(3)(C) was modified to clarify the reference to academic college courses and articulated tech-prep college courses.

A technical correction resulted in deleting §74.42(b)(11) relating to elective courses and adding the same language as new §74.42(c) for formatting consistency.

Language in §74.44(d)(3) was modified to clarify the reference to academic college courses and articulated tech-prep college courses.

The following comments were received regarding adoption of the amendments and new sections.

Comment. Concerning §74.3(b)(2)(K), a comment was received from an individual that supports the clarification of the required technology applications curriculum and the Texas Essential

Knowledge and Skills (TEKS) for Technology Applications in 19 TAC Chapter 126. In addition, the individual supports the listing of the eight technology applications courses in the graduation requirements in 19 TAC Chapter 74, Subchapter B.

Agency Response. The agency agrees with the comment and has maintained language as filed as proposed.

Comment. Concerning §74.3(b)(2)(K), a comment was received from an individual in opposition to the proposed change to reduce the number of technology applications courses from eight to four courses.

Agency Response. The agency disagrees with the comment and has maintained language as filed as proposed. Districts may offer all eight courses in technology applications, but at least four courses must be offered.

Comment. Concerning §§74.11(d)(9), 74.12(b)(11), and 74.13(a)(1)(k), comments were received from an individual representing the Texas Speech Communications Association supporting proposed language that the Communication Applications course be the course that students must complete to receive their speech credit. This individual expressed that the Communication Applications course provides a common ground in communication skills for all Texas students.

Agency Response. The agency agrees with the comment and has maintained language as filed as proposed. In addition, parallel language is maintained in §§74.42(b)(9), 74.43(b)(9), and 74.44(b)(9) as filed as proposed.

Comment. Concerning §74.13(a)(3)(C) and §74.44(d)(3), a representative of a tech-prep consortium expressed concern regarding the addition of the word "academic" to these sections. The individual pointed out that most tech-prep articulated college credit is awarded for career and technology courses, not for academic courses.

Agency Response. The agency agrees with the comment and has amended the section. In order to provide clarification, language was revised to specify that "academic college courses and tech-prep articulated college courses with a grade of 3.0 or higher" qualify as advanced measures.

Comment. Concerning §74.23, a comment was received from an individual in support of the clarification on distance learning courses.

Agency Response. The agency agrees with the comment and has maintained language as filed as proposed. Students who wish to pursue online courses for high school graduation credit may do so with the consent of the school district.

Comment. Concerning §74.25, a comment was received from an individual stating that there needs to be coordination of the alignment of college courses with the TEKS of the courses for which the students are receiving credit. The individual would like for districts to receive more guidance in this area from the state.

Agency Response. The agency agrees with the comment that there is a need for alignment of college courses with the TEKS of courses for which students are receiving credit; however, the agency disagrees that the state should provide more guidance in this area and has maintained language as filed as proposed. School districts have the authority to analyze the content of college courses and give permission to students who wish to take courses for dual credit.

Comment. Concerning §74.42(b)(3) and §74.43(b)(3), an individual requested that alternate options be considered for graduation that do not impose difficult academic standards for students interested in the arts, or simply not interested in careers requiring Algebra I or Chemistry and Physics.

Agency Response. The agency disagrees with the comment and has maintained language as filed as proposed. Students need a rigorous foundation in order to make wise career or education choices after they complete their high school diplomas.

Comment. Concerning §74.42(b)(3) and §74.43(b)(3), a comment was received from an individual recommending that students be allowed to take more than one of the science courses from the list of science courses reflected in the proposed language.

Agency Response. The agency disagrees with the comment and has maintained language as filed as proposed. Students entering Grade 9 in the 2001-2002 school year must have the proposed courses in order to meet the SB 103 assessment requirements. Students may take an additional science course in the academic elective. Students may also take science courses to fulfill any of the five and one-half credits of electives in the Minimum High School Program or the three and one-half credits of electives in the Recommended High School Program (RHSP).

Comment. Concerning §74.42(b)(3) and §74.43(b)(3), several individuals expressed concern about requiring students to take such rigorous courses such as Biology, Chemistry, and Physics for the RHSP. They also stated that students should be given choices other than these courses to complete the Minimum High School Program.

Agency Response. The agency disagrees with the comment and has maintained language as filed as proposed. In order for students to be adequately prepared for the exit-level exam as required in SB 103, students entering the Grade 9 in the 2001-2002 school year must have an opportunity to learn what will be tested. The course options presented in the proposed language meet the SB 103 content requirements.

Comment. Concerning §74.42(b)(3) and §74.43(b)(3), several individuals asked that the agency list a scope and sequence to be included in the list of science courses that students complete for the RHSP and the Distinguished Achievement Program (DAP).

Agency Response. The agency disagrees with the comment and has maintained language as filed as proposed. The new rules identify the course options and the courses are described in the TEKS. Decisions about course sequence are local authority.

Comment. Concerning §74.42(b)(3) and §74.43(b)(3), a comment was received from an individual asking that Advanced Placement Environmental Science be included in the list of science courses that students may choose for the RHSP and DAP.

Agency Response. The agency disagrees with the comment and has maintained language as filed as proposed. Current students may take this course to fulfill elective options in the graduation plans, but students entering Grade 9 in the 2001-2002 school year must have the proposed courses in order to meet the SB 103 assessment programs.

Comment. Concerning §74.42(b)(3), several individuals expressed concern that only two science credits are required in the Minimum High School Program.

Agency Response. The agency disagrees with the comment and has maintained language as filed as proposed. As outlined in the new rules, two credits would fulfill requirements for adequate preparation for the Grade 11 science exit-level assessment as outlined in SB 103. Students may also take an additional science course in the academic elective. Students may also take science courses to fulfill any of the five and one-half credits of electives in the Minimum High School Program.

Comment. Concerning §74.43(b)(3), comments were received from the Texas Business and Education Coalition and an individual that support the proposal of Biology as a prescribed course in the RHSP because it strengthens the core academic preparation for students.

Agency Response. The agency agrees with the comment and has maintained language as filed as proposed.

Comment. Concerning §§74.42(b)(4), 74.43(b)(4), and 74.44(b)(4), comments were received from two individuals and a representative of the Texas Eagle Forum that support adding one-half credit to United States History to make it a one and one-half credit course.

Agency Response. The agency disagrees with the comment and has maintained language as filed as proposed. Such a revision would require changes to other graduation requirements. It would also have implications for timelines for Proclamation 2000 and the new statewide assessment program.

Comment. Concerning §§74.42(b)(4), 74.43(b)(4), and 74.44(b)(4), the Texas Council for the Social Studies and several individuals expressed concern about the possibility of adding a third semester or one-half credit to United States History Studies Since Reconstruction. This addition would affect 10th grade assessment, the sequencing of courses at high schools, graduation requirements, textbooks, and the TEKS.

Agency Response. The agency agrees with the comment and has maintained language as filed as proposed.

Comment. Concerning §74.43(c) and §74.44(c), comments were received from the Texas Business and Education Coalition that recommend that Options I and II, as delineated in §74.12(c) and §74.13(a)(2)(A) for current elective credits required for graduation, be retained and continue to serve as a roadmap for students who prepare for associate's degrees, bachelor's degrees, and technical education. Additionally, they suggested that Option III of the current graduation requirements might be expanded to allow students to complete the 24-credit requirement by completing three and one-half elective credits from the state-approved high school level courses.

Comment. Concerning §74.43(c) and §74.44(c), comments were received from a tech-prep representative who expressed concern about the elimination of Options I-III in the RHSP and DAP. The representative felt that school districts should be held accountable for counseling students and that the options help students focus on their four-year plans and encourage them to make logical decisions for their future.

Agency Response. The agency disagrees with the comments and has maintained language as filed as proposed. The elimination of Options I-III allows more flexibility for students in choosing elective courses while at the same time maintains the rigor of the core curriculum. Under the new rules students may still take the courses specified in Option I-III.

Comment. Concerning §74.43(c) and §74.44(c), comments were received from several individuals who endorse the elimination of Options I-III. They believe that flexibility in electives would be beneficial for students. Individuals also commented that these options limit student elective course choices.

Agency Response. The agency agrees with the comment and has maintained the language as filed as proposed to eliminate Options I-III to allow more flexibility for students in choosing elective courses, and at the same time maintain the rigor of the core curriculum.

Comment. Concerning §74.44(c), several individuals objected to not including Option I, related to the math and science elective, since it helps direct students to academic choices in their electives.

Agency Response. The agency disagrees with the comment and has maintained language as filed as proposed. The elimination of Options I-III allows more flexibility for students in choosing elective courses while at the same time maintains the rigor of the core curriculum. Under the new rules students may still take the courses specified in Option I-III.

Comment. Concerning §74.44(b)(3), several individuals have expressed concern for including Integrated Physics and Chemistry (IPC) in the DAP since colleges and universities do not recognize this course.

Agency Response. The agency disagrees with the comment and has maintained language as filed as proposed. IPC is one of the courses that would meet the science requirements in new 19 TAC Chapter 74, Subchapter D, in all three of the high school graduation plans. The IPC course may be used in one of a number of course combinations that would prepare students to meet the exit-level test requirements of SB 103.

SUBCHAPTER A. REQUIRED CURRICULUM

19 TAC §74.3

The amendments are adopted under the Texas Education Code, §7.102(c)(4), which authorizes the State Board of Education (SBOE) to establish curriculum and graduation requirements; and §28.025(a), which authorizes the SBOE by rule to determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum under §28.002.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
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Proposal publication date: June 2, 2000
For further information, please call: (512) 463-9701

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SUBCHAPTER B. GRADUATION REQUIREMENTS

19 TAC §§74.11 - 74.14

The amendments are adopted under the Texas Education Code, §7.102(c)(4), which authorizes the State Board of Education (SBOE) to establish curriculum and graduation requirements; and §28.025(a), which authorizes the SBOE by rule to determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum under §28.002.

§74.13. Distinguished Achievement Program -- Advanced High School Program.

(a) General requirements. A student entering Grade 9 in the 1998-1999, 1999-2000, or 2000-2001 school years who wishes to complete an advanced high school program (called the distinguished achievement program) and have the accomplishment recognized and distinguished on the academic achievement record (transcript) must complete the following requirements.

(1) Academic core components. College Board advanced placement and International Baccalaureate courses may be substituted for requirements in appropriate areas. The student must demonstrate proficiency in the following.

(A) English--four credits. The credits must consist of English I, English II, English III, and English IV (English I for Speakers of Other Languages and English II for Speakers of Other Languages may be substituted for English I and II only for immigrant students with limited English proficiency);

(B) Mathematics--three credits. The credits must consist of Algebra I, Algebra II, and Geometry.

(C) Science--three credits. Students may choose three credits from the following four areas. Not more than one credit may be chosen from each of the four areas. All students who wish to complete the distinguished achievement program are encouraged to take Biology, Chemistry, and Physics to fulfill the requirements of this section.

(i) Integrated Physics and Chemistry;

(ii) Biology, AP Biology, or IB Biology;

(iii) Chemistry, AP Chemistry, or IB Chemistry; and

(iv) Physics, Principles of Technology I, AP Physics, or IB Physics.

(D) Social studies--three and one-half credits. The credits must consist of World History Studies (one credit), World Geography Studies (one credit), United States History Studies Since Reconstruction (one credit), and United States Government (one-half credit).

(E) Economics, with emphasis on the free enterprise system and its benefits--one- half credit. The credit must consist of Economics with Emphasis on the Free Enterprise System and Its Benefits.

(F) Languages other than English--three credits. The credits must consist of Level I, Level II, and Level III in the same language.

(G) Health education--one-half credit of Health 1 or Advanced Health, or Health Science Technology--one credit.

(H) Fine arts--one credit, which may be satisfied by any course in Chapter 117, Subchapter C, of this title (relating to Texas Essential Knowledge and Skills for Fine Arts).

(I) Physical education--one and one-half credits to include one-half credit in Foundations of Personal Fitness.

(i) A school district board of trustees may allow a student to substitute certain physical activities for the one and one-half required credits of physical education, including the one-half credit of Foundations of Personal Fitness. The substitutions must be based on the physical activity involved in drill team, marching band, and cheerleading during the fall semester; Junior Reserve Officer Training Corps (JROTC); athletics; Dance I-IV; and two- or three-credit career and technology work-based training courses.

(ii) In accordance with local district policy, a school district may also apply to the commissioner of education for a waiver to allow credit for appropriate private or commercially-sponsored physical activity programs conducted on or off campus. Such approval may be granted under the following conditions.

(I) Olympic-level participation and/or competition includes a minimum of 15 hours per week of highly intensive, professional, supervised training. The training facility, instructors, and the activities involved in the program must be certified by the superintendent to be of exceptional quality. Students qualifying and participating at this level may be dismissed from school one hour per day. Students dismissed may not miss any class other than physical education.

(II) Private or commercially-sponsored physical activities include those certified by the superintendent to be of high quality and well supervised by appropriately trained instructors. Student participation of at least five hours per week must be required. Students certified to participate at this level may not be dismissed from any part of the regular school day.

(J) Technology applications--one credit, which may be satisfied by:

(i) the following courses in Chapter 126 of this title (relating to Texas Essential Knowledge and Skills for Technology Applications): Computer Science I, Computer Science II, Desktop Publishing, Digital Graphics/Animation, Multimedia, Video Technology, Web Mastering, or Independent Study in Technology Applications;

(ii) the following courses in Chapter 120 of this title (relating to Texas Essential Knowledge and Skills for Business Education): Business Computer Information Systems I or II, Business Computer Programming, Telecommunications and Networking, or Business Image Management and Multimedia; or

(iii) the following courses in Chapter 123 of this title (relating to Texas Essential Knowledge and Skills for Technology Education/Industrial Technology Education): Computer Applications, Technology Systems (modular computer laboratory-based), Communication Graphics (modular computer laboratory-based), or Computer Multimedia and Animation Technology.

(K) Speech--one-half credit, which may be satisfied by Communication Applications, Speech Communication, Public Speaking, Debate, or Oral Interpretation.

(2) Additional components. All students who wish to complete the distinguished achievement program are encouraged to study each of the foundation curriculum areas (English language arts, mathematics, science and social studies) every year in high school as provided in Option I. Options II and III are provided for students who want to focus on a particular career exploration or the development of an academic interest or artistic talent. College Board advanced placement and International Baccalaureate courses may be substituted for requirements in appropriate academic areas. The student must choose one of the following options for additional components. Credit may be awarded without prior instruction under Texas Education Code, §28.023, (Credit by Examination).

(A) Option I: mathematics, science, elective. The student must demonstrate proficiency in the following.

(i) Mathematics--one credit. The credit must consist of Precalculus.

(ii) Science--one credit. Students may select any Science course including Integrated Physics and Chemistry; Biology; Environmental Systems; Chemistry; Aquatic Science; Physics; Astronomy; Geology, Meteorology, and Oceanography; AP Biology; AP Chemistry; AP Physics; AP Environmental Science; IB Biology; IB Chemistry; IB Physics; IB Environmental Systems; Scientific Research and Design; Anatomy and Physiology of Human Systems; Medical Microbiology; Pathophysiology; Principles of Technology I; and Principles of Technology II.

(iii) Elective--one-half credit.

(B) Option II: career and technology. The student must demonstrate proficiency equivalent to two and one-half credits in a coherent sequence of courses for career and technology preparation, as defined by the local school district. To be included in the distinguished achievement program, a technology preparation program approved by the Texas Education Agency (TEA) must meet distinguished achievement program criteria in English language arts, mathematics, science, social studies, languages other than English, health, fine arts, and technology applications.

(C) Option III: academic. The student must demonstrate proficiency equivalent to two and one-half credits consisting of state-approved courses from language arts, science, social studies, mathematics, languages other than English, fine arts, or technology applications. Students may choose all two and one-half credits from one of the disciplines, or they may select courses among the listed disciplines.

(3) Advanced measures. A student also must achieve any combination of four of the following advanced measures. Original research/projects may not be used for more than two of the four advanced measures. The measures must focus on demonstrated student performance at the college or professional level. Student performance on advanced measures must be assessed through an external review process.

(A) original research/project that is:

(i) judged by a panel of professionals in the field that is the focus of the project; or

(ii) conducted under the direction of mentor(s) and reported to an appropriate audience; and

(iii) related to the required curriculum set forth in §74.1 of this title (relating to Essential Knowledge and Skills);

(B) test data where a student receives:

(i) a score of three or above on The College Board advanced placement examination;

(ii) a score of four or above on an International Baccalaureate examination; or

(iii) a score on the Preliminary Scholastic Assessment Test (PSAT) that qualifies a student for recognition as a Commended Scholar or higher by the National Merit Scholarship Corporation; as part of the National Hispanic Scholar Program of the College Board; or as part of the National Achievement Scholarship Program for Outstanding Negro Students of the National Merit Scholarship Corporation. The PSAT score may count as only one advanced measure regardless of the number of honors received by the student; or

(C) college academic courses and tech-prep articulated college courses with a grade of 3.0 or higher.

(4) Substitutions. No substitutions are allowed in the Distinguished Achievement Program.

(b) Students entering Grade 9 in the 2001-2002 school year and thereafter must complete requirements in Chapter 74, Subchapter D, of this title (relating to Curriculum Requirements).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200005222
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
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For further information, please call: (512) 463-9701

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SUBCHAPTER C. OTHER PROVISIONS

19 TAC §§74.23 - 74.29, 74.31

The amendments and new section are adopted under the Texas Education Code, §7.102(c)(4), which authorizes the State Board of Education (SBOE) to establish curriculum and graduation requirements; and §28.025(a), which authorizes the SBOE by rule to determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum under §28.002.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Criss Cloudt
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Texas Education Agency
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SUBCHAPTER D. GRADUATION REQUIREMENTS, BEGINNING WITH SCHOOL YEAR 2001-2002

19 TAC §§74.41 - 74.44

The new sections are adopted under the Texas Education Code, §7.102(c)(4), which authorizes the State Board of Education (SBOE) to establish curriculum and graduation requirements; and §28.025(a), which authorizes the SBOE by rule to determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum under §28.002.

§74.42. Minimum High School Program.

(a) Credits. A student must earn at least 22 credits to complete the Minimum High School Program.

(b) Core Courses. A student must demonstrate proficiency in the following.

(1) English language arts--four credits. The credits must consist of:

(A) English I, II, and III (English I for Speakers of Other Languages and English II for Speakers of Other Languages may be substituted for English I and II only for immigrant students with limited English proficiency); and

(B) Fourth credit of English, which may be satisfied by English IV, Research/Technical Writing, Creative/Imaginative Writing, Practical Writing Skills, Literary Genres, Business Communication, Journalism, or concurrent enrollment in a college English course.

(2) Mathematics--three credits to include Algebra I and Geometry.

(3) Science--two credits. The credits must consist of Biology and Integrated Physics and Chemistry (IPC). A student may substitute Chemistry or Physics for IPC and then must use the second of these two courses as the academic elective credit identified in subsection (b)(6) of this section.

(4) Social studies--two and one-half credits. The credits must consist of World History Studies (one credit) or World Geography Studies (one credit), United States History Studies Since Reconstruction (one credit), and United States Government (one-half credit).

(5) Economics, with emphasis on the free enterprise system and its benefits--one-half credit. The credit must consist of Economics with Emphasis on the Free Enterprise System and Its Benefits.

(6) Academic elective--one credit. The credit must be selected from World History Studies, World Geography Studies, or any science course approved by the State Board of Education (SBOE) for science credit as found in Chapter 112 of this title (relating to Texas Essential Knowledge and Skills for Science). If a student elects to replace IPC with either Chemistry or Physics as described in subsection (b)(3) of this section, the academic elective must be the other of these two science courses.

(7) Physical education--one and one-half credits to include Foundations of Personal Fitness (one-half credit).

(A) A student may not earn more than two credits in physical education toward state graduation requirements.

(B) The school district board of trustees may allow a student to substitute certain physical activities for the required credits in physical education, including the Foundations of Personal Fitness. The substitutions must be based on the physical activity involved in drill team, marching band, and cheerleading during the fall semester; Junior Reserve Officer Training Corps (JROTC); athletics; Dance I- IV; two- or three-credit career and technology work-based training courses, and off-campus physical education.

(C) In accordance with local district policy, a school district may award up to two credits for physical education for appropriate private or commercially-sponsored physical activity programs conducted on or off campus. The district must apply to the commissioner of education for approval of such programs, which may be substituted for state graduation credit in physical education. Such approval may be granted under the following conditions:

(i) Olympic-level participation and/or competition includes a minimum of 15 hours per week of highly intensive, professional, supervised training. The training facility, instructors, and the activities involved in the program must be certified by the superintendent to be of exceptional quality. Students qualifying and participating at this level may be dismissed from school one hour per day. Students dismissed may not miss any class other than physical education.

(ii) Private or commercially-sponsored physical activities include those certified by the superintendent to be of high quality and well supervised by appropriately trained instructors. Student participation of at least five hours per week must be required. Students certified to participate at this level may not be dismissed from any part of the regular school day.

(8) Health education--one-half credit, which may be satisfied by Health 1 or Advanced Health, or Health Science Technology--one credit, which may be satisfied by Introduction to Health Science Technology, Health Science Technology I, or Health Science Technology II.

(9) Speech--one-half credit. The credit must consist of Communication Applications.

(10) Technology applications--one credit, which may be satisfied by:

(A) the following courses in Chapter 126 of this title (relating to Texas Essential Knowledge and Skills for Technology Applications): Computer Science I, Computer Science II, Desktop Publishing, Digital Graphics/Animation, Multimedia, Video Technology, Web Mastering, or Independent Study in Technology Applications;

(B) the following courses in Chapter 120 of this title (relating to the Texas Essential Knowledge and Skills for Business Education): Business Computer Information Systems I or II, Business Computer Programming, Telecommunications and Networking, or Business Image Management and Multimedia; or

(C) the following courses in Chapter 123 of this title (relating to the Texas Essential Knowledge and Skills for Technology Education/Industrial Technology Education): Computer Applications, Technology Systems (modular computer laboratory-based), Communications Graphics (modular computer laboratory- based), or Computer Multimedia and Animation Technology.

(c) Elective Courses--five and one-half credits. The credits must be selected from the list of courses specified in §74.41(f) of this title (relating to High School Graduation Requirements).

§74.44. Distinguished Achievement High School Program--Advanced High School Program.

(a) Credits. A student must earn at least 24 credits to complete the Distinguished Achievement High School Program.

(b) Core Courses. A student must demonstrate proficiency in the following:

(1) English language arts--four credits. The credits must consist of English I, II, III, and IV (English I for Speakers of Other Languages and English II for Speakers of Other Languages may be substituted for English I and II only for immigrant students with limited English proficiency).

(2) Mathematics--three credits. The credits must consist of Algebra I, Algebra II, and Geometry.

(3) Science--three credits. One credit must be a biology credit (Biology, Advanced Placement (AP) Biology, or International Baccalaureate (IB) Biology). Students must choose the remaining two

credits from the following areas. Not more than one credit may be chosen from each of the areas to satisfy this requirement. Students on the Distinguished Achievement High School Program are encouraged to take courses in biology, chemistry, and physics to complete the science requirements.

(A) Integrated Physics and Chemistry (IPC);

(B) Chemistry, AP Chemistry, or IB Chemistry; and

(C) Physics, Principles of Technology I, AP Physics, or IB Physics.

(4) Social studies--three and one-half credits. The credits must consist of World History Studies (one credit), World Geography Studies (one credit), United States History Studies Since Reconstruction (one credit), and United States Government (one-half credit).

(5) Economics, with emphasis on the free enterprise system and its benefits--one-half credit. The credit must consist of Economics with Emphasis on the Free Enterprise System and Its Benefits.

(6) Languages other than English--three credits. The credits must consist of Level I, Level II, and Level III in the same language.

(7) Physical education--one and one-half credits to include Foundations of Personal Fitness (one-half credit).

(A) A student may not earn more than two credits in physical education toward state graduation requirements.

(B) The school district board of trustees may allow a student to substitute certain physical activities for the required credits in physical education, including the Foundations of Personal Fitness. The substitutions must be based on the physical activity involved in drill team, marching band, and cheerleading during the fall semester; Junior Reserve Officer Training Corps (JROTC); athletics; Dance I-IV; and two- or three-credit career and technology work-based training courses.

(C) In accordance with local district policy, a school district may award up to two credits for physical education for appropriate private or commercially-sponsored physical activity programs conducted on or off campus. The district must apply to the commissioner of education for approval of such programs, which may be substituted for state graduation credit in physical education. Such approval may be granted under the following conditions:

(i) Olympic-level participation and/or competition includes a minimum of 15 hours per week of highly intensive, professional, supervised training. The training facility, instructors, and the activities involved in the program must be certified by the superintendent to be of exceptional quality. Students qualifying and participating at this level may be dismissed from school one hour per day. Students dismissed may not miss any class other than physical education.

(ii) Private or commercially-sponsored physical activities include those certified by the superintendent to be of high quality and well supervised by appropriately trained instructors. Student participation of at least five hours per week must be required. Students certified to participate at this level may not be dismissed from any part of the regular school day.

(8) Health education--one-half credit, which may be satisfied by Health 1 or Advanced Health, or Health Science Technology--one credit, which may be satisfied by Introduction to Health Science Technology, Health Science Technology I, or Health Science Technology II.

(9) Speech--one-half credit. The credit must consist of Communication Applications.

(10) Technology applications--one credit, which may be satisfied by:

(A) the following courses in Chapter 126 of this title (relating to Texas Essential Knowledge and Skills for Technology Applications): Computer Science I, Computer Science II, Desktop Publishing, Digital Graphics/Animation, Multimedia, Video Technology, Web Mastering, or Independent Study in Technology Applications;

(B) the following courses in Chapter 120 of this title (relating to the Texas Essential Knowledge and Skills for Business Education): Business Computer Information Systems I or II, Business Computer Programming, Telecommunications and Networking, or Business Image Management and Multimedia; or

(C) the following courses in Chapter 123 of this title (relating to the Texas Essential Knowledge and Skills for Technology Education/Industrial Technology Education): Computer Applications, Technology Systems (modular computer laboratory-based), Communications Graphics (modular computer laboratory- based), or Computer Multimedia and Animation Technology.

(11) Fine arts--one credit, which may be satisfied by any course in Chapter 117, Subchapter C, of this title (relating to Texas Essential Knowledge and Skills for Fine Arts).

(c) Elective Courses--two and one-half credits. The credits may be selected from the list of courses specified in §74.41(f) of this title (relating to High School Graduation Requirements). All students who wish to complete the Distinguished Achievement High School Program are encouraged to study each of the four foundation curriculum areas (English language arts, mathematics, science, and social studies) every year in high school.

(d) Advanced measures. A student also must achieve any combination of four of the following advanced measures. Original research/projects may not be used for more than two of the four advanced measures. The measures must focus on demonstrated student performance at the college or professional level. Student performance on advanced measures must be assessed through an external review process. The student may choose from the following options:

(1) original research/project that is:

(A) judged by a panel of professionals in the field that is the focus of the project; or

(B) conducted under the direction of mentor(s) and reported to an appropriate audience; and

(C) related to the required curriculum set forth in §74.1 of this title (relating to Essential Knowledge and Skills);

(2) test data where a student receives:

(A) a score of three or above on the College Board advanced placement examination;

(B) a score of four or above on an International Baccalaureate examination; or

(C) a score on the Preliminary Scholastic Assessment Test (PSAT) that qualifies the student for recognition as a commended scholar or higher by the National Merit Scholarship Corporation, as part of the National Hispanic Scholar Program of the College Board or as part of the National Achievement Scholarship Program for Outstanding Negro Students of the National Merit Scholarship Corporation. The PSAT score shall count as only one advanced measure regardless of the number of honors received by the student; or

(3) college academic courses and tech-prep articulated college courses with a grade of 3.0 or higher.

(e) Substitutions. No substitutions are allowed in the Distinguished Achievement High School Program, except as specified in this 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 July 28, 2000.

TRD-200005220
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Effective date: September 1, 2001
Proposal publication date: June 2, 2000
For further information, please call: (512) 463-9701

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 1. TEXAS BOARD OF HEALTH
SUBCHAPTER A. PROCEDURES AND POLICIES

The Texas Department of Health (department) adopts the repeal of §1.2 and amendments to §1.1, and §§1.3-1.8 concerning procedures and policies of the Board of Health (board). Section 1.6 and §1.7 are adopted with changes to the proposal published in the January 28, 2000, issue of the *Texas Register* (25 TexReg 496). Sections 1.1-1.5 and 1.8 are adopted without changes and therefore will not be republished.

Specifically the sections address the purpose of the sections, organization of the board, powers and duties of the board, meetings of the board, actions requiring board approval, the commissioner of health, and press and public relations. The repeal of the section on membership of the board is adopted in order to delete language which is redundant of state law.

Government Code, §2001.039 requires each state agency to review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 1.1 - 1.8 have been reviewed and the department has determined that the reasons for adopting these sections, other than §1.2 on membership of the board, continue to exist; however, the language of the sections should be updated and language that is redundant of state law should be deleted. The language is redundant of state law found in the Health and Safety Code, Chapters 11 and 12 relating to appointments of the chair and vice-chair of the board, advisory committees appointed by the board, meetings of the board, and reimbursement of expenses of board members; Open Meetings Act, Texas Government Code, Chapter 551 relating to meetings of governmental bodies; and Texas Civil Statutes, Article 6252-31 relating to dissenting votes in board meetings. In addition to clarifying language throughout the sections, §§1.4, 1.6, and 1.7 are amended to conform with House Bill 2641, enacted by the 76th Legislature. This law establishes new relationships among the Health and Human Services Commission, the Board of Health, and the Commissioner of Health (commissioner). Section 1.5(e) is added to state that time limits may be established for public comments or testimony at board and committee meetings.

The department published a Notice of Intention to Review the sections in the *Texas Register* (23 TexReg 9075) on September 4, 1998. No comments were received by the department on these sections.

No comments were received on the proposal during the comment period; however, the department is making the following changes.

Change: Concerning §1.6, language was added to address the approval by the board of assistant commissioners.

Changes: Concerning §1.7(b)(2), language was added to expressly authorize the commissioner to designate one or more employees of the department to approve expenditure vouchers of the department. The Government Code and the rules of the Comptroller of Public Accounts authorize a governing body of an agency to authorize its executive director to designate employees to approve vouchers. Inclusion of this language constitutes the board's approval for the commissioner to designate employees. Subsection (c) is added to provide further explanation concerning the vouchers.

25 TAC §§1.1, 1.3 - 1.8

The amendments are adopted under the Health and Safety Code, Chapters 11 and 12 which allow the board to adopt rules relating to advisory committees and board meetings and §12.001 which provides the board with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, and the commissioner of health.

§1.6. Actions Requiring Board Approval.

(a) Strategic plan. The strategic plan is subject to approval by the Board of Health.

(b) Appropriation request. The department's appropriation request and annual operating budget are subject to approval by the board prior to submission to the legislature.

(c) Rules. The board shall adopt rules for its own procedure and for the performance of each duty imposed by law on the board, the department, and the commissioner.

(d) Appointment of the director of the Internal Audit Division. The appointment or removal of the director of the Internal Audit Division by the commissioner is subject to approval by the board.

(e) Of those appointments made by or coordinated with the commissioner, the following shall be subject to the approval of the board:

(1) the executive deputy and deputy commissioners of the department;

(2) the associate commissioners of the department;

(3) the assistant commissioners of the department;

(4) the regional directors of the department;

(5) the director of the Texas Center for Infectious Disease; and

(6) the director of the South Texas Hospital.

(f) Contracts. The chair of the board shall appoint a subcommittee of no more than three members to review contract activities to which the department is a party, involving payment greater than $1 million. The subcommittee shall report major contract activity to the board on a quarterly basis.

(g) Other actions. The board may approve any other action by the commissioner or the department where the approval of the board is required by law, delegated by the commissioner of the Health and Human Services Commission, or requested by the commissioner.

§1.7. Commissioner of Health.

(a) The powers and duties of the commissioner of health under this section are subject to the authority of the Health and Human Services Commission (commission) under Government Code, Chapter 531 and the memorandum of understanding between the commissioner of health and the commissioner of the Health and Human Services Commission. The commissioner of health, as the executive director of the Texas Department of Health (department), shall perform the duties delegated and assigned by the Board of Health (board), the commissioner of the Health and Human Services Commission, and state law.

(b) The commissioner of health shall:

(1) administer and enforce federal and state health laws applicable to the department by issuing orders, making decisions, awarding and executing contracts, and implementing the duties delegated or assigned to the commissioner of health by the board and the commissioner of the Health and Human Services Commission;

(2) administer and implement department services, programs, and activities, maintain professional standards within the department, and represent the department as its chief executive. To accomplish this goal, the commissioner of health is authorized to hire and supervise personnel, establish appropriate organization, acquire suitable administrative, clinical, and laboratory facilities, obtain sufficient financial support, provide for the operation of the department, designate one or more employees of the department to sign and approve expenditure vouchers of the department, and further delegate to departmental personnel duties delegated or assigned by the board and the commissioner of the Health and Human Services Commission;

(3) hire and supervise all personnel subject to §1.6(e) of this title;

(4) execute all contracts to which the department is a party involving payment greater than $1 million. This duty may not be delegated; and

(5) provide information to the board's subcommittee on contracts concerning contracting activities anticipated to be for payment greater than $1 million, including requests for proposals, invitations for bid, and other procurement activities.

(c) Expenditure vouchers under subsection (b)(2) of this section include Uniform Statewide Accounting System (USAS) payment documents, USAS payroll documents, Uniform Statewide Purchasing System (USPS) payroll documents, and vouchers submitted to the Comptroller of Public Accounts on paper. All employees who are properly designated and listed on the department's voucher signature cards have the authority to approve each payment voucher type.

This agency 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 July 27, 2000.

TRD-200005193
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: August 16, 2000
Proposal publication date: January 28, 2000
For further information, please call: (512) 458-7236

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25 TAC §1.2

The repeal is adopted under the Health and Safety Code, Chapters 11 and 12 which allow the board to adopt rules relating to advisory committees and board meetings and §12.001 which provides the board with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, and the 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.

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TRD-200005192
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: August 16, 2000
Proposal publication date: January 28, 2000
For further information, please call: (512) 458-7236

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CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES
SUBCHAPTER T. SCHOOL-BASED HEALTH CENTERS

25 TAC §§37.531 - 37.538

The Texas Department of Health (department) adopts new §§37.531 - 37.538 concerning school-based health centers. Sections 37.532, 37.537, and 37.538 are adopted with changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5550). Section 37.531 and §§37.533 - 37.536 are adopted without change, and therefore will not be republished.

The new sections implement House Bill 2202, Acts 1999, 76th Legislature, §1, which added Education Code, §§38.0095, 38.011, and 38.012. This legislation requires the Texas Board of Health (board) to adopt rules to establish procedures for awarding grants to assist school districts with the costs of operating school-based health centers, and to establish standards for health care centers supported by such grants. Adoption of these sections will assure that grants to support school-based health centers will be awarded fairly and consistently and that the goals which funded health centers strive to attain also are consistent with department policy. Specifically, the sections cover the purpose of the rules; definitions; number of awards; dollar amount of awards; matching funds; competitive process, guidelines for requests for proposals; and standards for school-based health centers.

The sections include changes made in response to comments, with the objective of increasing flexibility during implementation of the program in a manner consistent with the intent of the legislation. Particular concerns and suggestions by stakeholders included such issues as reproductive services, program protocols, funding sources, and the number and location of funded school-based health centers.

The department is making the following minor changes to clarify the intent and improve the accuracy of the sections.

Change: Concerning new §37.532(8), a definition of "parent" has been added to avoid the necessity of repeating the phrase "parent, guardian, or other person having legal control of the student" in several sections. Paragraphs (8) and (9) as proposed have been renumbered.

Change: Concerning §37.538(2)(i), the phrase "or guardian" has been deleted because it is included in the definition of "parent" added at §37.532(8).

Change: Concerning §37.538(2)(ii), the phrase "or guardian" has been deleted because it is included in the definition of "parent" added at §37.532(8).

Change: Concerning §37.538(2)(E)(v), the phrase "guardian, or other person having legal control of the student" has been deleted because it is included in the definition of "parent" added at §37.532(8).

Change: Concerning §37.538(2)(E)(v), the department has clarified the reference to "consent" by adding that "informed consent" is required for some procedures or services involving risks or hazards to the student, for the protection of the school district, the provider, as well as the student.

Change: Concerning §37.538(2)(E)(viii), the phrase "concerning the clinical treatment" has been added to clarify that coordination by the staff of the school-based health center staff with a student's primary care physician includes a clinical component which impacts the quality of care provided, as well as the necessity to obtain prior authorization for services in order to seek reimbursement from third-party payors.

Change: Concerning §37.538(2)(E)(xi), a new clause has been added to clarify that school-based health centers must maintain documentation of their efforts, required by other sections of the rules, to involve the student's parent in identification of the student's health-related concerns as well as notification of the student's parent of scheduled appointments and proposed services, coordination with the student's primary care physician, and consent for services by the student's parent, including informed consent when required for specific services.

The following comments concerning the proposed rules were received during the public comment period. Following each comment is the department's response and any resulting change(s).

Comment: Concerning the subchapter as a whole, one commenter stated that the department should award grant funds only to those school-based health centers that plan to provide comprehensive services to children.

Response: Education Code, §38.011 requires that school districts, with assistance from their local health care advisory councils, assess the need for school-based health centers, and then determine the types of services to be provided. The department will evaluate those decisions as part of an applicant's proposal for funding, but has chosen not to require the provision of specific "comprehensive health care services". No changes were made as a result of this comment.

Comment: Concerning the subchapter as a whole, one commenter stated that the department should require school districts to collaborate with health care agencies in order to receive funds.

Response: Education Code, §38.011(h) authorizes but does not require a school district to collaborate with public health agencies in the community, and §38.011(b) authorizes a school district to contract with persons, to provide services at a school-based health center. The department strongly encourages local school districts to collaborate with any providers of health care services in their communities, including individual persons. No changes were made as a result of this comment.

Comment: Concerning the subchapter as a whole, one commenter stated that the department should fund at least one school-based health center in each of the major cities in Texas with an equal number being funded in heavily populated urban areas, moderate sized cities, and rural areas.

Response: Education Code, §38.011(p) requires that grants be awarded annually on a competitive basis and that school districts located in rural areas or that have low property wealth per student must be given preference in funding decisions. No changes were made as a result of this comment.

Comment: Concerning the subchapter as a whole, one commenter suggested that the department should require funded applicants to participate in the Texas Association of School- Based Health Care as well as the National Assembly For School-Based Health Care.

Response: The department disagrees. While the department supports participation by school districts in professional organizations, requiring such activities by rule exceeds the scope of the Legislature's mandate. No changes were made as a result of this comment.

Comment: Concerning §37.533, several commenters requested that the department fund more than two grant applications per year.

Response: The department's legislative appropriation for school health activities during the current biennium is finite. The department agrees that the mandate from the Legislature to fund at least two school-based health center contracts per year is a minimum standard rather than a maximum limit. No changes were made as a result of this comment.

Comment: Concerning §37.533, commenters requested that the department continue to fund established school-based health centers as well as applicants for new grants.

Response: The department interprets references at Education Code §38.011(b) and (h) to apply to school districts which seek assistance with the initial establishment of a school-based health center, subject to availability of federal or state appropriated funds. No changes were made as a result of this comment.

Comment: Concerning §37.537(5), one commenter recommended that the department should evaluate applicants' proposals on the basis of their "stated willingness" as well as their ability to comply with the standards for school-based health centers.

Response: The department agrees and has amended the section accordingly.

Comment: Concerning §37.538, one commenter suggested that the following language should be added as a new paragraph (5). "Compliance. A funded applicant shall be subject to audit by the department in order to ensure that all department requirements are being met. A funded applicant must also provide the following: (A) An annual written report detailing the methods by which the funded applicant has met department requirements; and (B) A statement signed by a representative of the school district that states that the district has made a good faith effort to meet all requirements of the department."

Response: The department agrees that a funded applicant will be obligated by rule and its contract to expend grant funds only as described in its application. Section 37.538(4)(B)(iv) requires funded applicants to produce an annual report with data evaluating the effectiveness of the school-based health center, including its impact on student attendance and performance. Since the annual report already required should enable the department to determine if a funded applicant is complying with program standards, mandating an additional report as suggested appears unnecessary. The department has added a new paragraph §37.538(5) requiring annual assurances by representatives of funded applicants of their good faith efforts to meet all department requirements.

Comment: Concerning §37.538(1), one commenter recommended that the paragraph be amended to clarify that school-based health centers must comply with "all" strategies listed for facilitating community-based solutions.

Response: The department agrees and has amended the section accordingly.

Comment: Concerning §37.538(1)(D), one commentor recommended that funded applicants should "require" rather than "encourage" parental involvement, including accompaniment of the child and attendance at school-based health center appointments.

Response: The department agrees that funded applicants should require parental involvement in the health care services their children receive at and through school-based health centers and has amended the section accordingly. However, requiring parental accompaniment would mean some children whose parent(s) are interested and wish to be involved would be denied services at school-based health centers if their parent(s) could not accompany them. The department will continue to "encourage" parental accompaniment of their children when receiving services at school-based health centers and attendance at appointments.

Comment: Concerning §37.538(1)(D), one commentor recommended that parental accompaniment be encouraged for any child younger than 18 years of age.

Response: The department agrees and has amended the section accordingly.

Comment: Concerning §37.538(2)(E)(i), one commentor recommended adding the words "or other person having legal control of the student".

Response: The department has added a definition of "parent" at §37.532(8), which includes the word "guardian" as well as the phrase "or other person having legal control of the student" when used in this subchapter. No changes were made as a result of this comment.

Comment: Concerning §37.538(2)(E)(iii), one commenter suggested that "reproductive services" should be defined as "family planning services" is defined at 25 Texas Administrative Code (TAC) §56.102, but added that referrals for treatment of sexually transmitted diseases or prenatal care would not be excluded by such an amendment.

Response: The department agrees and has added new §37.532(9). The department agrees that treatment for sexually transmitted diseases and prenatal care is not within the scope of "reproductive services" as defined at 25 TAC §56.102. No changes were necessary to clarify the ability of school-based health centers to provide referrals for sexually transmitted diseases or prenatal care.

Comment: Concerning §37.538(2)(E)(iii), several commenters stated that school-based health centers receiving grant funds should be prohibited from providing reproductive services, counseling, or referrals even if the services are paid for with other nongrant funds.

Response: The department agrees and has amended the section accordingly.

Comment: Concerning §37.538(2)(E)(iii), several commenters stated that school-based health centers should not provide contraceptives, abortions, and/or referrals to Planned Parenthood.

Response: By law, school-based health centers may not provide reproductive services, as defined at §37.532(8). No changes were made as a result of this comment.

Comment: Concerning §37.538(2)(E)(v), one commenter requested that the phrase "for each treatment occasion" be added.

Response: The department has added the phrase, including clarification that a student's parent may provide specific written consent for more than one treatment occasion at once. The department also has deleted the definition of "treatment occasion" which was proposed as §37.532(10) because it is inconsistent with the Legislature's intent, stated at Education Code, §38.011(f).

Comment: Concerning §37.538(2)(E)(viii), one commenter suggested that coordination with the person's primary physician before delivering a service should include "obtaining an authorization form" from the physician.

Response: The department agrees that school-based health centers must obtain authorization prior to delivery of services if a student has a primary care physician under Medicaid or another health plan in order to seek reimbursement and has amended the section accordingly.

Comment: Concerning §37.538(3)(A)-(E), one commenter stated that the referenced population-based strategies are too vague, and that the department should adopt and implement protocols.

Response: The department believes these more general strategies rather than specific protocols will allow community-based programs to address their unique needs in culturally appropriate ways in line with current practice patterns in their own regions of the state. No changes were made as a result of this comment.

The following commenters were generally in favor of the rules, but had concerns, questions, and/or suggestions for change: Representative Arlene Wohlgemuth; Citizens for Excellence in

Education; Global Maintenance Services, Inc.; and Campus Care Centers, Brownsville, Texas.

The following commenter had questions and suggestions for change, but was neither for nor against the rules in their entirety: Hays Consolidated Independent School District.

The new sections are adopted under Education Code, §38.011(n), which requires the commissioner of health to adopt rules to establish procedures for awarding grants in accordance with the section; Education Code, §38.011(q), which requires the commissioner of health to adopt rules establishing standards for health care centers funded through said grants; and Health and Safety Code, §12.001, which authorizes the Texas Board of Health (board) to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

§37.532. Definitions.

The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Applicant--A school district applying for a grant from the Texas Department of Health to assist with the costs of operating a school-based health center.

(2) Conventional health services--Family and home support; health care, including immunizations; dental health care; health education; and preventive health strategies.

(3) Department--The Texas Department of Health.

(4) Funded applicant--A school district that applies for a grant from the Texas Department of Health to assist with the costs of operating a school-based health center and with which the Texas Department of Health subsequently executes a contract to operate a school-based health center.

(5) Grant--A sum of money awarded to a selected applicant on the basis of a Request for Proposals that results in a contract.

(6) Local health education and health care advisory council--Persons appointed by the board of trustees of a school district to make recommendations to the district concerning the establishment of school-based health centers and to assist the district in ensuring that local community values are reflected in the operation of each center. In addition to the majority of appointees who shall be parents of students, the board of trustees shall also appoint at least one person from each of the following groups:

(A) teachers;

(B) school administrators;

(C) licensed health care professionals;

(D) the clergy;

(E) law enforcement;

(F) the business community;

(G) senior citizens; and

(H) students.

(7) Low property wealth per student--An assessed valuation per student in the applicant school district of no more than 25% of the state average assessed valuation per student.

(8) Parent--The mother, a man presumed to be the biological father, a man legally determined to be the biological father, a man who has been adjudicated to be the biological father by a court of competent jurisdiction, an adoptive mother or father, a guardian, or other person having legal control of the student.

(9) Reproductive services--Family planning services as defined by §56.102 of this title (relating to Definitions).

(10) Rural area--A county with a population of not greater than 50,000, or an area that has been designated under state or federal law as:

(A) a health professional shortage area;

(B) a medically underserved area; or

(C) a medically underserved community as defined by the Center for Rural Health Initiatives.

(11) School-based health center--An entity established by a school district or by a school district jointly with a public health agency at one or more campuses in the school district to deliver cooperative health care programs, prevention of emerging health threats that are specific to the district, and conventional health services for students and their families.

§37.537. Guidelines for Requests for Proposals.

The department shall complete one Request for Proposals (RFP) process for school-based health centers per state fiscal year according to the following guidelines.

(1) Proposals submitted in response to the RFP for school-based health centers shall be screened, reviewed, and evaluated according to a competitive process described in full in the RFP.

(2) The department's School Health Program shall utilize a standard evaluation instrument for scoring applicants' proposals. A copy of the instrument shall be included in the RFP.

(3) A primary review of all applicants' proposals shall be performed by a member of the School Health Program staff. The reviewer shall award the same number of bonus points to each applicant located in a rural area and/or that has low property wealth per student.

(4) The School Health Program shall select and train evaluators to score proposals after primary review.

(5) Proposals shall be evaluated based on the applicant's ability and stated willingness to comply with the department's standards for school-based health centers described in §37.538 of this title (relating to Standards for School-Based Health Centers).

§37.538. Standards for School-Based Health Centers.

Funded applicants shall comply with the following standards for school-based health care centers.

(1) Community-based solutions. The funded applicant shall facilitate collaboration among families, schools, and members of the community to assess and meet the health needs of the community's children and families. The funded applicant shall utilize all the following strategies for facilitating community-based solutions:

(A) Establish a local health education and health care advisory council to make recommendations to the district on the establishment of school-based health centers and to assist the district in ensuring that local community values are reflected in the operation of each center and in the provision of health education.

(B) Establish and/or enhance links between school personnel, school-based health center personnel, other health/social services providers and agencies in the community, and other supportive community sectors.

(C) Enable students and families to be responsible decision-makers in promoting their own health and well-being, making connections with community systems that help to prevent the social isolation and alienation of individuals and families, and using the health care system wisely.

(D) Require parental involvement in and management of the health care of children receiving services from the center; encourage parental accompaniment of any child younger than 18 years of age at visits to the center; notify the child's parent in writing at least one week in advance of the scheduled appointment; and encourage the parent to attend the appointment.

(2) Administration. The funded applicant shall plan and administer a school-based health center that meets the health needs of the community's children and families by use of the following strategies:

(A) Deliver primary and preventive health services to children and families in a school-based setting.

(B) Establish efficient, client-friendly procedures for utilizing all available sources of funding to compensate the district for services provided by the school-based health center, including money available under the state Medicaid program, a state children's health plan program, private health insurance or health benefit plans, and the ability of those using a school-based health center to pay for the services.

(C) Contract for provision of services at the school-based health center if necessary and appropriate.

(D) Develop and present a specific, detailed plan for future funding of the school-based health center that demonstrates how the center will continue to operate when grant funding is no longer available.

(E) Research, develop, and implement the forms and administrative procedures necessary to remain in compliance with all applicable and relevant legislation and regulations. Required procedures contained in applicable legislation for operation of school-based health centers include but are not limited to the following:

(i) provision of services to a student only if the school district or the provider with whom the district contracts has obtained written consent to the services from the student's parent within the one-year period preceding the date on which the services are provided, and the consent has not been revoked;

(ii) joint identification by school-based health center staff and the student's parent of any health-related concerns of the student that may affect the student's health and/or success in school;

(iii) provision of neither reproductive services, counseling, nor referrals through the school-based health center receiving grant funds awarded under this subchapter;

(iv) provision of all services by only appropriately licensed, certified, or credentialed professionals as required by law;

(v) referral of a student for mental health services only upon notification of and with the written consent of the student's parent, which must be followed by written consent by the student's parent for each treatment occasion(s) authorized by the provider, including informed consent when required for specific services;

(vi) a good faith effort by staff of a school-based health center located in a rural area described by §37.532(8) of this title (relating to Definitions) to identify and coordinate with existing health care providers;

(vii) provision of notice by the staff of the school-based health center to the primary care physician of a student who has received services;

(viii) coordination by the staff of the school-based health center with the primary care physician concerning the clinical treatment of any person who has a primary care physician under the state Medicaid program or another health plan and obtaining authorization before delivering a service;

(ix) utilization of all available sources of funding to compensate the school district or provider with whom the district contracts for services provided by a school- based health center;

(x) conduct or facilitation of the conduct of client surveys in school-based health centers by funded applicants; and

(xi) documentation in the student's medical record of the school- based health center's efforts to involve the student's parent in identification of the student's health- related concerns; notification of the student's parent of scheduled appointments and proposed services; coordination with the student's primary care physician; and maintenance of written consent for treatment by the student's parent, including informed consent when required for specific services.

(3) Emphasis on prevention. A funded applicant shall provide for primary emphasis on the delivery of conventional health services and secondary emphasis on the implementation of population-based models that prevent emerging health threats by use of the following strategies:

(A) increasing substantially the number of children in the community with health-care (medical) homes;

(B) facilitating access to appropriate primary and preventive care for children and families;

(C) educating, enabling, and empowering individuals for healthier lifestyles;

(D) involving the community in identifying priorities and developing health promotion strategies; and

(E) relying on the evidence of effective prevention to develop interventions that can demonstrate impact.

(4) Focus on outcomes. A funded applicant shall focus on the achievement of outcomes that can be documented, using the following strategies:

(A) delivering conventional health services and disease prevention of emerging health threats through access to appropriate primary and preventive care for children and families through a program designed to achieve the following goals:

(i) a reduction in student absenteeism and drop-out rates;

(ii) an increase in each student's ability to meet his or her academic potential; and

(iii) stabilization of each student's physical well-being.

(B) A funded applicant shall research, document, analyze, and evaluate outcomes, including the goals listed in subparagraph (A) of this paragraph, by activities that include but are not limited to the following:

(i) gathering data and statistics, monitoring outcomes, and producing data by use of quantitative measurement systems to report on project impact as required by the Request For Proposals;

(ii) providing quarterly reports as required by the department;

(iii) conducting client surveys and other qualitative measures of client satisfaction; and

(iv) producing an annual written report that includes a project evaluation with baseline data; data and analysis from client surveys; any available statistics related to increased academic success, improved student health, and improved performance on student assessment instruments administered under Education Code, Chapter 39, Subchapter B; and other information as specified by the department.

(5) Compliance. A funded applicant shall provide to the department annually a statement signed by a representative of the school district stating that the district has made a good faith effort to meet all requirements of the department.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 96. BLOODBORNE PATHOGEN CONTROL

25 TAC §§96.101, 96.201 - 96.203, 96.301 - 96.304, 96.401, 96.402, 96.501, 96.601

The Texas Department of Health (department) adopts new §§96.101, 96.201- 96.203, 96.301-96.304, 96.401-96.402, 96.501, and 96.601, concerning the standards for occupational exposure of governmental unit employees to bloodborne pathogens. Sections 96.101, 96.302, and 96.401 are adopted with changes to the proposed text as published in the March 10, 2000, issue of the *Texas Register* (25 TexReg 1941). Sections 96.201-96.203, 96.301, 96.303-96.304, 96.402, 96.501, and 96.601 are adopted without changes, and therefore the sections will not be republished.

The exposure control plan which is referenced in §96.202, Exposure Control Plan, was published as a miscellaneous document in the March 10, 2000, issue of the *Texas Register* (25 TexReg 2192). This exposure control plan is adopted with changes as described in this preamble in the comments and responses and will be republished with changes as a miscellaneous notice in this issue of the *Texas Register.*

These sections are adopted to extend the protections provided to employees of private entities by Occupational Safety and Health Administration (OSHA) rules, to employees of state and local governments, and for related purposes. The new sections are required by Health and Safety Code, Chapter 81, Subchapter H, which was added by Chapter 1411 (House Bill 2085), §§26.01-26.03, 76th Legislature.

The new sections decrease the risk of exposure to bloodborne pathogens for employees who work in governmental units by increased training and education; increased use of vaccination for employees; and increased use of personal protective equipment. The recommendation for the use of needleless systems and sharps with engineered sharps injury protection will reduce the risk of injury and transmission of bloodborne pathogens to governmental unit employees.

The following comments were received concerning the proposed sections. Following each comment is the department's response and any resulting change(s).

Comment: Concerning the proposed preamble for Chapter 96. Bloodborne Pathogen Control, one commenter wrote, "that the second paragraph of the preamble to the Final (sic) Proposed Bloodborne Pathogen Rule be amended to state: The rules are needed to adopt minimum standards for an exposure control plan. The plan would decrease the risk of exposure to bloodborne pathogens for employees who work in governmental units by increased training and education; increased use of vaccination for employees; and increased use of personal protective equipment. The recommendation for the use of needleless systems and sharps with engineered injury protection will reduce the risk of injury and transmission of bloodborne pathogens to governmental unit employees. However, there are other needlestick prevention technologies which the U.S. Food and Drug Administration has determined to be safe and effective in reducing the risk of needlestick injuries. These alternative technologies may also be used by governmental units, if appropriate for their work site (...)".

Response: The department disagrees. The law is specific to the types of devices to be addressed and the rules are written to strictly implement the legislation. The proposed preamble cannot be amended because it is not part of the rule. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter wrote, "We support the requirement to fully implement the OSHA bloodborne pathogen standard for public and/governmental hospitals." The commenter has revised their exposure control plan and is addressing the issue of safe needle devices. "We believe that implementation of these regulations will improve employee and health care worker safety."

Response: The department agrees and appreciates the commenter's support for the proposed rules. No change was made as a result of this comment.

Comment: Concerning the rules in general, a commenter voiced concern about "the short time for preparation and compliance with the new rules. Specifically implementation by September 1, 2000, will be difficult due to a) limited supplies reported by vendor, (b) limited budget for sharps systems changes and filing fees (budgets already set), and (c) limited staff for registering, monitoring compliance, and reporting as proposed."

Response: The department partially agrees. Many governmental agencies implemented bloodborne pathogen standards for their agency several years ago when the OSHA Bloodborne Pathogen Standards were implemented for the private sector. For governmental agencies that did not implement an exposure control plan similar to the OSHA standards set in 1992, the new rule will require the governmental agencies to develop an exposure control plan, monitor their compliance, and in addition report sharp injuries to their local health authority. The department adhered to compliance dates set by the legislation

during the rule making process. The department is not clear on the reference on limited supplies since this is a recommendation not a mandate. The department is not clear about the commenter's statement regarding "limited staff for registration." If the commenter is referring to the registration of needleless devices or sharps with engineered sharps injury protection, this is the responsibility of vendors working with the department to register devices. The department will make a list of registered devices available to governmental agencies. This activity will not be a local governmental unit activity. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter asked "Does the rule apply to all TDCJ staff or only those who work in medical settings? The definitions of sharps and sharp exposure appear limited to medical settings, but the guards may have an exposure to a sharp that does not meet the definition in the rule. For example, a paper clip sharpened and used as a tattoo needle."

Response: Section 96.401(d) regarding sharps injury reporting applies to individuals working in a health care setting. The department agrees that other types of sharp injuries occur outside of medical facilities on occasion. The reporting component of this rule is limited to sharps that are encountered in a health care setting. Sections 96.202 and 96.203 applies to all governmental unit employees at risk for an occupational blood exposure regardless of their employment setting. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter stated, "The medical staff in TDCJ is employed by UTMB or Texas Tech. It is not clear to me that compliance would be the responsibility of the managed care contractors or of TDCJ. Administratively, it would be difficult for TDCJ to hold the compliance responsibility for the medical staff, since they already work for an employer that has an infection control plan. There would also be a duplication of effort."

Response: The department agrees. A governmental employer is responsible for implementation of an exposure control plan involving training their paid employees regarding universal precautions and work practice controls, and for ongoing treatment of a paid employee according to the employer's current procedure for post-exposure follow-up. Unless otherwise specified in an agency contract, a governmental agency that uses contract employees to provide services within the governmental agency is not required to do exposure control training, nor provide follow-up for bloodborne exposures that occur while the contract employee is working in a governmental unit. The governmental agency would be responsible to report the contractual employee's contaminated sharp injury through the normal reporting mechanism. The employer is ultimately responsible. Here both contractor and contracting entity are governmental agencies so contract could address responsibilities. No change was made as a result of this comment.

Comment: Concerning proposed §96.101(4), "contaminated sharps injury" definition, renumbered as §96.101(5), one commenter was concerned that the definition would lead readers to believe that if blood or body fluids are invisible on the sharp, then the sharp is not contaminated. The commenter suggested that §96.101(4) be changed to read, "Any sharps injury that occurs with a sharp used or encountered in a health care setting."

Response: The department partially agrees. The word "contaminated" has been defined to mean the presence or reasonably anticipated presence of blood or other potentially infectious material on an item or surface. By definition "contaminated" does not depend on whether or not blood or other potentially infectious body fluids are visible. The department agrees that sharp injuries can occur prior to the use of the sharp (while the sharp is sterile) and during or after use of the sharp. In addition, a "contaminated" sharp may not be covered with blood or a body fluid that is visible to the naked eye. The department also agrees that employers may require employees to report all sharp injuries that occur, regardless of whether or not the sharp was contaminated. For the purposes of this rule, the department only requires governmental entities report "contaminated sharp injuries." The definition for the word "contaminated" has been added to §96.101 as a result of this comment.

Comment: Concerning proposed §96.101(20)(G), "a dental knife, drill, or bur", renumbered as §96.101(21)(G), one commenter suggested deleting dental knife, since no such instrument is used in treating patients. "The only dental type tool referred to as a "knife" is used in a laboratory, a situation absent the possibility of blood contact." The commenter also suggested deleting the word "drill." "These are more properly designated "handpieces" and are not instruments capable of causing injuries; it is the burs used in them that cause injury. The commenter suggested adding "(H) to include excavators, explorers, and scalers."

Response: The department disagrees with the commenter regarding §96.101(20)(G). "A dental knife, drill, or bur" is part of the definition supplied by the statute and the department does not have the authority to change this language. There are such devices as dental knives (officially referred to as periodontic knives by the FDA) and they do indeed have clinical uses and could be associated with a sharps related injury. No change was made as a result of this comment.

Comment: Concerning proposed §96.101(6), "employee" definition, renumbered as §96.101(7), one commenter stated, "This regulation exceeds the federal statute. It includes non-paid employees, such as students, public health nurses, etc., who are not supervised or controlled by the governmental entity. It would cause double reporting of healthcare workers' injuries as reports would be filed by both their employer and by the governmental entity where working at the time of the accident." Another commenter wrote, "The definition of "employee" in §96.101(6) is overly broad and encompasses both contract and temporary workers. While §96.201(c.) appears to limit the requirements placed on the governmental unit for certain types of "employees," this limitation requires further clarification."

Response: These new rules were written to implement state law, House bill 2085, Article 26. Federal regulations do not directly apply to these rules. The committee that developed the proposed rule struggled with the definition of employee during the rule making process. The Honorable Senator Bernsen clarified the legislative intent regarding which employees are covered by the statute for the committee. In a letter dated November 12, 1999, Senator Bernsen wrote, "If the Board were to confine the reporting only to exposures involving direct employees, the utility of the data would be dramatically reduced. Obviously, we would then have no data on the scope of the problem. As it is, only data from public institutions will be collected, but that is data that can be projected with some degree of confidence on the state as a whole. If reporting will vary widely from institution to institution based on who contracts for services, how pervasively and in

which departments, there will be no way that meaningful conclusions can be drawn. Furthermore, the extremely important Epidemiology of whether there is meaningful safety difference between employees and contract personnel would be totally lost." No change was made as a result of this comment.

Comment: Concerning proposed §96.101(9) "exposure incident" definition, renumbered as §96.101(10), one commenter requested a clearer definition of what constitutes an exposure incident. The commenter wrote "This broad definition leads the regulated community to question when the requirements for post-exposure evaluation and follow-up must occur. The plan requires post-exposure evaluation and follow-up when an employee incurs an "exposure incident." This follow-up includes numerous requirements, including medical evaluation and counseling of the employee. Under the broad exposure incident definition, would exposure to feces, urine, and other potentially infectious materials of a special education teacher's or aide's in the course of potty training a student qualify? Would this same teacher's changing of a diaper qualify?"

Response: The department disagrees. The occupational tasks of potty training and diaper changing are not in and of themselves an exposure incident; but both are activities during which an employer should reasonably anticipate an exposure incident could occur. It is incumbent on the employer to train employees regarding exposure control and provide the appropriate protective equipment. Urine and feces are not body substances that normally contain blood or bloodborne pathogens; but feces may contain other pathogens such as, hepatitis A virus or Shigella. If an exposure incident should occur then the employee should receive follow-up and/or treatment in order to prevent infection. For example, immune globulin may be given to a teacher who has been exposed to the stool of a child who has hepatitis A infection, thus preventing the teacher from becoming ill with symptoms of hepatitis A infection. An employer would not be required to report such an exposure as these rules require reporting of sharp injuries only. No change was made as a result of this comment.

Comment: Concerning §96.101, "definitions", one commenter wrote, "Add Sharps injury prevention technology to the list of definitions under Section 96.101 as number 22 and renumber accordingly."

Response: The department disagrees. Although the statute was written to recommend the use of needleless systems and sharps with engineered sharps injury protection, it does not exclude the use of other devices like the one manufactured by this commenter. No change was made as a result of this comment.

Comment: Concerning §96.201, "applicability", one commenter wrote, "that the first sentence of §96.201(c) be revised to read as follows: Employees who are directly compensated by a governmental unit and who have a risk of occupational exposure are subject to all provisions of this chapter."

Response: This language used in the proposed rule is directly from the statute and does not include the word "occupational." No change was made as a result of this comment.

Comment: Concerning §96.201(b), "local- or state-funded university student infirmaries", one commenter stated that "the presence of such an infirmary might make the university a "governmental unit" subject to this rulemaking and applicable statute, the infirmary itself would not be a "governmental unit."

Response: The department agrees. If a school infirmary is being operated under the authority of a governmental unit then the rules would apply. If the infirmary is privately operated under contract so that it comes under existing OSHA regulations, then these rules would not apply. No change was made as a result of this comment.

Comment: Concerning §96.203, "minimum standards", one commenter suggested that the section be amended to allow employers to exclude provisions irrelevant to their particular facility or organization.

Response: The department disagrees. Section 96.203(b) states, "Governmental units may modify the plan appropriately to their respective practice settings. Employers will need to include provisions relevant to their particular facility or organization in order to develop an effective comprehensive exposure control plan specific to their facility or organization." The current language allows governmental units to modify the exposure control plan in order to make it specific to their agency. No change was made as a result of this comment.

Comment: Concerning §96.301, "safety recommendations", one commenter suggested §96.301(a) be "amended to state that: The Texas Department of Health (department) recommends that governmental units implement needleless systems and sharps with engineered sharps injury protection for employees. However, there are other needlestick prevention technologies which the U.S. Food and Drug Administration has determined to be safe and effective in reducing the risk of needlestick injuries. These alternative technologies may also be used by governmental units, if appropriate for their work site."

Response: The department disagrees. The intent of the statute was to recommend the use of needleless systems and sharps with engineered sharps injury protection; it does not preclude the use of any other technology that exists. No change was made as a result of this comment.

Comment: Concerning §96.301(b)(1)(B), "waiver for undue burden," one commenter wrote, "a more complete definition or explanation for "unduly burdensome" would be very helpful."

Response: With regard to §96.301, in general, the department deliberately left out a definition for unduly burdensome in the rule. The department has no enforcement authority in this matter: it is the responsibility of the governmental unit through it's evaluation committee to determine what constitutes an undue burden. No change was made as a result of this comment.

Comment: Concerning §96.301(b), "waiver for undue burden," a commenter wrote, "Section 81.305, Texas Health and Safety Code does not set up any procedure or requirement for Texas Department of Health to issue a waiver of the Board's recommendation regarding the implementation of needless (sic) systems and sharps with engineered sharps injury protection. Instead, under Section 81.305(b) of this statute, the evaluation committee of a governmental unit decides whether the recommendation applies and then reports its decision to the Texas Department of Health."

Response: The department agrees and has no enforcement authority over this section of the rule. The department intends to acknowledge receipt of a request for waiver for undue burden and maintain the waiver in an active file should questions regarding the waiver arise. No change was made as a result of this comment.

Comment: Concerning §96.301(a), three commenters requested clarification of this section. "The section recommends the use of needleless systems and engineered sharps, but (b)

provides for waivers." "It is unclear why a waiver is needed for something that is a recommendation and not a requirement. Please clarify." "This makes paragraph (a) sound like a requirement, not a recommendation. I always thought a recommendation could be ignored, and think this would be clearer if it were reworded." "Suggest removing paragraph (b) and leaving only paragraph (a) to remove ambiguity."

Response: Article 26, House Bill 2085, directs the Board of Health to recommend the use of these devices, not require the use of them. The statute also provides a waiver to the recommendation if an evaluation committee created in conformance with §96.301(c)(1)(2) has established that the use of the needleless systems or sharps with engineered sharps injury protection will jeopardize patient or employee safety with regard to specific medical procedures or will be unduly burdensome. No change was made as a result of these comments.

Comment: Concerning §96.301(a), one commenter supports the concept of the use of needleless systems and sharps with engineered sharps injury protection, but requests the implementation date, for the use of the devices, be extended to January 1, 2002. The extended date would allow the governmental unit to identify appropriate funding for this rule.

Response: The department has no authority to extend the implementation dates as requested by the commenter. The statute sets the compliance dates for the rule; any changes in these dates would have to be made by the legislature. Section 96.301(b)(1)(B) provides a waiver to the recommendation in §96.301(a) if an "evaluation committee" has determined that compliance would be unduly burdensome or jeopardize patient or employee safety with regard to a specific medical procedure. No change was made as a result of this comment.

Comment: Concerning §96.301(a), one commenter urges the department " to replace your recommendation with a mandate in order to effectively protect Texas healthcare workers."

Response: The Texas Board of Health was mandated by the legislature to recommend the use of these devices; legislation would be required for the department to mandate the use of these devices. No change was made as a result of this comment.

Comment: Concerning §96.301(a), one commenter suggested broadening the implementation recommendations. The commenter wrote, "The Texas Department of Health (department) recommends that governmental units implement needleless systems, (delete and) sharps with engineered sharps injury protection, or other sharps injury prevention technology for employees." The commenter stated that this wording is consistent with the 1999 OSHA Compliance Directive requiring "comprehensive approach" and "not advocating the use of one particular device over another." The commenter further explained that the added language "allows and encourages the use of other appropriate technologies as they become available. The Department would not have to rewrite regulations if the Legislature changed recommends to required."

Response: The department disagrees. By adding the term "sharps injury prevention technology" to §96.301(a), as suggested by the commenter, the types of devices eligible for inclusion in the registration program would be expanded beyond the scope of the statutory definitions for the terms "needleless system" or "engineered sharps injury protection". No change was made as a result of this comment.

Comments: Concerning §96.302(a), "device registration", one commenter suggested adding the terminology "sharps injury prevention technology." The commenter wrote, "The Texas Department of Health (department) shall compile and maintain a list of needleless system devices, (delete and) sharps devices with engineered sharps injury protection and sharps injury prevention technology that are available in the commercial marketplace and registered with the department to assist governmental units to comply with this chapter." The commenter also wrote, "In (b), (c), (e), (g), (h), (k)(4), (l) add or sharps injury prevention technology after engineered sharps injury protection."

Response: The department disagrees. By adding the term "sharps injury prevention technology" to §96.302(a), as suggested by the commenter, the types of devices eligible for inclusion in the registration program would be expanded beyond the scope of the statutory definitions for the terms "needleless system" or "engineered sharps injury protection". No change was made as a result of this comment.

Comment: Concerning §96.301(a), §96.302, and §96.303, "safety recommendations, device registration, and registration procedures" one commenter wrote, "Paragraph 301(a) does not state that registered needleless devices are recommended or required. Sections 302 and 303, however, offer lengthy discussion for needeless (sic) device manufacturers to register their product(s) with TDH. This ambiguous information should be clarified."

Response: The department disagrees. Article 26 House Bill 2085 directed the Board of Health to recommend the use of needleless devices and sharps with engineered sharps injury protection. In addition, the statute directed the department to compile and maintain a list of needleless system devices and sharps with engineered sharps injury protection that are available in the commercial market place to assist governmental units to comply with this chapter. Each device manufacturer who manufactures a needleless system device or sharps device with engineered sharps injury protection and wants to register with the department will pay a fee to be on this list of devices. Governmental units may use the list to identify available products in the marketplace, but the department does not endorse any device that is registered with the department nor does the department require the use of the devices on the list. No change was made as a result of this comment.

Comment: Concerning §96.303(a), one commenter wrote, "add sharps injury prevention technology to registration procedures in section 96.303(a) after engineered sharps injury protection."

Response: The department disagrees. By adding the term "sharps injury prevention technology" to §96.303(a), as suggested by the commenter, the types of devices eligible for inclusion in the registration program would be expanded beyond the scope of the statutory definitions for the terms "needleless system" or "engineered sharps injury protection". No change was made as a result of this comment.

Comment: Concerning §96.304, "registration fees", one commenter stated that "the requirement for a registration fee is onerous on its face and the $1,500 initial fee with a $1,000 annual renewal is excessive in any case. The most likely effect of these fees will be to prevent healthcare workers from learning about new technology, especially from smaller manufacturers due to the high fee amounts. It is also unclear whether the fees apply to a "class" or type of product, or to each individual item. In either

case we urge you to waive all fees to assure complete participation by manufacturers so that Texas healthcare providers and workers will have access to the most current and effective technologies."

Response: The department disagrees. Section 81.307, Article 26, House Bill 2085, directs the Board of Health to charge fees for the registration of each device to be included in a list that will be made available to governmental entities. The statute clearly indicates that these fees may be appropriated only to the department to implement the Subchapter. The department anticipates that program costs will include, among other activities, the review and approval of device registration applications, compiling and maintaining the registration list, the collection and reporting of sharps injuries data, waiver request review, and the dissemination of information related to bloodborne pathogen control. The department has deliberated at length through its stakeholder committee meetings, which included industry representation, in order to establish fees that will be expected to cover the startup and operational costs associated with this new program. The department realizes that these costs may change over time and therefore intends to continually reevaluate the appropriateness of the fees. In addition, the department believes that the language in §§96.302 and 96.303 is sufficient to reflect that the registration fee for each device is not meant to refer to a class or type of product, but rather to each device as identified by name. Nothing prevents manufacturers from using traditional promotion methods to inform healthcare workers about their products. No change was made as a result of this comment.

Comment: Concerning §96.304, "registration fees", one commenter wrote, "add sharps injury prevention technology to registration fees in Section 96.304." With the suggested change the section would read, "The Texas Department of Health (department) shall charge a fee to register a needleless system device or sharps device with engineered sharps injury protection or sharps injury prevention technology."

Response: The department disagrees. The legislation is specific to needleless system devices or sharps with engineered sharps injury protection, and the rules are written to comply with this legislation. No change was made as result of this comment.

Comment: Concerning §96.401(d), "sharps injury log", one commenter wrote, "the deadline for reporting contaminated sharps injury should be extended to one month plus ten working days after the injury has been reported. The current deadline is too restrictive and may occasionally not be met."

Response: The department disagrees with the commenter to extend the deadline for reporting; the department expects reporting in a timely fashion. On occasion a contaminated sharps injury may occur that would pose a difficulty for the agency to meet the reporting deadline, but there is no penalty for late reporting. No change was made as a result of this comment.

Comment: Concerning §96.401, "sharps injury log", one commenter stated, "this rulemaking raises the possibility of the dual reporting of a contaminated sharps injury for example, if a medical resident receives such an injury both the medical school and the hospital may need to report the injury."

Response: The department disagrees. Section 96.401 does not require that both entities report the injury. For example, if the medical student is injured while working within the hospital, the hospital should report the injury. This may require better communication and coordination of reporting efforts between entities that have dual responsibilities for employees. No change was made as a result of this comment.

Comment: Concerning §96.401, "sharps injury log", one commenter stated "As many as 50% of sharps injuries may not be reported by healthcare workers. The department requires collection of a large volume of data for each sharps injury. How does the department plan to make use of this data given that it may represent no more than half of the sharps injuries that occur? How will the data be analyzed? What is the denominator? How will the data be reported back to the institutions that provided it? Will benchmarks be established? Another commenter wrote, "The sharps injury log is an overbearing way of gathering statistics. At most, filing this data should be voluntary. Implementing such a requirement at the universities and agencies would be nearly impossible. Suggest that the TDH coordinate with the Texas Workers' Compensation Commission (TWCC) to generate sharps injury reports from TWCC electronic files, which will include all state agency employees. This would reduce the burden on individual employers and eliminate a paperwork jumble."

Response: Health and Safety Code, §81.306, Article 26, House Bill 2085, states "the board by rule shall require that information concerning exposure incidents be recorded in a written or electronic sharps injury log to be maintained by a governmental unit. This information must be reported to the department and must include: the date and time of the exposure incident; the type and brand of sharp involved; and a description of the exposure incident, including; the job classification or title of the exposed employee; the department or work area where the exposure incident occurred; the procedure that the exposed employee was performing at the time of the incident; how the incident occurred; the employee's body part that was involved in the exposure incident; and whether the sharp had engineered sharps injury protection and, if so, whether the protective mechanism was activated and whether the injury occurred before, during, or after the activation of the protective mechanism." The department is also required in Health and Safety Code, §81.306(c) to make the information reported available in aggregate form, provided that the name and other information identifying the facility is deleted and the information is provided according to public health regions established by the department. The department will report the total number of needlesticks (numerator data only) by public health region. The department understands the commenter's concern about not collecting a denominator in order to calculate rates, but at this time the collection of a denominator is not feasible. Benchmarking for sharp injuries by the department is not feasible; it is anticipated that institutions could develop benchmarks for themselves. Since governmental agencies are currently sending reports of sharp injuries to the TWCC and if the report contains all the required elements to be reported to the department the governmental unit could consider sending a copy of the TWCC report to the department. No change was made as a result of this comment.

Comment: Concerning §96.401(c)(11), regarding the history of hepatitis B vaccine, one commenter wrote, "Some healthcare workers are poor historians and do not remember receiving three doses of the hepatitis B vaccine or attending bloodborne pathogen education. While this information can be verified for our own employees, it would be labor intensive trying to obtain and verify this information on non-employees. Statistical information in which we have no control may result in skewed numbers that may reflect adversely on the governmental entity." Another commenter wrote, "In relation to sharps injuries,

§96.201 and §96.401 would apparently require the governmental unit to supply information regarding whether a contract or temporary worker had completed a hepatitis B vaccination series and had received training on the Exposure Control Plan during the last 12 months. Compliance with these requirements for a contract or temporary worker would be difficult and burdensome."

Response: The department partially agrees. In the rare instance that contract or temporary employees may not recall their hepatitis B vaccination status nor recall their training history, immediately after an exposure incident, verification may be difficult. In these instances where the worker does not easily recall the information, the reporting entity might need to state that the information requested is "unknown." No change was made as a result of this comment.

Comment: Concerning §96.401, "sharps injury log", one commenter indicated that the facilities within the TDCJ system routinely report to the central office in Huntsville and "Reporting from each facility would impose a dual reporting burden on the facility, since they must report to Huntsville in order to get reimbursed for treating an exposure."

Response: The department agrees. Agencies should report sharp injuries to the department using their normal reporting mechanisms. In most instances this reporting would be through the local health department. Agencies with non-traditional reporting mechanisms (i.e., do not routinely send reports to the local health department) can continue to use their standard reporting procedures (i.e., report to their regional office or directly to the central office). No change was made as a result of this comment.

Comment: Concerning §96.401(c) , "sharps injury log", one commenter wrote that the "sharps log seems out of place. It is in the middle of the reporting requirements. If this is the information that must be reported, then it should be labeled as such. Another sentence could be added that the information also has to be maintained in a log." Another commenter wrote, "It will also be difficult to include an updated listing of implemented needleless systems and safety- engineered sharps available to an injured employee with each sharps injury report as required in §96.401(b)(18)."

Response: The department agrees that clarification is needed. Language has been added to §96.401(d) to read, "Information contained in §96.401(c)(1) (17) concerning each contaminated sharps injury shall be reported not later than 10 working days after the end of the calendar month in which it occurred." Concerning §96.401(b)(18), Article 26 House Bill 2085 requires that a listing of available needleless systems and sharps with engineered sharps injury protection be available for employees within the governmental entity and is not part of the reporting requirement. A change in §96.401(d) has been made as a result of these comments.

Comment: Concerning §96.402, "confidentiality statement", one commenter wrote, Texas Hospital Association (THA) "strongly supports the department's efforts to maintain the confidentiality of information related to occupational exposures that is reported to TDH or its agents. The department has indicated that it expects to address actual disclosure of this information through TDH policies and procedures, so that hospitals' concerns about confidentiality and use of the information reported may be addressed. THA recommendation: that THA be included in the discussions and development of TDH policies and procedures regarding disclosure of information reported to or compiled by TDH, so that THA's concerns about the confidentiality and use of the information may be addressed."

Response: Standard policies and procedures exist to govern reporting of surveillance data and these data are considered both confidential and privileged. Certainly the department would be willing to discuss the issue with any concerned party. No change was made as a result of this comment.

Comment: Concerning the exposure control plan "compliance methods" section, published in the March 10, 2000, issue of the *Texas Register* (25 TexReg 2192), one commenter believes the plan should be amended to "explicitly permit the use of a wide range of effective needlestick prevention technologies." The commenter requested, that in the third sentence of the second paragraph which starts "Examples include .", the following be added to the sentence "other technologies that the U.S. Food and Drug Administration has determined to be safe and effective in reducing the risk of needlestick injuries..." The commenter also stated "The decision of which FDA-cleared and approved needlestick prevention devices to use should rest with the employer."

Response: The department's exposure control plan "compliance methods" section states, "Engineering and work practice controls are used to eliminate or minimize exposure to employees. Where occupational exposure remains after institution of these controls, personal protective equipment is used. Examples include safety design devices, sharps containers, needleless systems, sharps with engineered sharps injury protection for employees, passing instruments in a neutral zone, etc." "Work practice controls" means controls that reduce the likelihood of exposure by altering the manner in which a task is performed and "engineering controls" means controls that isolate or remove the bloodborne pathogens hazard from the workplace. This language adequately addresses the commenter's concern about the existence of other technologies without a long list of other available controls available in the marketplace. No change was made as a result of this comment.

Comment: Concerning the exposure control plan "interaction with healthcare professionals" section, one commenter suggested that item (5) be revised to read as follows: "(5) whether the employee has been told about any medical conditions resulting from exposure to blood or other potentially infectious materials which require further evaluation or treatment (all other findings or diagnosis shall remain confidential and shall not be included in the written report); and"

Response: The department agrees. Under the section "Interaction with Healthcare Professionals," regarding written opinions from the healthcare professionals, the second #5 has been changed to the commenter's suggested wording.

Comment: Concerning the exposure control plan, one commenter requested that the department allow the employer to determine whether to make hepatitis B vaccine available to employees as a pre-exposure or as a post-exposure series. "Since post-exposure vaccination is effective in most instances, it would be much more reasonable and cost effective to provide flexibility in the HBV vaccination program."

Response: The department disagrees. According to the CDC Personnel Health Guideline published in 1998,"nosocomial transmission of HBV is a serious risk for health care personnel. Approximately 1000 health care personnel were estimated to have become infected with HBV in 1994." The guideline also

states, "Hepatitis B vaccination of health care personnel who have contact with blood and body fluids can prevent transmission of HBV and is strongly recommended." The guideline does not include the option of the sole use of post-exposure vaccination as a means to prevent this infection. The department agrees that post-exposure vaccination in conjunction with hepatitis B immune globulin is effective in reducing the risk of HBV infection in employees who refuse hepatitis B vaccine or who are hepatitis B vaccine non- responders. As stated in §96.203(b) "Governmental units may modify the plan appropriately to their respective practice settings. Employers will need to include provisions relevant to their particular facility or organization in order to develop an effective, comprehensive exposure control plan specific to their facility or organization." No change was made to the exposure control plan as a result of this comment.

Comment: Concerning the exposure control plan regarding "training", one commenter wrote, "Annual refresher training is burdensome."

Response: The department disagrees. Effective training is a critical element of any overall exposure control plan. The department has concluded that it is essential for employees to understand the nature of the hazards they may face in the course of their employment and the procedures to follow to minimize or eliminate the risks associated with their exposure to these hazards. Because of the severity of the diseases and the potential to contract them from a single event, it is also important to retrain workers exposed to bloodborne pathogens on an annual basis. Annual retraining allows an employer to refresh and update employee knowledge and may not require the extensive efforts in the initial training. It also provides an opportunity to present new information that had not been available at the time of initial training. No change was made to the exposure control plan as a result of this comment.

Comment: Concerning the exposure control plan, one commenter wrote, "The first item listed to be covered in the training program requirements is the OSHA Bloodborne Pathogen Final Rule. Covering the TDH Bloodborne Pathogen Control Rule makes more sense."

Response: The department partially agrees. The first item on the list should include Chapter 96. Bloodborne Pathogen Control but the OSHA Bloodborne Pathogen Final Rule should also be reviewed. Covering Chapter 96 will include the minimum standards for exposure control and a review of the OSHA Bloodborne Pathogen Final Rule will give employees a basis for the department's exposure control plan. The exposure control plan list has been changed.

Comment: Concerning the exposure control plan "record keeping" section, one commenter wrote, "In the recordkeeping section, the plan states, 'According to OSHA's Bloodborne Pathogens Standard, medical records (and training records) are maintained by:' Does this mean the employers are to follow OSHA's requirements (i.e., retention for 30 years)? Keeping medical records for 30 years, as required by the OSHA standard, would be very cumbersome."

Response: Under the "Recordkeeping"" section of the plan no reference to the length of time medical record information should be maintained is cited. Governmental units should maintain employee records according to agency policy and/or in accordance with any applicable state or federal regulations regarding record retention. The department developed this exposure control plan to be analogous to the OSHA Bloodborne Pathogen standard as required by the statute. As stated in the "Guidance" section of the exposure control plan, "Governmental units may modify the plan appropriately to their respective practice settings. Employers will need to include provisions relevant to their particular facility or organization in order to develop an effective, comprehensive exposure control plan." No change was made to the exposure control plan as a result of this comment.

Comment: Concerning the exposure control plan "post exposure evaluation and follow up" section, one commenter suggested the plan "allow versus require testing of the source. In the alternative, specifically state that if the source does not want to consent to the test the affected governmental entity is not required to obtain consent."

Response: The department partially agrees. The wording "require testing of the source" is not contained in the Post Exposure Evaluation and Follow up section of the exposure control plan. The department has clarified the section by deleting "If possible, the identification of the source individual. The blood of the source is tested for HIV/HBV infectivity. Consent is obtained if required by law." The department has added the following to the post exposure evaluation and follow up section of the exposure control plan as a result of this comment. "Identification and documentation of the source individual, unless the employer can establish that identification is infeasible or prohibited by state or local law. After obtaining consent, unless law allows testing without consent, the blood of the source individual should be tested for HIV/HBV infectivity, unless the employer can establish that testing of the source is infeasible or prohibited by state or local law."

Comment: Concerning the exposure control plan, one commenter requested amendment of "the exposure control plan to provide more flexible and less stringent standards than OSHA's standards based on input from affected governmental entities."

Response: The department disagrees. The language contained in §96.203(b) states, "Employers should review the plan for particular requirements as applicable to their specific situation. Governmental units may modify the plan appropriately to their respective practice settings. Employers will need to include provisions relevant to their particular facility or organization in order to develop an effective, comprehensive exposure control plan specific to their facility or organization." The language in this section adequately addresses the commenter's concern regarding flexibility with the exposure control plan. No change was made to the exposure control plan as a result of this comment.

Comment: Concerning the exposure control plan "personal protective equipment" section, one commenter respectfully requested, "the Exposure Control Plan proposed by the department be amended so as to include "puncture resistant protective fingerguards" on the list of examples of available PPE.

Response: The department disagrees. The department feels that these devices are adequately addressed as safety design devices in the ECP "compliance methods" section which states; "Examples include safety design devices, sharps containers, needleless systems, sharps with engineered sharps injury protection for employees, passing instruments in a neutral zone, etc." No changes was made to the exposure control plan as a result of this comment.

Comment: Concerning the exposure control plan, Appendix B, "assessment tool", one commenter requested that the following be added to the tool, "Employees wear appropriate needlestick

prevention finger guards during those procedures where fingers and thumb are at risk to percutaneous injury."

Response: The department disagrees. The assessment tool adequately addresses the commenter's concern about the use of engineering controls in the work center in statement #4 of the assessment tool. Appendix B is designed as a model for governmental entities to use to monitor compliance with their specific agency's exposure control plan. Monitoring of compliance is the responsibility of the agency and the manner in which they use the tool is up to the employer. The employer may choose to include a list of devices available in the agency and monitor compliance with each device with the assessment tool. No change was made to the exposure control plan as a result of this comment.

Comment: Concerning the exposure control plan "laundry procedures" section, one commenter wrote, "If the rule applies to all of TDCJ, I do not think the exposure control plan properly addresses laundry. It would be a burden to consider all TDCJ laundry to be contaminated. This requirement should be limited to laundry generated in the medical department." Two other comments regarding the laundry section were received. One commenter wrote," ...the ECP requires all used laundry be treated as contaminated although this is not an OSHA requirement." The other commenter suggested deleting the first sentence in the Laundry Procedure section.

Response: The department agrees. The Laundry Procedures section of the exposure control plan has been reworded. The following statement from The Centers for Disease Control and Prevention, "Guidelines for isolation precautions in hospitals" regarding Linen and Laundry has been modified and has been added to the exposure control plan section labeled "Laundry Procedures." "Although soiled linen may be contaminated with pathogenic microorganisms, the risk of disease transmission is negligible if it is handled, transported, and laundered in a manner that avoids transfer of microorganisms to patients, personnel, and environments. Rather than rigid rules and regulations, hygienic and common sense storage and processing of clean and soiled linen are recommended. The methods for handling, transporting, and laundering of soiled linen are determined by the agencies written policy and any applicable regulations." The last sentence in the Laundry Procedures section will be maintained, "Laundry is cleaned at: (designate onsite or name offsite facility.)"

Comment: In the Post Exposure Follow up section of the exposure control plan, results of the source individual's testing must be made available to the exposed employee. I believe statutes only clearly allow this if the exposed employee is a medical employee. If it is a public safety officer, disclosure is only clearly allowed if the source is tested under mandatory testing (81.050, Health and Safety Code). I would like to be able to disclose results to our exposed security officers without having to go through the formality of 81.050, so would actually like to see this addressed legislatively, the next time Chapter 81 is opened in legislature.

Response: The department agrees that this issue needs to be addressed at the legislative level. No change was made to the exposure control plan as a result of this comment.

Comment: Concerning the exposure control plan "hepatitis B vaccine" section, one commenter suggested to "Amend the plan by deleting the requirements that the hepatitis B vaccine be provided at no cost to employees. Alternatively, amend the plan to allow governments to assess the level of exposure risk and at their discretion provide certain employees with the hepatitis B vaccine at no cost."

Response: The department disagrees. The exposure control plan in the exposure determination section states, " (plan) requires employers to perform an exposure determination for employees who have occupational exposure to blood or other potentially infectious materials. The exposure determination is made without regard to the use of personal protective equipment." The hepatitis B vaccine section of the plan states, "All employees who have been identified as having occupational exposure to blood or other potentially infectious materials are offered the hepatitis B vaccine, at no cost to the employee, under the supervision of a licensed physician or licensed healthcare professional." This language adequately addresses the commenter's concern. No change was made to the exposure control plan as a result of this comment.

Comment: Concerning the exposure control plan "personal protective equipment" section, one commenter requested the plan be amended "to give affected governmental entities the discretion to provide equipment to certain employees free of cost to the employee. Amend the plan to give affected governmental entities the discretion to decide which employees should be trained and recommend rather than mandate the appropriate credentials for trainers."

Response: The department disagrees. Regarding the commenter's concern about personal protective equipment the plan states, "Personal protective equipment is chosen based on the anticipated exposure to blood or other potentially infectious materials." This language adequately addresses the commenter's concern about providing personal protective equipment. Under the training section the plan states, "Training for all employees is conducted prior to initial assignment to tasks where occupational exposure may occur." The language in this section adequately addresses the commenter's concern. No change was made to the exposure control plan as a result of this comment.

Comment: Concerning the exposure control plan, one commenter wrote, "The ECP "Housekeeping" section requires the use of an EPA registered germicide although the OSHA standards in this area are not so restrictive."

Response: The department agrees. Under the "Housekeeping" section of the plan the first sentence will be deleted. The following sentence has been added, "Employers shall ensure that the worksite is maintained in a clean and sanitary condition. The employer shall determine and implement an appropriate written schedule for cleaning and method of decontamination based upon the location within the facility, type of surface to be cleaned, type of soil present, and tasks or procedures being preformed in the area."

Comment: Concerning the exposure control plan, one commenter wrote, "The ECP "Specimens" section exempts certain containers with specimens from labeling requirements, but this exemption is not mentioned in the "Labels" section.

Response: The department agrees that some clarification is needed regarding the "Specimens" and "Labels" sections. The "Specimens" section applies to the collection of blood or other specimens from a person. In the "Specimens" section the following changes have been made. The first two sentences in the section have been deleted. The title of the section has been changed to "Collection of Specimens." The following statements have replaced the first two deleted sentences. "Specimens of

blood and other potentially infectious body substances or fluids are usually collected within a hospital, doctor's office, clinic, or laboratory setting. Labeling of these specimens should be done according to the agency's specimen collection procedure. This procedure should address placing the specimen in a container, which prevents leakage during the collection, handling, processing, storage, transport, or shipping of the specimens. In facilities where specimen containers are sent to other facilities and/or universal precautions are not used throughout the procedure, a biohazard or color-coded label should be affixed to the outside of the container." The rest of the section will remain the same. The "Labels" section has been clarified by changing the section title to "Use of Biohazard Labels." Agencies should have a procedure that determines when biohazard-warning labels are to be affixed to containers or placed in color- coded bags. The procedure should include the types of materials that should be labeled as biohazard material. These materials may include but are not limited to, regulated waste, refrigerators and freezers containing blood or other potentially infectious materials, and other containers used to store, transport, or ship blood or other potentially infectious materials. The department appreciates the commenter's suggestions for clarification.

Comment: Concerning the exposure control plan, one commenter wrote, "Appendix B, item 21 of the ECP is confusing. It discusses requirements for "regulated medical waste", waste," and "regulated waste" and should be clarified."

Response: The department agrees. In appendix B, item 21 has been changed to read "Employees demonstrate knowledge of the agency's policies regarding disposal and transport of regulated waste by placing regular waste, special waste, and/or biohazard waste in appropriate containers and transporting the waste according to policy."

Comment: Two comments were received regarding the reporting form to be provided by the department for governmental entities to use to report sharp injuries. One commenter requested that the form be changed to state "student working in the provision of health care." The other commenter stated, "Line 2, Type and brand of sharp Does not mention dental instruments; Line 3, Original intended use It lists drilling but does not specify medical or dental use; Line 10, Location where sharps injury occurred--Should list university, not just a school, clinic should specify medical or dental; Line 11, Work area where injury occurred Should include dental operatory, dental clinic, operating room, student health clinic."

Response: The comments have been forwarded to the Infectious Disease Epidemiology and Surveillance Division for their consideration of this comment on the reporting form. The form is not a part of the rule and comments regarding the form may be directed to Dr. Kate Hendricks, Division Director, Infectious Disease Epidemiology and Surveillance Division. The department appreciates the commenter's review of the Sharps Injury Reporting Form.

The commenters were Representative Harryette Ehrhardt, Senator David Bernsen, Harris County Hospital District, University of Texas Medical Branch at Galveston, City of Denton Landfill, SafetySyringes, Inc.™, Austin/Travis County Health and Human Services Department, Parkland Health and Hospital System, Primary Care Department City of Austin, Texas Association of School Boards, University of Texas MD Anderson Cancer Center, Texas Hospital Association, MedPro, Inc., Texas Department of Criminal Justice, Texas A&M University System, Bio Medical Disposal, University of Texas System, Digit-Pro, Inc. Three commenters were in favor of the rules in their entirety. The other commenters were not against the rules in their entirety, however they expressed concerns, asked questions, and suggested recommendations for change as discussed in the summary of comments.

The new sections are adopted under Health and Safety Code §81.303 which requires the department to establish an exposure control plan; Health and Safety Code §81.304 which requires the board to adopt minimum standards to implement the exposure control plan; Health and Safety Code §81.305 which requires the board to recommend by rule that governmental units implement needleless systems; Health and Safety Code §81.306 which requires the board to require the reporting of information concerning exposure incidents; Health and Safety Code §81.307 which requires the board to implement a registration program for existing needleless systems and sharps with engineered sharps injury protection; Chapter 1411 (House Bill 2085), §26.02, 76th Legislature, which allows the board by rule to waive application of Health and Safety Code, Chapter 81, Subchapter H, for certain rural counties; Health and Safety Code §81.021 which requires the board to exercise its power in matters relating to protecting the public health to prevent the introduction of disease into the state; Health and Safety Code §81.004 which allows the board to adopt rules necessary for the effective administration and implementation of Chapter 81; 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.

§96.101. Definitions.

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

(1) Blood - Human blood, human blood components, and products made from human blood.

(2) Bloodborne pathogens - Pathogenic microorganisms that are present in human blood and that can cause diseases in humans, and include:

(A) hepatitis B virus (HBV);

(B) hepatitis C virus (HCV); and

(C) human immunodeficiency virus (HIV).

(3) Contaminated The presence or reasonably anticipated presence of blood or other potentially infectious material on an item or surface.

(4) Contaminated equipment - Any equipment used in the workplace that has been soiled with blood or other potentially infectious materials on an item or surface.

(5) Contaminated sharps injury - Any sharps injury that occurs with a sharp used or encountered in a health care setting that is contaminated with human blood or body fluids.

(6) Device - An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory that is:

(A) recognized in the official United States Pharmacopoeia National Formulary or any supplement to it;

(B) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease in man or other animals; or

(C) intended to affect the structure or any function of the body of man or other animals and that does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and is not dependent on metabolization for the achievement of any of its principal intended purposes.

(7) Employee - An individual who works for a governmental unit or on premises owned or operated by a governmental unit whether or not he or she is directly compensated by the governmental unit.

(8) Employs - Engages the services of employees.

(9) Engineered sharps injury protection - A physical attribute that:

(A) is built into a needle device used for withdrawing body fluids, accessing a vein or artery, or administering medications or other fluids and that effectively reduces the risk of an exposure incident by a mechanism, such as barrier creation, blunting, encapsulation, withdrawal, retraction, destruction, or another effective mechanism; or

(B) is built into any other type of needle device, into a nonneedle sharp, or into a nonneedle infusion safety securement device that effectively reduces the risk of an exposure incident.

(10) Exposure incident - A specific eye, mouth, other mucous membrane, nonintact skin, or parenteral contact with blood or other potentially infectious materials that results from the performance of an employee's duties.

(11) Governmental unit - This state and any agency of the state, including a department, bureau, board, commission, or office and includes:

(A) a political subdivision of this state, including any municipality, county, or special district; or

(B) any other institution of government, including an institution of higher education.

(12) HBV - Hepatitis B virus.

(13) HCV - Hepatitis C virus.

(14) Health care professional - A person whose legally permitted scope of practice allows him or her to independently evaluate an employee of a governmental unit and determine the appropriate interventions after an exposure incident; this would include hepatitis B vaccination and postexposure evaluation and follow up.

(15) HIV - Human immunodeficiency virus.

(16) Needleless system - A device that does not use a needle and that is used:

(A) to withdraw body fluids after initial venous or arterial access is established;

(B) to administer medication or fluids; or

(C) for any other procedure involving the potential for an exposure incident.

(17) Occupational exposure - A reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties.

(18) Other potentially infectious materials include:

(A) the following human body fluids: semen, vaginal secretions, cerebrospinal fluid, synovial fluid, pleural fluid, pericardial fluid, peritoneal fluid, amniotic fluid, saliva in dental procedures, any body fluid that is visibly contaminated with blood, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids;

(B) any unfixed tissue or organ (other than intact skin) from a human, living or dead; and

(C) HIV-containing cell or tissue cultures, organ cultures, and HIV- or HBV- containing culture medium or other solutions; and blood, organs, or other tissues from experimental animals infected with HIV or HBV.

(19) Personal protective equipment - Specialized clothing or equipment worn by an employee for protection against a hazard. General work clothes (eg, uniforms, pants, shirts, or blouses) not intended to function as protection against a hazard are not considered to be personal protective equipment.

(20) Regulated waste/special waste from health care-related facilities - Solid waste which if improperly treated or handled may serve to transmit an infectious disease(s) and which is composed of the following:

(A) animal waste;

(B) bulk blood, bulk human blood products, or bulk human body fluids;

(C) microbiological waste;

(D) pathological waste; or

(E) sharps.

(21) Sharp - An object used or encountered in a health care setting that can be reasonably anticipated to penetrate the skin or any other part of the body and to result in an exposure incident and includes:

(A) needle devices;

(B) scalpels;

(C) lancets;

(D) a piece of broken glass;

(E) a broken capillary tube;

(F) an exposed end of a dental wire; or

(G) a dental knife, drill, or bur.

(22) Sharps injury - Any injury caused by a sharp, including a cut, abrasion, or needlestick.

(23) Universal precautions/standard precautions - Approaches to infection control as defined in Title 29 Code of Federal Regulation §1910.1030, Occupational Safety and Health Administration (OSHA), Bloodborne Pathogens Standard and Morbidity and Hospital Infection Control Practices Advisory Committee, Guideline for isolation precautions in hospitals published in *Infection Control Hospital Epidemiology*, 1996;17:53-80, and *American Journal of Infection Control*, 1996;24:24-52. According to the concept of universal precautions, all human blood and certain human body fluids are treated as if known to be infectious for HIV, HBV, and other bloodborne pathogens.

§96.302. Device Registration.

(a) The Texas Department of Health (department) shall compile and maintain a list of needleless system devices and sharps devices with engineered sharps injury protection that are available in the commercial marketplace and registered with the department to assist governmental units to comply with this chapter.

(b) Each needleless system device or sharps device with engineered sharps injury protection that is the subject of the department's device registration application shall be in conformance with all applicable premarket notification or premarket approval requirements established by the U.S. Food and Drug Administration (FDA) unless otherwise exempted from such requirements.

(c) Each device manufacturer who manufactures a needleless system device or sharps device with engineered sharps injury protection and who desires to register the device for the first time with the department shall apply for registration in accordance with the procedures found in §96.303 of this title (relating to Registration Procedures).

(d) If a device manufacturer introduces more than one needleless system device or sharps device with engineered sharps injury protection into commerce, the manufacturer shall register each device separately in order for the device to be included on a list maintained by the department.

(e) Each sharps device with engineered sharps injury protection that is the subject of the department's device registration application shall contain physical attributes consistent with those recognized as effective for engineered sharps injury protection, as defined in §96.101(9) of this title (relating to Definitions).

(f) The department may accept reports from authorities in other jurisdictions, including the FDA, to determine the extent of compliance with these sections and with the provisions of Health and Safety Code, Chapter 81, Subchapter H.

(g) The department shall register a needleless system device or sharps device with engineered sharps injury protection that meets the requirements of these sections.

(h) Registration of a needleless system device or sharps device with engineered sharps injury protection by the department does not constitute an endorsement or recommendation of such device.

(i) Registration certificates shall not be transferable from one device to another or from one device name to another. Any request for transfer of registration due to a change in ownership shall be made pursuant to the requirements in subsection (l) of this section.

(j) All device registration certificates shall expire on December 31, 2001 and annually thereafter.

(k) Renewal of registration.

(1) Upon expiration of a device registration, the registration may be renewed by filing an application for renewal on a form prescribed by the department, accompanied by the appropriate renewal fee.

(2) The renewal registration certificate shall be valid through December 31st of the year issued.

(3) The appropriate registration renewal form and renewal fee for each device should be submitted to the department not later than 30 days following the expiration date of the current device registration in order to maintain the device on the department's list of existing needleless system devices and sharps devices with engineered sharps injury protection.

(4) The department shall renew the registration of a needleless system device or sharps device with engineered sharps injury protection following receipt of the appropriate renewal form and renewal fee.

(l) The device manufacturer shall notify the department in writing of any change that would render the information required in the initial registration application no longer accurate. Upon receipt of a written notification involving a change, the department may update the information contained in its list of needleless system devices and sharps devices with engineered sharps injury protection in order to reflect the change.

§96.401. Sharps Injury Log.

(a) The chief administrative officer for each facility within a governmental unit shall report, as required by this section, each employee, as defined in §96.101(7) of this title (relating to Definitions), who sustains a contaminated sharps injury, as defined in §96.101(5) of this title. The chief administrative officer of the governmental unit may designate an employee for each facility within the governmental unit to serve as the reporting officer.

(b) Information concerning each contaminated sharps injury shall be recorded in a written or electronic sharps injury log which shall be maintained by a governmental unit, in accordance with Health and Safety Code, Chapter 81, Subchapter H, and this chapter.

(c) The following information must be recorded in the sharps injury log:

(1) name and address of facility where injury occurred;

(2) name and phone number of the chief administrative officer or reporting officer;

(3) date and time of the injury;

(4) age and sex of the injured employee;

(5) type and brand of sharp involved;

(6) original intended use of the sharp;

(7) whether the injury occurred before, during, or after the sharp was used for its original intended purpose;

(8) whether the exposure was during or after the sharp was used;

(9) whether the device had engineered sharps injury protection, as defined in §96.101(9)(A) and (B) of this title (relating to Definitions), and if yes, was the protective mechanism activated and did the exposure incident occur before, during, or after activation of the protective mechanism;

(10) whether the injured person was wearing gloves at the time of the injury;

(11) whether the injured person had completed a hepatitis B vaccination series;

(12) whether a sharps container was readily available for disposal of the sharp;

(13) whether the injured person received training on the exposure control plan during the 12 months prior to the incident;

(14) the involved body part;

(15) the job classification of the injured person;

(16) the employment status of the injured person;

(17) the location/facility/agency and the work area where the sharps injury occurred; and

(18) a listing of the implemented needleless systems and sharps with engineered sharps injury protection for employees available within the governmental entity.

(d) Information contained in subsection(c)(1) - (17) of this section concerning each contaminated sharps injury shall be reported not

later than ten working days after the end of the calendar month in which it occurred.

(e) A chief administrative officer for each facility within a governmental unit or the designee shall report the contaminated sharps injury to the local health authority where the facility is located. The local health authority, acting as an agent for the Texas Department of Health (department), shall receive and review the report for completeness, and submit the report to the department. If no local health authority is appointed for the jurisdiction where the facility is located, the report shall be made to the regional director of the Texas Department of Health (department) regional office in which the facility is located.

(f) A contaminated sharps injury shall be reported on the department's Contaminated Sharps Injury Reporting Form or through an electronic means established by the department. Copies of the Contaminated Sharps Injury Reporting Form can be obtained on the Internet at http://www.tdh.state.tx.us/ideas/report/sharps.htm or from the Texas Department of Health Public Health Regional offices.

This agency 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 July 27, 2000.

TRD-200005195
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: August 16, 2000
Proposal publication date: March 10, 2000
For further information, please call: (512) 458-7236

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CHAPTER 137. BIRTHING CENTERS
SUBCHAPTER C. ENFORCEMENT

25 TAC §137.26

The Texas Department of Health (department) adopts new §137.26, concerning the regulation of birthing centers without changes to the proposed text as published in the March 17, 2000, issue of the *Texas Register* (25 TexReg 2291), and therefore the section will not be republished.

New §137.26 implements certain provisions of Senate Bill 1232, 76th Legislature, 1999, which grants the department the authority to appoint a monitor for a center to ensure compliance with Health and Safety Code Chapter 244, when the center's failure to comply with Chapter 244 creates a serious threat to the health and safety of the public. The rule places the cost of a monitor on the birthing center, and clarifies who may be appointed as a monitor, qualifications, and the purpose of a monitor. The rule language was developed by an ad hoc advisory committee convened by the department to implement the statutory language of §244.006(b).

No comments were received on the proposal during the comment period.

The new section is adopted under Health and Safety Code, Chapter 244, which authorizes the department to appoint a monitor for a center to ensure compliance with Health and Safety Code Chapter 244, when the center's failure to comply with Chapter 244 creates a serious threat to the health and safety of the public; 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 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 July 27, 2000.

TRD-200005197
Susan K. Steeg
General Counsel
Texas Department of Health
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Proposal publication date: March 17, 2000
For further information, please call: (512) 458-7236

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CHAPTER 169. ZOONOSIS CONTROL
SUBCHAPTER E. DOG AND CAT STERILIZATION

25 TAC §169.101

The Texas Department of Health (department) adopts an amendment to §169.101 concerning the expiration date of the terms of office for the members of the Animal Friendly Advisory Committee without changes to the proposed text published in the April 14, 2000, issue of the *Texas Register* (25 TexReg 3164), and therefore, the section will not be republished.

The section is amended to change the expiration date from September 1 to January 31, making it conform with the statute which created the committee, Health and Safety Code, §828.015.

No comments were received on the proposal during the comment period.

The amendment is adopted under the Health and Safety Code, §828.015, which provides for the appointment of an Animal Friendly Advisory Committee; 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.

This agency 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 July 27, 2000.

TRD-200005194
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: August 16, 2000
Proposal publication date: April 14, 2000
For further information, please call: (512) 458-7236

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CHAPTER 295. OCCUPATIONAL HEALTH
SUBCHAPTER C. TEXAS ASBESTOS HEALTH PROTECTION

25 TAC §§295.31, 295.32, 295.63

The Texas Department of Health (department) adopts amendments to §§295.31 and 295.32 and new §295.63 concerning authority of the department to administer and enforce the federal Asbestos Hazard Emergency Response Act (AHERA, 40 CFR, Part 763 Subpart E, excluding appendices) without changes to the proposed text as published in the June 2, 2000, issue of the *Texas Register* (25 TexReg 5124), and therefore the sections will not be republished.

Amended §295.31 expands the scope of the rules to include administration and enforcement of AHERA by the department. Amended §295.32 adds one new definition. New §295.63 transfers authority from U.S. EPA to the department for administration and enforcement of AHERA.

No comments were received regarding the proposal during the comment period.

The amendments and new section are adopted under Texas Civil Statutes, Article 4477- 3a, §12(c), which provides the Board of Health (board) with the authority to adopt rules specifying performance standards at least as stringent as applicable federal standards, 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.

This agency 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 July 27, 2000.

TRD-200005196
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: August 16, 2000
Proposal publication date: June 2, 2000
For further information, please call: (512) 458-7236

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PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 409. MEDICAID PROGRAMS

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeals of §409.1, §409.2, §409.3, §409.5, and §409.7 of Chapter 409, Subchapter A, concerning general reimbursement methodology for all medical assistance programs; §409.213 of Chapter 409, Subchapter F, concerning case management program requirements; and §409.256 of Chapter 409, Subchapter G, concerning case management for persons with severe and persistent mental illness. The repeals are adopted without changes to the proposal as published in the April 14, 2000, issue of the *Texas Register* (25TexReg3164-3166).

Sections 409.1, 409.3, 409.5, and 409.7 are repealed because they are duplicative of 1 TAC §§355.701, 355.703, 355.705, and 355.707. Section 409.2 is repealed because it conflicts with 1 TAC §355.702, which was amended effective September 1, 1999. Sections 409.213 and 409.256, both relating to right to appeal, are repealed because provisions regarding fair hearings for Medicaid recipients of service coordination (previously referred to as case management) are described in 25 TAC §412.464. The two sections were inadvertently omitted when TDMHMR repealed the subchapters concerning case management.

No public comment on the proposal was received.

SUBCHAPTER A. GENERAL REIMBURSEMENT METHODOLOGY FOR ALL MEDICAL ASSISTANCE PROGRAMS

25 TAC §§409.1 - 409.3, 409.5, 409.7

The repeals of the sections are adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of HHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Texas Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the 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 July 31, 2000.

TRD-200005285
Charles Cooper
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: August 20, 2000
Proposal publication date: April 14, 2000
For further information, please call: (512) 206-5216

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SUBCHAPTER F. CASE MANAGEMENT PROGRAM REQUIREMENTS

25 TAC §409.213

The repeal of this section is adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of HHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Texas Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the 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 July 31, 2000.

TRD-200005286
Charles Cooper
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: August 20, 2000
Proposal publication date: April 14, 2000
For further information, please call: (512) 206-5216

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SUBCHAPTER G. CASE MANAGEMENT FOR PERSONS WITH SEVERE AND PERSISTENT MENTAL ILLNESS

25 TAC §409.256

The repeal of this section is adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of HHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Texas Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the 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 July 31, 2000.

TRD-200005287
Charles Cooper
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: August 20, 2000
Proposal publication date: April 14, 2000
For further information, please call: (512) 206-5216

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CHAPTER 419. MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES SUBCHAPTER O. ENROLLMENT OF MEDICAID WAIVER PROGRAM PROVIDERS

25 TAC §419.709

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeal of §419.709 of Chapter 419, Subchapter O, concerning Enrollment of Medicaid Waiver Program Providers, without changes to the proposal as published in the April 14, 2000, issue of the *Texas Register* (25 TexReg 3167 - 3168). The adoption of new §419.709, which replaces the repealed section, is contemporaneously adopted in this issue of the *Texas Register*.

A public hearing was held on April 27, 2000, at TDMHMR Central Office, Austin. No comments were received concerning the repeal of the section. No commenters opposed the repeal of the section.

The repeal is adopted under the Texas Health and Safety Code, §532.015(a), which provides TDMHMR with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code §32.021(a), which provide the HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of HHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. HHSC has designated TDMHMR as the operating agency for selected Medicaid waiver programs the including Home and Community-based Services (HCS) Program, the Home and Community-based Services - OBRA (HCS-O) Program, and the Mental Retardation Local Authority (MRLA) Pilot 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 July 31, 2000.

TRD-200005288
Charles Cooper
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: August 20, 2000
Proposal publication date: April 14, 2000
For further information, please call: (512) 206-5216

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25 TAC §419.709

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new §419.709 of Chapter 419, Subchapter O, concerning Enrollment of Medicaid Waiver Program Providers, with changes to the proposed text as published in the April 14, 2000, issue of the *Texas Register* (25 TexReg 3167 - 3168). The repeal of existing §419.709, which the new section replaces, is contemporaneously adopted in this issue of the *Texas Register*.

At its January 2000 meeting, the TDMHMR board adopted amendments to §409.501 (relating to Description of the Mental Retardation Local Authority (MRLA) Program) of Chapter 409, Subchapter L, to allow TDMHMR to expand the MRLA program service area with Health Care Financing Administration approval. An expansion of the program requires home and community-based services (HCS) providers and home and community-based services - OBRA (HCS-O) providers in the expanded service areas to become MRLA providers. The new §419.709 allows an HCS and HCS-O provider operating in the expanded MRLA service area to be provisionally certified or

certified as an MRLA provider based on the provider's status as a provisionally certified or certified HCS or HCS-O provider.

The title of the section is changed on adoption to reflect that provisional certification or certification as an MRLA provider is not concurrent with, but in addition to, provisional certification or certification as an HCS or HCS-O program provider.

Subsections (a) and (b) are adopted without changes. Subsection (c) is revised on adoption to require, rather than permit, TDMHMR to provisionally certify as an MRLA provider a provisionally certified HCS or HCS-O provider if the MRLA program expands into the county where the provisionally certified HCS or HCS-O provider is providing services. Similarly, subsection (d) is revised on adoption to require, rather than permit, TDMHMR to certify as an MRLA provider a certified HCS or HCS-O provider if MRLA program expands into the county where the certified HCS or HCS-O provider is providing services. Additionally, subsection (d) is revised on adoption to delete the language permitting TDMHMR to not conduct an onsite review prior to certifying as MRLA providers the certified HCS and HCS-O providers in the MRLA expansion area.

New subsection (e) was added on adoption to specify that sanctions and corrective actions pending at the time of MRLA provisional certification or certification will remain in effect until resolved. Proposed subsection (e), which clarifies that TDMHMR may for good cause deny certification to an HCS or HCS-O provider requesting certification under subsections (a) or (b), is redesignated as subsection (f) on adoption. Language is added to clarify that the subsection applies only to the situations described in subsections (a) and (b).

A public hearing was held on April 27, 2000, at TDMHMR Central Office, Austin. Public testimony was given by Martin Luther Homes, Bryan. Written comments were received from the Private Providers Association of Texas, Austin; Bethesda Lutheran Homes and Services, Inc., Cypress; and LTB House, Houston. No commenters opposed the proposed new rule.

Two commenters requested that the department allow an HCS or HCS-O provider in good standing who wants to separate the contracts into smaller geographic areas to be exempt from the application process and be provisionally certified as an HCS or HCS-O provider under a new contract for each geographic area. The department responds that the request is outside the scope of the rule and that it declines to make the suggested change at this time.

One commenter requested that criteria for denying certification in accordance with proposed subsection (e) be developed. The commenter stated that when an application is denied, the department should give the provider feedback and offer the provider a means to appeal the denial. Another commenter requested that the provision be deleted or amended to clarify whether an HCS or HCS-O provider can become an MRLA provider after a sanction has been lifted.

The department declines to make the recommended revisions. With respect to the development of criteria for denying certification, the department responds that it will deny certification for good cause as it determines. Concerning whether an HCS or HCS-O provider can become an MRLA provider after a sanction has been removed, the department has clarified in subsections (c) and (d) that it will certify or provisionally certify an HCS or HCS-O provider as an MRLA provider but, as provided in subsection (e), sanctions and corrective actions will remain in effect until resolved.

One commenter expressed support for the MRLA Pilot Program. The department acknowledges the commenter's support. Two commenters stated that the expansion of MRLA is premature. The department responds that the rule action does not expand the MRLA Program, but rather anticipates expansion based on determinations by the department.

One commenter expressed concern over the fiscal statement, which indicated there would be no probable economic cost to persons required to comply with the new section. The commenter reported that MRLA providers have indicated that additional staff time will be required as a result of the confusion between the providers' and local authorities' different responsibilities for providing service coordination. The department responds that the comment does not appear to be related to the proposed rule action. The statement of fiscal impact is based on the cost of applying for and receiving an additional certification and not on the cost involved in operating the MRLA provider's program. The department notes that only employees of local authorities can provide service coordination.

One commenter asked for clarification on several issues related to sanctions. The commenter asked how the department is ensuring that the deeming process is not biased against some providers. The department responds that the certification process described in the new section applies equally to all waiver program providers.

Second, the commenter asked how the provisions in the new section affect state schools and local authorities. The department responds that state schools and local authorities are unaffected by the new section.

Third, the commenter asked whether the general public is made aware of sanctions issued by the department. The department responds that reports are available on request.

Fourth, the commenter asked whether additional certification will be denied based on the type of sanction that is in effect. The department responds that subsection (f) provides that TDMHMR may deny certification for good cause, including for sanctions that are pending.

Fifth, the commenter asked for information about the types of sanctions that can be issued. The department responds that sanctions are contained in Chapter 419, Subchapters D and P, and in Chapter 409, Subchapter L.

Sixth, the commenter asked what a sanctioned provider's recourse is if certification is denied. The department responds that the provider may reapply.

Seventh, the commenter asked who determines what is good cause. The department responds that it determines what is good cause.

The new section is adopted under the Texas Health and Safety Code, §532.015(a), which provides TDMHMR with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code §32.021(a), which provide the HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of HHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation

of the program. HHSC has designated TDMHMR as the operating agency for selected Medicaid waiver programs the including Home and Community-based Services (HCS) Program, the Home and Community-based Services - OBRA (HCS-O) Program, and the Mental Retardation Local Authority (MRLA) Pilot Program.

§419.709. Additional Provider Certification.

(a) Upon the request of a certified HCS provider, TDMHMR may provisionally certify the HCS provider as an HCS-O provider.

(b) Upon the request of a certified HCS-O provider, TDMHMR may provisionally certify the HCS-O provider as an HCS provider.

(c) TDMHMR shall provisionally certify as an MRLA provider a provisionally certified HCS or HCS-O provider authorized to serve individuals residing in a county added to the service area of the MRLA program.

(d) TDMHMR shall certify as an MRLA provider a certified HCS or HCS-O provider authorized to serve individuals residing in a county added to the service area of the MRLA program.

(e) Corrective actions or sanctions pending at the time of certification or provisional certification under subsections (c) or (d) of this section will remain in effect until resolved. If not resolved, TDMHMR may impose sanctions in accordance with §409.537 of this title (related to Sanctions).

(f) TDMHMR may deny provisional certification or certification for good cause, which includes but is not limited to corrective actions or sanctions that are pending against the HCS or HCS-O provider in accordance with subsections (a) or (b) of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 31, 2000.

TRD-200005289
Charles Cooper
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: August 20, 2000
Proposal publication date: April 14, 2000
For further information, please call: (512) 206-5216

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 11. CONTRACTS

SUBCHAPTER D. RESOLUTION OF CONTRACT CLAIMS

30 TAC §§11.101 - 11.108

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §11.101, Definitions; §11.102, Applicability; §11.103, Other Rules and Statutes; §11.104, Filing Notice of Claim for Breach of Contract; Counterclaim; §11.105, Negotiation; §11.106, Settlement of Claim; §11.107, Mediation; and §11.108, Request for Hearing. The sections are adopted without changes to the proposed text as published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3911) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of Chapter 11, Subchapter D, Resolution of Contract Claims, is to implement Texas Government Code, Chapter 2260, Resolution of Certain Contract Claims Against the State, which was created by House Bill (HB) 826, 76th Legislature, 1999. The statute requires that each unit of state government must adopt rules to govern the negotiation and mediation of contractor claims for breach of contract. Chapter 2260 provides that this administrative claim procedure is a prerequisite to filing suit by the contractor. Chapter 2260 also requires the commission to define by rule the process for mediating and settling claims against the state arising under contracts for goods and services. The adopted rules have been drafted to be consistent with the intent and language of HB 826, and to specifically satisfy the rulemaking requirements required of the commission.

The adopted rules establish a procedure for the administrative processing of contractor claims for breach of written contracts with the commission.

SECTION BY SECTION DISCUSSION

No sections were changed from the proposed version.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

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 that statute. These are procedural rules governing the resolution of breach of contract claims. These rules do not set any environmental standards or affect the enforcement of environmental standards. There are no federal standards for these contracting issues. These rules are specifically required by state law, Texas Government Code, §2260.052(c). These rules are adopted under this specific state statute rather than the general powers of the commission. These rules do not exceed the requirements of state law. These rules do not relate to any delegation agreements or contracts between the state and federal government concerning state contracting procedures.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rules is to implement legislation on procedures for handling contract disputes between the commission, and persons who enter into contracts with it. These are procedural rules governing the resolution of breach of contract claims. These rules do not set any environmental standards or affect the enforcement of environmental standards. These rules do not regulate the use of private real property. Therefore, these rules will not constitute a takings under Texas Government Code, Chapter 2007.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that the rulemaking does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code,

§§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. These are procedural rules that do not set environmental standards or affect their enforcement.

HEARING AND COMMENTERS

A public hearing was held in Austin on June 1, 2000. No comments were received at the public hearing or during the public comment period which closed on June 5, 2000.

STATUTORY AUTHORITY

The new sections are adopted under HB 826, 76th Legislature, 1999, codified as Texas Government Code, Chapter 2260, which requires the commission to develop rules governing the negotiation and mediation of claims for breach of contract between the commission and a contractor.

This agency 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 July 31, 2000.

TRD-200005271
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 20, 2000
Proposal publication date: May 5, 2000
For further information, please call: (512) 239-0348

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CHAPTER 14. GRANTS

30 TAC §§14.1 - 14.10, 14.12, 14.15, 14.16

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §14.1, Definitions; §14.2, Commission Authority; §14.3, Applicability; §14.4, Funding; §14.5, Recipient Eligibility; §14.6, Recipient Selection Criteria; §14.7, Solicitations; §14.8, Direct Award; §14.9, Notices; §14.10, Payment Procedures; §14.12, Eligible Activities; §14.15, Delegation of Authority; and §14.16, Affect on Prior Grants. Adopted new §14.4 and §14.9 are adopted with changes to the proposed text as published in the May 5, 2000, issue of the *Texas Register (*25 TexReg 3913). The commission is withdrawing §§14.11, 14.13, and 14.14. The remaining sections are adopted without changes to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the new sections is to implement Senate Bill (SB) 1421 and House Bill (HB) 3561, 76th Legislature, 1999. Senate Bill 1421, 76th Legislature, 1999, adds Texas Water Code (TWC), §5.124 and HB 3561 adds TWC, §5.125 (Session Laws, 76th Legislature, 1999, Chapter 187 (HB 3561) pages 660-662), Authority to Award Grants. Both sections contain identical language and require the commission to establish, by rule, procedures for awarding a grant, for making any determination related to awarding a grant, and for making grant payments. The adopted rules, in a new Chapter 14, respond to this requirement. The Agency has determined that no conflict exists between these rules and other TNRCC rules relating to certain types of grants when by their terms those rules would also apply.

SECTION BY SECTION DISCUSSION

In §14.4, Funding, the description of possible funding has been modified to clarify the meaning of the words "federal grant money" in §14.4(3). Section 14.9(a) has been modified to clarify that the $25,000 threshold for publication in the Texas Marketplace applies to TNRCC grants in the same manner in which it applies to procurements of goods and services under Texas Government Code, §2155.074, as added by Chapter 508, §1, Acts of the 76th Legislature, 1999. Section 14.11, Other Requirements, §14.13, Uniform Grant Management Standards, and §14.14, Grant Awards Affecting Mexico are withdrawn because they refer to statutes and standards which apply on their own terms to grants awarded under this chapter and these provisions would have been redundant.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule," as defined in that statute. In addition, the rulemaking is not a major environmental rule because it does not meet any of the four applicability requirements of a "major environmental rule" defined in §2001.0225(a). There is no federal law or federal delegation agreement specifically applicable to these rules.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for the rules pursuant to Texas Government Code, §2007.043. The specific purpose of the rules is to implement legislation concerning the commission's authority to award grants for resource conservation and environmental protection purposes. The rules establish the agency's procedures for awarding grants, for making any determination relating to awarding a grant, and for making grant payments. The rules do not affect private real property. Therefore, new Chapter 14 will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the rules are not identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, Actions and Rules Subject to the Texas Coastal Management Program (CMP), and will not affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the rules are not subject to the CMP.

HEARING AND COMMENTERS

A public hearing was not convened. The written comment period closed on June 5, 2000. No comments were received.

STATUTORY AUTHORITY

The new sections are adopted under SB 1421 and HB 3561, 76th Legislature, 1999, and require the commission to establish, by rule, procedures for awarding a grant, for making any determination relating to awarding a grant, and for making grant payments. Also, the new chapter is adopted under TWC, §5.103, which authorizes the commission to adopt any rules needed to carry out its powers and duties. This rulemaking responds to a new requirement of state law.

§14.4. Funding.

Grants awarded by the agency under this chapter may use:

(1) money appropriated for specific grant-making purposes;

(2) federal money granted to the agency for making pass-through grants; or

(3) state funds or federal grant funds appropriated for a purpose which the executive director determines is, and documents as being, consistent with a purpose of the grant.

§14.9. Notices.

(a) The executive director shall publish on the state electronic business daily, commonly known as the Texas Marketplace, information regarding any solicitation related to a grant or series of grants, any of which is reasonably expected to exceed $25,000, to be awarded under this chapter.

(b) The notice will indicate either that the executive director is seeking proposals or applications from potential grant recipients, or that one or more direct awards is anticipated, in accordance with §14.8 of this title (relating to Direct Award).

(c) If one or more direct awards is anticipated, the notice will identify the recipients selected to receive a direct award and will describe the objective and amount of each proposed award.

(d) Following recipient selection and final grant award, except in the case of a previously noted direct award, the executive director shall file a second notice in the state's electronic business daily identifying the successful recipients and indicating the amount of each awarded grant.

(e) In addition, the executive director may publish or broadcast information concerning a grant or grants in any publication, web site, or other forum.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Margaret Hoffman
Director, Environmental Law Division
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CHAPTER 80. CONTESTED CASE HEARINGS
SUBCHAPTER C. HEARING PROCEDURES

30 TAC §80.128

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §80.128, Specific Admissibility of Evidence for Concrete Batch Plants, without changes to the proposed text as published in the April 21, 2000, issue of the *Texas Register* (25 TexReg 3418).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill (SB) 1298, 76th Legislature, 1999, amended the Texas Health and Safety Code (THSC), §382.058, Limitation on Commission Exemption for Construction of Certain Concrete Plants, by adding subsection (d), to prohibit evidence regarding air dispersion modeling from being submitted at a hearing under THSC, §382.056, Notice of Intent to Obtain Permit or Permit Review; Hearing, for concrete batch plants which register under THSC, §382.057, Exemptions.

Senate Bill 766, which also passed during the 76th Legislature, 1999, amended THSC, §382.058, to reference permits by rule and standard permits instead of exemptions for concrete batch plants. In order to give effect to both SB 1298 and SB 766, the commission will implement the intent of the language "adoption of exemption under §382.057" to include "issuance of standard permit under §382.05195" and the procedures which are codified under 30 TAC Chapter 116, Subchapter F.

It is anticipated that concrete batch plants will be eligible for a standard permit from the commission instead of an exemption. The commission has concluded extensive research, including air dispersion modeling, to ensure that the standard permit for concrete batch plants will be protective. Prior to the approval of a registration for a standard permit, certain concrete batch plants will be required to provide public notice and may be subject to a contested case hearing. Under these circumstances, when air dispersion modeling is introduced at a public hearing for a concrete batch plant registering under a standard permit, it would be redundant with air dispersion modeling already conducted by the commission. Senate Bill 1298 creates a prohibition on submittal of evidence regarding air dispersion modeling during a public hearing when a standard permit considering modeling and impacts review for these facilities has been issued by the commission. This prohibition will begin to apply upon the issuance of a standard permit for concrete batch plants by the commission which is anticipated shortly after the adoption of this rule.

SECTION BY SECTION DISCUSSION

The new adopted §80.128 prohibits evidence regarding air dispersion modeling to be submitted at a hearing under THSC, §382.056, if the commission considers air dispersion modeling information in the course of adopting the standard permit under Texas Clean Air Act (TCAA), §382.05195, for a concrete plant.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

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" as defined in that statute. Section 80.128 contains a change in the procedural rules which prohibits the introduction of modeling in a contested case hearing. It is not the specific intent of this rule to protect the environment or reduce risks to human health from environmental exposure. Since extensive modeling was performed by the commission regarding concrete batch plants and the emissions from these plants has been shown to be insignificant, this prohibition will not affect the protection of the environment.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule under Texas Government Code, §2007.043. The following is a summary of that assessment. It is anticipated certain concrete batch plants will be eligible for a standard permit from the commission. The commission has concluded extensive research, including air dispersion modeling, to ensure that the standard permit for concrete batch plants will be protective.

Prior to the approval of a registration for a standard permit, certain concrete batch plants will be required to provide public notice and may be subject to a contested case hearing. When air dispersion modeling is introduced at a public hearing, it would be redundant with air dispersion modeling already conducted by the commission. Section 80.128 creates a prohibition on submittal of evidence regarding air dispersion modeling during a public hearing involving a concrete batch plant standard permit. This rule is simply a procedural rule and does not burden private real property. Therefore, this revision will not constitute a takings under Texas Government Code, Chapter 2007.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted section is not subject to the Texas Coastal Management Program (CMP). The adopted action concerns only the procedural rules of the commission and general agency operations, is not substantive in nature, does not govern or authorize any actions subject to the CMP, and is not itself 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 this proposal was held in Austin on May 16, 2000 and no oral comments were received. The comment period closed on May 22, 2000. The Residents for A Better Community, a citizen group, submitted two written comments with suggested changes concerning §80.128.

ANALYSIS OF TESTIMONY

The Residents for A Better Community commented that there was a lack of public notification to the changes to the TNRCC rules and regulations as required by SB 1298.

The commission disagrees with this comment as it relates to the specific regulatory procedure. The commission followed the procedures in accordance with Texas Government Code, §2001.023, Notice of Proposed Rules. Section 2001.023(a) states that a state agency shall give at least 30 days notice of its intention to adopt a rule before it adopts the rule and §2001.023(b) states that a state agency must file notice of the proposed rule with the secretary of state for publication in the *Texas Register*. These requirements were met. A notice regarding the proposed new rule appeared in the *Texas Register* (25 TexReg 3418) on April 21, 2000, and a notice for a public hearing was published by April 14, 2000 in the following newspapers: Austin American-Statesman, El Paso Times, Fort Worth Star-Telegram, and the Houston Chronicle. This meets the requirement for publication in the *Texas Register* as well as the 30-day requirements.

The commission also disagrees with the comment as it relates to the specific adopted rule. Senate Bill 1298 amended the THSC, §382.058, by adding subsection (d) which prohibits evidence regarding air dispersion modeling to be submitted at a hearing under THSC, §382.056, for concrete batch plants. In accordance with this amendment, the new adopted §80.128 prohibits evidence regarding air dispersion modeling to be submitted at a public hearing, if the commission considers air dispersion modeling information in the course of adopting a concrete batch plant standard permit. There is no reference to public notification in the legislation or new adopted rule, and therefore the issue of public notice for these facilities is outside the scope of this rulemaking.

The Residents of a Better Community commented that the new regulation should not be retroactive.

The commission agrees with this comment. The new §80.128 will only apply to a new standard permit for concrete batch plants once it is effective and does not apply to existing permit applications or registrations for permit by rule.

STATUTORY AUTHORITY

The new section is adopted under THSC, §382.058(d), to prohibit evidence regarding air dispersion modeling submitted at a hearing under THSC, §382.056, for concrete batch plants which register under TCAA, §382.05195; §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which provides the commission the authority to develop a comprehensive plan for the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA, §382.051, which authorizes the commission to issue a permit for numerous similar sources; §382.0513, which authorizes the commission to establish and enforce permit conditions consistent with the TCAA; and §382.05195, which authorizes the commission to issue a standard permit.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 307. TEXAS SURFACE WATER QUALITY STANDARDS

30 TAC §§307.2 - 307.10

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§307.2 - 307.10, concerning the Texas Surface Water Quality Standards. These sections are adopted *with changes* to the proposed text as published in the February 4, 2000 issue of the *Texas Register* (25 TexReg 677).

As published in the Rule Review section in this issue of the *Texas Register*, the commission also adopts the review of Chapter 307 in accordance with Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, Section 9-10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years. The commission has determined that the reasons for the rules continue to exist. The rules are readopted and amended to satisfy Texas Water Code (TWC), §26.023, which requires the commission to set water quality standards by rule for the water in the state and allows the commission to amend the standards from time to time. The rules are also readopted and amended to satisfy the federal Clean Water Act (CWA), §303, which requires states to adopt water quality standards and review and revise those standards at least once every three years.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Section 303 of the Federal Water Pollution Control Act (commonly referred to as the federal CWA, 1972, 33 United States Code (USC), §1313(c)) requires all states to adopt water quality standards for surface water. A water quality standard consists of the designated beneficial use or uses of a water body or a segment of a water body and the water quality criteria that are necessary to protect the use or uses of that particular water body. Water quality standards must also contain an antidegradation policy. Water quality standards are the basis for establishing discharge limits in waste discharge permits and other regulatory actions. The standards are used to assess whether water bodies are attaining appropriate water-quality related goals.

The states are required under the CWA to review their water quality standards at least once every three years and revise them, if appropriate. States review standards because new scientific and technical data may be available which have a bearing on the review. Further, environmental changes over time may warrant the need for a review. Where standards do not meet established uses, the standards must be periodically reviewed to see if uses can be attained. Additionally, water quality standards may have been established for the protection and propagation of aquatic life and for recreation in and on the water without sufficient data to determine whether the uses were attainable. Finally, changes in the CWA or in the United States Environmental Protection Agency's (EPA) regulations may necessitate reviewing standards to ensure continual compliance.

The states, in conjunction with EPA, select water bodies for which water quality standards are to be reviewed in-depth. To make this determination, the states and EPA are aided by: CWA, §304(l), lists of waters; CWA, §305(b), state reports (these reports provide an assessment of the condition of waters within the boundaries of each state); the waters identified under CWA, §303(d); the construction grants priority list; and segments where major waste discharge permits have expired.

States may modify non-existing designated uses when it can be demonstrated, through a Use Attainability Analysis, that attaining the higher designated use is not feasible. Factors affecting a water body, such as naturally high water temperatures, physical impediments, or natural background pollutant levels may effectively prevent a non-existing designated use from being met. States may adopt seasonal uses as an alternative to reclassifying a water body or segment thereof to uses requiring less stringent criteria.

Following adoption of water quality standards, the Governor or his designee must submit the officially adopted standards to the EPA Region 6 Administrator for review. The Regional Administrator reviews the state's standards to determine compliance with the CWA and implementing regulations. Standards are effective based upon state adoption, except as provided in 40 Code of Federal Regulations (CFR) §131.21 where approval by EPA is first needed.

The Texas statewide surface water quality standards were last amended on July 13, 1995. Amendments to §307.4, General Criteria, and §307.10, Appendices A - E, were made in April 1997 as a result of the EPA's disapproval of the change in presumed standards for perennial streams from an aquatic-life use of "high" to an aquatic-life use of "intermediate" for East Texas streams. The EPA last approved the state's standards in 1998.

The commission establishes, reviews, and revises on a periodic basis the State of Texas' surface water quality standards pursuant to the TWC, §26.023. The commission has adopted site-specific standards for all classified water bodies and presumed standards for all unclassified water bodies for which the state has not yet completed site-specific studies. The commission has also established a program to conduct such site-specific studies, called Receiving-Water Assessments, which consist of fish sampling, habitat assessment, chemical analysis, and in some cases invertebrate sampling, to help determine the attainable aquatic-life uses and dissolved oxygen criteria for unclassified streams. A receiving-water assessment may be conducted on an unclassified stream when: (1) a new discharge is proposed to enter a stream believed to be perennial or intermittent with perennial pools; (2) there is a change proposed for an existing discharge, such as an increase in flow or loading; or (3) there is a need to better ascertain the aquatic life use of a water body. Sampling is conducted over one or two days in an area of the stream that is not influenced by the discharge and in most cases is relatively unimpacted. When a stream has been individually studied, site-specific standards (uses and criteria) may replace the presumed standards for that stream.

In addition, the commission has established a program for conducting and evaluating Use Attainability Analyses. A Use-Attainability Analysis is the evaluation and final determination of the appropriate water quality standards for a water body. The analysis may be based on a receiving-water assessment or other kind of study acceptable by the executive director, or a combination of studies. The use-attainability procedures require the identification of reference areas and the defining of stream reaches to be included in the assessment. Physical evaluations of the streambeds, flow characteristics and habitat descriptions are also categorized. Fish sampling and, in some cases, macroinvertebrate sampling, is also conducted. The assessment, which may be included in a receiving-water assessment, is reviewed and a final determination is made on whether the designated aquatic life uses on a classified stream should be revised or a site-specific standards modification to presumed aquatic life uses for an unclassified perennial stream should be established. This final determination is presented in a formal report known as a Use-Attainability Analysis and submitted to the EPA for approval.

The state's surface water quality standards are necessary to protect public health, enhance water quality, and meet the purposes of the CWA, which are to restore and maintain the chemical, physical, and biological integrity of the nation's waters. The commission uses intensive survey data; the CWA §304(l), list of waters; monitoring data; CWA, §305(b), data; and other available data for a water body to determine whether standards are appropriate. Physical, chemical, and biological factors are examined to assess whether the criteria are appropriate. The commission uses results from receiving-water assessments and information from sampling and monitoring data to develop the standards.

The commission adopts editorial revisions as well as substantive changes. Editorial revisions are adopted to improve clarity, to make grammatical corrections, and to renumber or reletter subsections as appropriate. The commission also adopts changes that are needed to incorporate additional information on toxic pollutants and new data on waters in the state. The adopted changes provide revisions to general criteria that are more consistent with current permitting practices and with the requirements of Texas Pollutant Discharge Elimination System

(TPDES) permitting. The adopted changes also provide clarity on how the standards apply in certain permitting situations.

In connection with the adoption of these rules, the commission is completing revisions to its implementation procedures for applying the adopted standards in wastewater discharge permits. Changes to the implementation procedures incorporate the adopted changes to the water quality standards contained in these rules. Changes are also being completed to implement the antidegradation policy. The implementation procedures are contained in a guidance document entitled, *Procedures to Implement the Texas Surface Water Quality Standards*. This document provides guidance and explanation of the general and technical procedures used in implementing the standards in wastewater discharge permits. The document is being revised at this time, both to be consistent with the amendments adopted in this chapter and in consideration of public comment on the proposed revisions to the implementation procedures. Revisions to the implementation procedures include information on endangered and threatened species, temporary standards and variances, dissolved oxygen modeling, antidegradation, total maximum daily loads (TMDLs), total dissolved solids (TDS), and storm water permitting. Although not part of the regulatory action covered by the adoption of amendments to this chapter, the revisions to the implementation procedures were proposed at the same time as the proposed amendments to this chapter. This allowed for a more coordinated and consistent review by the commission and the public. These implementation procedures are referenced as Series 23 in the commission's Continuing Planning Process which describes the commission's water quality management program. The implementation procedures must be approved by the commission and submitted to the EPA for approval. The commission is expected to consider adoption of the revisions to the implementation procedures in the upcoming months of 2000.

Implementation procedures, which address how the standards are applied in wastewater discharge permits, provide flexibility in how affected permittees can change treatment procedures so that their discharge will not affect a segment's ability to maintain its water quality standards. Costs related to these changes are site-specific and will be dependent upon the extent of the permittee's changes to their treatment process.

SECTION BY SECTION DISCUSSION

The commission adopts amendments to §307.2, Description of Standards, to clarify provisions and revise the sequence of steps for seeking and applying for temporary variances, clarify that interim effluent limits may not last longer than three years except where a temporary variance is in effect, and provide a new provision for adopting temporary standards where a criterion is not attained and cannot be reasonably attained for reasons listed in 40 CFR §131.10(g). The adopted amendments require preliminary information indicating that the standards change may be appropriate to be included in the variance request, and provide for the variance request to be included in the public notice for the permit application. The adopted amendments also clarify the effective date of the standards in order to reflect the current state administrative practices and a recent court ruling related to EPA approval and the effective date of standards.

In response to comments, amended §307.2(d)(5) now better describes that scientific information justifying the site-specific amendment of the standard is necessary. In response to comments, amended §307.2(d)(5)(E) now clarifies that the commission approves a variance extension based upon a study which supports the change in standards. In response to comments, §307.2(e) has been amended to refer to the correct title of a guidance document which recently underwent revision.

Provisions for the approval of temporary standards have also been adopted as §307.2(g). These temporary standards may be approved as an alternative to revising a use where a criterion is not attained or cannot be reasonably attained. In response to comments, §307.2(g) has been changed to delete the word "reasonably" when referring to attainment of a standard and the subsection now includes a reference to the standards implementation procedures, which includes greater detail on how the commission will use and implement temporary standards.

The commission adopts §307.2(h), which specifies the effective date of these amendments and manner in which the effective date is affected by EPA review and approval. The commission adopts §307.2(i), which includes a severability clause.

The commission adopts amendments to §307.3, Definitions and Abbreviations, to include amendments to the definitions for "ambient," "background," "best management practices," "discharge permit," "fecal coliform," "method detection limit," "minimum analytical level," "noncontact recreation," "seven-day two-year low-flow," "standards," "standards implementation procedures," "sustainable fisheries," and "water-effects ratio." New definitions have been adopted for "attainable use;" "bioconcentration factor;" "biological integrity;" "classified;" "designated use;" "*E. coli*" and "enterococci bacteria;" "existing use;" "incidental fishery;" "intermittent stream with perennial pools;" "point source;" "presumed use;" "public drinking water supply;" "seagrass propagation;" "segment;" "significant aquatic life use;" "storm water;" "storm water discharge;" "tidal;" "to discharge;" "total maximum daily load (TMDL);" and "wetland water quality functions." In response to comments, the commission has changed the definition of several terms in the adoption of the amendments to this section. The revised definitions are for the terms "bioconcentration factor," biological integrity," "chronic toxicity," "mixing zone," "public drinking water supply," "seagrass propagation," "standards implementation procedures," "storm water discharge," "surface water in the state," "toxicity biomonitoring," "water effects ratio," and "water quality management program."

In response to comments, the commission also has deleted its proposal to include a definition of "pollutant" and instead adopts a definition of "pollution," as that term is used in this chapter. Attainable, designated, existing, and presumed uses have all been individually defined to provide for a more accurate description of each use. In response to comments, the proposed definitions of "attainable use" and "existing use" have been revised in the adoption of amendments to this section. In response to comments, the commission has deleted the terms "commission," "general contact recreation," and "high use contact recreation."

The adopted changes add new abbreviations in §307.3(b) for Chemical Abstracts Service Registry number (CASRN), maximum contaminant level (for public drinking water) (MCL), municipal separate storm sewer system (MS4), total maximum daily load (TMDL), Texas Pollutant Discharge Elimination System (TPDES), and total suspended solids (TSS).

The commission adopts amendments to §307.4, General Criteria, to clarify in §307.4(b)(3) that the provision for settleable solids does not prohibit dredge and fill activities under the federal CWA, §404. The adoption includes changes which were incorporated in response to comments.

The revisions also clarify in adopted amendments to §307.4(d) that acute toxic criteria apply to all water in the state, and that chronic toxicity criteria apply to surface waters with a significant aquatic life use of limited, intermediate, high, or exceptional. In response to comments, the adoption of this subsection includes changes to cross-reference §307.8(a)(2) and includes correction of a typographical error.

Amendments to the salinity provisions in §307.4(g) have been adopted to indicate that concentrations of dissolved minerals such as chlorides, sulfates, and TDS will be maintained such that existing, designated, and attainable uses will not be impaired, and that absence of numerical salinity criteria shall not preclude evaluations and regulatory actions based on estuarine salinity. In response to comments, the amendments to §307.4(g)(3) have been changed to more clearly reflect that attainable uses will be protected.

The commission adopts amendments to §307.4(h) to clarify the general provision that dissolved oxygen concentrations shall be sufficient to support existing, designated, and attainable aquatic life uses. The adopted amendments more clearly address the general criteria for dissolved oxygen for all waters in the state regardless of whether the water is classified or unclassified. The amendments also clarify that perennial waters not listed in Appendix A or D are presumed to have a high aquatic life use and corresponding dissolved oxygen criteria, while intermittent streams must maintain a 24-hour dissolved oxygen mean of at least 2.0 milligrams per liter (mg/L) and an absolute minimum dissolved oxygen concentration of 1.5 mg/L. The revisions on perennial waters clarify distinctions between presumed aquatic life uses for different water body types. In response to comments, the adoption of amended §307.4(h)(4) includes changes to reflect that higher uses will be protected where they are attainable. The commission determined it was unnecessary to reference the standards implementation procedures and has deleted the reference in §307.4(h)(4).

The commission adopts §307.4(i), relating to aquatic life uses and habitat. In response to comments, the adoption of this subsection includes a change that deletes reference to protection of "existing" uses.

The commission adopts §307.4(j), relating to aquatic recreation. In response to comments, the adoption of this subsection includes changes which delete the proposed criteria of "general" and "high use" as contact recreation subcategories. Also, the adopted language includes changes to note that contact recreation is a presumed use, except where otherwise specified for specific water bodies.

The commission adopts amendments to §307.5, Antidegradation, to clarify that the development and implementation of TMDLs are actions subject to the antidegradation policy. The amendments also more closely follow the federal regulations, reflecting the "tier" approach to describing the antidegradation policy. The antidegradation policy affords three tiers or levels of protection to the waters in the state.

In response to comments, adopted amendments to §307.5(a), (b)(4), and (c) include references to pollution and loadings, rather than pollutants or pollutant loadings. Changes also include corrected references to "agency" and "commission," as appropriate. Also in response to comments, adopted amendments to §307.5(b)(1) reflect that Tier 1 antidegradation reviews consider existing uses.

The commission adopts amendments to §307.5(b)(4) to further clarify that antidegradation review procedures apply to TPDES permits for wastewater, permits relating to dredge and fill projects, and other permitting and regulatory activities which may increase pollution. In response to comments, the adopted amendments to paragraph (4) include changes to better describe the scope of the commission's antidegradation policy.

The commission adopts amendments to §307.5(c) to also specify the manner in which the agency will implement its antidegradation policy, including the consideration of public input. In response to comments, the adopted amendments to §307.5(c)(2)(E) include a change which makes it clear that public comment will be considered on decisions concerning antidegradation for specific regulatory actions.

The commission adopts amendments to §307.6, Toxic Materials, to clarify that acute numerical aquatic-life criteria for toxic substances apply above low-flow conditions (1/4 of 7Q2). The adopted amendments also include the addition of human health criteria for acrylonitrile and 1,3-Dichloropropene to Table 3, relating to Human Health Protection. The commission adopts amendments to the numerical criteria for human health protection in Table 3. The amendments remove Mirex from Table 3 due to a lack of national data for determining criteria for human health. The standards will continue to address Mirex through aquatic life criteria. Amendments to Polychlorinated Biphenyls (PCBs) numerical criteria have been adopted. Amendments have been adopted to Table 1, concerning Toxic Criteria to Protect Aquatic Life, and Table 2, concerning Total Hardness and pH Values. The amendments to Table 1 include: (1) adjusting criteria for dissolved metals in accordance with new EPA data; and (2) adding water-effects ratios to metals criteria to address site-specific differences in toxicity due to water chemistry. Adopted amendments to Table 2 include updating basin pH and hardness values in response to new data received. Chemical Abstracts Service Registry Numbers (CASRN) have also been added for each substance in Tables 1 and 3.

In response to comments on §307.6(b)(4), the commission adopts amendments that include changes to clarify the scope of the protection of terrestrial wildlife. In response to comments on §307.6(c)(9), the commission adopts amendments that include changes to specify that a wastewater discharge permit application will include public notice of a proposed water-effects ratio which affects an effluent limitation in a permit. In response to comments on §307.6(d)(8)(C), the commission adopts amendments that include changes which clarify that technically valid information is used by the agency in deriving numerical criteria when toxic criteria are not listed in Table 3. Also, throughout this section, the amendments include appropriate revisions to cite actions by the "agency," rather than by the executive director or commission.

In response to comments on §307.6 (Table 3), the commission adopts amendments that include changes to delete its proposed numerical criteria for perchlorate and for atrazine. Additionally, the commission adopts several amendments to Table 3 which were not specifically proposed, but which are necessary changes for editorial clarity or to resolve contradictions within the existing rule.

The commission adopts amendments to §307.7, relating to Site-Specific Uses and Criteria. The adopted amendments to this section include a change in the recreational indicators to *E. coli* and enterococcus. *E. coli* and enterococcus have been identified as being more indicative of assessing risk of illness due to

ingestion of water. The commission adopts amendments which retains fecal coliform as an indicator for noncontact recreational waters. Additionally, the commission adopts amendments which include changes to clarify the units of measurement in indicator bacteria tests. In response to comments on §307.7(b)(1), the commission has deleted the proposal to subcategorize contact recreation into general and high uses. Additionally, paragraph (1) has been changed to adopt single sample maximums for all three indicator bacteria and to clarify the manner in which compliance with these standards will be evaluated.

In response to comments, the commission adopts amendments to §307.7(b)(1)(B)(i) with changes from the proposal to refer to all bodies of saltwater rather than to tidal streams and rivers. Also in response to comments, the commission adopts amendments to §307.7(b)(1)(D) with changes from the proposed language referring to local swimming advisory programs.

The commission adopts amendments to Table 5, concerning critical low-flow values for dissolved oxygen for the eastern and southern Texas ecoregions. These amendments clarify how dissolved oxygen criteria for East Texas streams are applied to all water bodies, including segments, at lower flow ranges, and how the critical low-flow values can be adjusted by relating site-specific dissolved oxygen concentrations with other stream characteristics. Throughout §307.7(b)(3)(A), the amendments include appropriate revisions to cite actions by the "agency," rather than by the commission.

The commission adopts amendments to §307.7(b)(5) which specify wetland water quality functions and seagrass propagation as uses to be maintained and protected.

The commission adopts amendments to §307.8, Application of Standards, to clarify the stream flow conditions where acute toxic criteria apply. The adopted rule specifies that acute toxic criteria apply at stream flows above 1/4 of 7Q2. The adopted amendments to §307.8(b)(5) describe the context of mixing zones specified in permits issued by state and federal agencies. In response to comments, the adopted amendments to paragraph (5) include changes to better reference the agencies which issue the permits.

The commission adopts §307.8(e), relating to storm water discharges, to specify that pollutants in storm water shall not impair existing or designated uses. This subsection includes new provisions to describe how the quality of storm water discharges are controlled and how the evaluation of instream monitoring data occurs. In response to comments, the adopted amendments to this subsection include changes to the title of the subsection and references to "pollution" rather than to "pollutants." The commission has deleted its proposal to describe when specific numerical criteria are not applicable due to short-term effects of storm water.

The commission adopts amendments to §307.9, Determination of Standards Attainment. The amendments to §307.9(a) include updating references to guidance documents which the agency considers when assessing standards attainment. In response to comments, the adopted amendments to §307.9(a) include changes to the title of the subsection. Also, in this subsection and in the other subsections of §307.9, references to particular guidance documents have been changed to either the "latest version" or the "latest approved version," as appropriate. The remarks in §307.9 alluding to various guidance documents and other reference materials are included to inform those using these rules of some of the resources that may be consulted in designing or reviewing studies and of data to assess standards attainment. They are advisory and not exclusive. Standards attainment is determined by the executive director's staff and by the commission on a case-by-case basis.

The commission adopts amendments to §307.9(b) to update procedures for approval by the agency of sampling locations and for consideration of representativeness of samples. Adopted amendments to §307.9(b) include changes to delete the proposed title of "Sampling locations."

The commission adopts amendments to §307.9(c) and (d) to update the procedures for the collection, preservation, and analysis of water samples--for assessing instream standards compliance. These amendments provide for enhanced consistency and quality assurance in reporting.

The commission adopts amendments to §307.9(e) to update the manner in which the number and periodicity of water samples is evaluated. In response to comments, the commission adopts amendments that include changes from the proposal. These adopted changes from the proposal include correction of the standards attainment method for chloride, sulfate, and TDS. Also, as an addition to the proposal, the adopted amendments address how single sample maximums are assessed for the attainment of bacteria criteria. Finally, the commission adopts changes to the proposal in §307.9(e)(6)(B) to clarify how minimum dissolved oxygen values are assessed from single sample measurements.

The commission adopts new provisions in §307.9(f) for measuring biological integrity which is assessed by sampling of aquatic organisms. In response to comments, the adopted provision includes changes to refer to sampling of the aquatic community, rather than sampling of the presence and abundance of aquatic organisms.

The commission adopts new provisions in §307.9(g) which address how attainment of narrative criteria in the water quality standards will be assessed.

Throughout §307.9, the adoption of the amendments include appropriate revisions to cite actions by the "agency," rather than by the commission or executive director.

Adopted changes to §307.10, Appendices A - E, include changes in Appendix A to aquatic life uses for the lower Pease River (new segment 0230) from high to intermediate, the upper arm of Sam Rayburn reservoir (new segment 0615) from high to intermediate, and the Nueces River Tidal (segment 2101) from exceptional to high in Appendix A. These adopted changes are based on the results of use attainability analyses that have been performed. Adopted changes in Appendix A also include (1) the creation of two new segments (1256--Brazos River/Lake Brazos and 1257--Brazos River Below Whitney Lake) from existing segment 1242 which has been renamed to Brazos River Above Navasota River, and (2) the creation of segment 1802--Guadalupe River Below San Antonio River from existing segment 1803--Guadalupe River Below San Marcos River to account for different hydrological conditions and dissolved minerals (TDS, chlorides, and sulfates) gradients and different ambient concentrations. Another new segment, segment 0502--Sabine River Above Tidal, has been created from the upper portion of segment 0501--Sabine River Tidal and the lower portion of segment 0503--Sabine River Below Toledo Bend Reservoir, which has been renamed Sabine River Above Cagey Creek, to account for different hydrological conditions.

Dissolved minerals criteria revisions are adopted for 108 segments in Appendix A based on new calculations using updated information. The following segments have had one or more of the dissolved minerals (chloride, sulfate and TDS) revised: 0105, 0228, 0229, 0401, 0408, 0409, 0503, 0504, 0505, 0507, 0512, 0602, 0603, 0604, 0605, 0606, 0609, 0610, 0611, 0612, 0613, 0818, 0819, 0820, 0838, 0902, 1002, 1003, 1004, 1008, 1009, 1010, 1011, 1012, 1015, 1016, 1108, 1212, 1217, 1221, 1226, 1229, 1233, 1240, 1242, 1243, 1244, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1255, 1302, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1414, 1415, 1416, 1427, 1428, 1429, 1430, 1432, 1434, 1502, 1602, 1604, 1605, 1803, 1804, 1805, 1806, 1809, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1905, 1908, 1911, 1912, 1913, 2004, 2110, 2111, 2112, 2113, 2114, 2115, 2303, 2309, 2310, 2312, and 2313. Other adopted changes to Appendix A include the addition of the aquifer protection use to 14 existing segments (1243--Salado Creek, 1244--Brushy Creek, 1248--San Gabriel/North Fork San Gabriel River, 1249--Lake Georgetown, 1250--South Fork San Gabriel River, 1251--North Fork San Gabriel River, 1804--Guadalupe River Below Comal River, 1806--Guadalupe River Above Canyon Lake, 1809--Lower Blanco River, 1810--Plum Creek, 1811--Comal River, 1814--Upper San Marcos River, 1815--Cypress Creek, and 1903--Medina River Below Medina Diversion Lake). The protection of these segments is included in the Chapter 213 Edwards Aquifer rules and noted in Appendix A. The pH range for segment 0507--Lake Tawankoni has been revised as a result of additional data. Adopted new indicator bacteria and criteria for recreational uses are also included in Appendix A.

Adopted changes to Appendix B include a recalculation of critical-condition flows to incorporate more recent instream flow data.

Appendix C adopted changes include descriptions for new segments, and revised descriptions for those segments affected by the creation of the new segments in Appendix A. Segment boundary revisions are also adopted for segments 0608--Village Creek, 0823--Lewisville Lake, 0839--Elm Fork Trinity River Below Ray Roberts Lake, 1013--Buffalo Bayou Tidal, 1107 and 1108--Chocolate Bayou Tidal and Above Tidal, 1245--Oyster Creek, and 2003 and 2004--Aransas River Tidal and Above Tidal. Other segment description revisions are adopted to clarify or to correct clerical errors in existing descriptions of segments found in Appendix A.

Adopted changes to Appendix D include the addition of 100 sites with designated aquatic life uses and dissolved oxygen criteria. The water bodies are tributaries within the listed segment numbers as follows: 0202, Bois d'Arc Creek; 0202, Pine Creek, 0203, Big Mineral Creek; 0203, Little Mineral Creek; 0303, Morrison Branch; 0402, Hughes Creek; 0404, Dry Creek; 0404, Sparks Branch; 0404, Tankersley Creek; 0404, Unnamed tributary of Okry Creek; 0407, Beach Creek; 0503, Caney Creek; 0505, Little Rabbit Creek; 0505, Rocky Creek; 0505, Wall Branch; 0506, Giladon Creek; 0506, Unnamed tributary of Grand Saline Creek; 0506, Unnamed tributary of Sabine River (Ninemile Creek); 0506, Wiggins Creek; 0510, Adaway Creek; 0510, Mill Creek; 0513, Trout Creek; 0604, Caddo Creek; 0604, Cedar Creek; 0604, Graham Creek; 0604, Unnamed tributary of Caddo Creek; 0605, Little Duncan Branch; 0606, Prairie Creek; 0607, Boggy Creek; 0607, Cotton Creek; 0610, Ayish Bayou; 0611, Henshaw Creek; 0701, Green Pond Gully; 0701, Mayhan Gully; 0704, Willow Marsh Bayou; 0802, Choates Creek; 0802, Long King Creek; 0803, Harmon Creek; 0803, Parker Creek; 0803, Turkey Creek; 0804, Box Creek; 0804, Mims Creek; 0815, Waxahachie Creek; 0818, One Mile Creek; 0827, Cottonwood Creek; 0827, White Rock Creek; 0836, Pin Oak Creek; 1001, Gum Gully; 1001, Jackson Bayou; 1001, Rickett Creek; 1002, Tarkington Bayou; 1004, East Fork White Oak Creek; 1004, Unnamed tributary; 1004, West Fork White Oak Creek; 1008, Mill Creek; 1008, Panther Branch (two reaches); 1009, Dry Creek (two reaches); 1009, Dry Gully (two reaches); 1012, Robinson Creek; 1012, Town Creek; 1014, Buffalo Bayou; 1014, Horsepen Creek; 1014, Langham Creek, 1014, South Mayde Creek; 1014, Turkey Creek; 1101, Magnolia Creek; 1102, Marys Creek/North Fork Marys Creek; 1105, Flores Bayou; 1202, Beason Creek; 1202, Unnamed oxbow slough; 1206, Kickapoo Creek; 1206, Rock Creek; 1206, Unnamed Tributary of Rock Creek; 1209, Wickson Creek; 1221, Indian Creek; 1221, Pecan Creek; 1230, Palo Pinto Creek; 1242, Thompson Creek; 1246, Comanche Springs Spring Brook; 1246, Harris Creek; 1305, Hardeman Slough; 1402, Allen Creek; 1402, Buckners Creek; 1402, Cummins Creek; 1404, Hamilton Creek; 1412, Deep Creek; 1412, North Fork Champion Creek; 1418, Hord Creek; 1434, Cedar Creek; 1434, Gazley Creek; 1602, Big Brushy Creek; 1604, East Mustang Creek; 1605, West Navidad River; 1810, Town Branch; 2201, Perennial drainage ditches; 2202, Perennial drainage ditches; 2422, Anahuac Ditch; 2432, Mustang Bayou; 2491, Perennial drainage ditches; and 2494, Perennial drainage ditches. Other adopted changes in Appendix D include a revision of the site description for Wards Creek (tributary to segment 0505), an addition of a seasonal dissolved oxygen criterion and site-specific flow for Rabbit Creek (tributary to segment 0505), a revision of dissolved oxygen criteria from 3.0 mg/L to 5.0 mg/L for Alto Branch and Larisson Creek in segment 0604, a revision of the site description for Mud Creek in segment 0611 which extends the high aquatic life use designation upstream to the confluence of Prairie Creek, a revision from 4.0 mg/L to 3.0 mg/L of the dissolved oxygen criterion for Jefferson County canals in segment 0702, and clarification of the site descriptions for Bear Creek, South Mayde Creek, Horsepen Creek, and Mason Creek in segment 1014. Aquatic life use for the portion of Brushy Creek upstream of the segment 1244--Brushy Creek boundary has been revised from intermediate to high based on a recent receiving water assessment using current commission protocols for field collections.

Adopted changes to Appendix E include the addition of site-specific toxic criteria for 20 sites. The sites and the affected toxic criteria are: Dixon Creek in segment 0101, selenium; Welsh Reservoir in segment 0404, aluminum; segment 0501 in Orange County, copper; segment 0505, from SH 149 in Gregg County downstream to the confluence of Brandy Branch, copper; segments 1001, 1005 (upper reach), 1006, 1007, 1013, and 2427, copper; segment 1005 (lower reach), copper; Tucker Bayou in segment 1006, copper; Greens Bayou tidal in segment 1006, copper; segment 1201 and tidal tributaries, copper; segment 1236, aluminum; Lake Creek Reservoir in segment 1242, copper; Linneville Bayou in segment 1304, selenium; Red Draw Reservoir in segment 1412, selenium; Kinney Bayou tidal and Jewel Fulton Canal tidal in segment 2481, copper and zinc; and a portion of segment 2484, selenium. Criteria in Appendix E have been recalculated to incorporate EPA conversion factors for metals.

The adopted changes in Appendices A - E were made to incorporate results of numerous studies, water quality monitoring activities and sampling assessments on individual water bodies conducted by the commission, river authorities, and in some cases, individual permittees.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the amended rules may 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, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendments to Chapter 307 will require some cities and may require certain agricultural and industrial wastewater dischargers to change or employ new treatment methods or techniques in order to comply with the adopted standards. These changes or methods may range from developing new techniques or changing best management practices to renovating, expanding, or building an entirely new treatment facility. The adopted rules are intended to protect the environment or reduce risks to human health and safety from environmental exposure and may have adverse effects on certain wastewater dischargers which could be considered a sector of the economy. Although the amended rules may meet the definition of a major environmental rule as defined in the Texas Government Code, the adopted rules do not meet any of the four applicability requirements listed in §2001.0225(a) which states that this section applies only to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law.

Specifically, the standards and requirements within these rules were developed in order to conform to the CWA and the TWC. The adopted amendments do not exceed a standard set by federal law, exceed an express requirement of state law, nor exceed a requirement of a delegation agreement. The amendments were not developed solely under the general powers of the agency but were specifically developed to comply with the directive of the TWC, §26.023, and to meet water quality standards required to be established under federal and state law. The standards are adopted under authority of the TWC, which authorizes and requires the commission to set water quality standards by rule. The TWC directs the commission to consider the existence and effects of nonpoint source pollution, toxic materials, and nutrient loading in developing water quality standards.

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 Texas Surface Water Quality Standards (30 TAC Chapter 307) establish instream water quality standards for Texas streams, rivers, lakes, estuaries, and other waterbodies such as wetlands. The commission is required to establish water quality standards in TWC, §26.023. The federal CWA requires states to publicly review and revise the state's surface water quality standards every three years. The adopted rules and revisions will satisfy federal requirements for a triennial review. The adjustments of criteria for dissolved metals and consideration of new procedures for human health criteria are needed to incorporate new EPA requirements. These revised criteria will be more protective of human health and provide a public benefit. The site-specific standards are needed to incorporate new sampling data and to establish the appropriate revisions in the rules so that permit issues related to specific waterbodies may be resolved. Site-specific standards more accurately describe the ambient quality of the water body. These site-specific standards also provide more accurate permit requirements that are protective of human health, in most cases economically affordable, and enhance water quality.

The specific purpose of this action is to satisfy state statute requirements, TWC, §26.023, and requirements of federal CWA, §303(d), and to more accurately assess water quality in the state and revise requirements to protect human health and water quality. The adopted rules substantially advance this stated purpose by establishing water quality criteria and requirements that are supported by site-specific studies, federal and state research, and statewide monitoring and sampling data. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because the amendments revising the state's surface water quality standards do not limit or restrict a person's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The executive director has determined that this rulemaking will affect an action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC, §505.11, and has considered applicable goals and policies of the Texas Coastal Management Plan (CMP) during the rulemaking process.

The commission has prepared a consistency determination for the adopted rules pursuant to 31 TAC, §505.22 and has found that the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The rulemaking is consistent with the CMP goal of protecting, preserving, restoring and enhancing the diversity, quality, quantity and functions, and values of coastal natural resources by establishing standards and criteria for instream water quality for Texas streams, rivers, lakes, estuaries, and other waterbodies such as wetlands. These adopted water quality standards and criteria will provide parameters for permitted discharges that will protect, preserve, restore, and enhance the quality, functions, and values of coastal natural resources. The rulemaking will also provide for clearer and more protective conditions for variances that will ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. These variance conditions will allow dischargers an opportunity to examine options for upgrades while maintaining water quality that will allow for human uses of the coastal waters.

The rulemaking will require wastewater discharge permit applicants to provide information and monitoring data to the commission so that the commission may make an informed decision in authorizing the discharge permit. Submission of such information and data will help ensure that the authorized activities in the permit comply with all applicable requirements. Thus, the rulemaking is consistent with the administrative policies of the CMP.

The rulemaking also provides clarity and identifies the circumstances in which the commission will consider and grant variances from the standards.

The rulemaking considers information gathered through the yearly assessments of water quality in the commission's Water Quality Inventory to prioritize those coastal waters for studies and analysis in reviewing and revising the state's surface water quality standards. The standards are established to protect designated uses of coastal waters including protection of uses for recreational purposes and propagation and protection of terrestrial and aquatic life. The rulemaking is consistent with the CMP's policies for discharges of municipal and industrial wastewater to coastal waters and how they relate to specific activities and coastal natural resource areas.

The adopted revisions to §307.2, Description of Standards; §307.3, Definitions and Abbreviations; §307.4, General Criteria; §307.5, Antidegradation; §307.6, Toxic Materials; §307.7, Site-specific Uses and Criteria; §307.8, Application of Standards; and Appendices A - E, as they pertain to designated tidal segments within the CMP boundary, will be submitted to the Coastal Coordination Council for recertification.

HEARING AND COMMENTERS

A public hearing was held in Austin, Texas on March 21, 2000 to receive public comments on the proposed revisions to Chapter 307. TNRCC staff members were available before and after the hearing to address specific questions from those who attended the hearing. It was also noted that the comment period for the proposed revisions would close at 5:00 p.m. on March 31, 2000.

The National Wildlife Federation, Texas Association of Metropolitan Sewerage Agencies, Texas Chemical Council (TCC), Texas Clean Water Action, Texas Committee on Natural Resources, Texas Municipal League, and several individuals complimented the work of the stakeholder workgroup which assisted the agency staff with the development of the proposed revisions.

The following commenters presented testimony in support of the proposed revisions which would create Segment 0615 in the Angelina River Basin with an intermediate aquatic life use designation: AFL-CIO of Texas; Angelina County; Angelina County Chamber of Commerce; Deep East Texas Development Association; Donohue Paper Company; Freshwater Anglers Association; City of Huntington; International Association of Machinists and Aerospace Workers; City of Lufkin; Lufkin Independent School District; Paper, Allied Chemical, and Energy Workers; Texas Forestry Association; Texas Forest Landowners Council; and Texas Logging Council. Six individuals also presented oral testimony in support of this proposed change.

The following commenters presented oral comments expressing opposition to the proposed revisions which would create Segment 0615 in the Angelina River Basin with an intermediate aquatic life use designation: Clean Water Action of Texas; Lone Star Chapter of Sierra Club; National Wildlife Federation; Texas Association of Bass Clubs; and Texas Committee on Natural Resources. Six individuals also presented testimony in opposition to the proposed change. Some of these commenters also voiced a concern about a proposed change in the criterion for aluminum and the potential this might have on water quality of Sam Rayburn reservoir.

The Colorado Municipal Water District expressed some concern about the proposed criteria for selenium in Red Draw Reservoir, but reserved comment as to support or opposition.

A representative of Lakeway Parents Concerned about Sewage Spray made comments expressing support of proposed changes related to aquatic habitat and wetlands. They were opposed to any changes to the rule which were interpreted as lower standards with particular concern expressed about proposed changes related to bacterial indicators.

The National Wildlife Federation, the Texas Committee on Natural Resources, and Texas Clean Water Action expressed concerns about the proposed revision related to contact recreation, both the procedure for determination of standards attainment and the proposed change in indicator organisms.

The TCC presented testimony which expressed support for proposed revisions related to temporary variances, temporary standards, and inclusion of the water effects ratio for site-specific conditions with respect to metals criteria. They expressed concern about the inclusion of human health criteria for several compounds and recommended that information related to hardness and pH values be moved from the rule to implementation procedures as guidance. The TCC also made comments related to specific issues included in the implementation procedures guidance documents including use of whole effluent toxicity testing, once-through cooling water discharges, and screening for TDS.

The Texas Committee on Natural Resources expressed opposition to any changes in standards that represented a lowering of criteria, particularly as it relates to Sam Rayburn Reservoir, the Nueces River Tidal, and the Pease River. They and Texas Clean Water Action supported the proposed revisions related to inclusion of habitat and wetland protection, as well as the listing of seagrass propagation as a designated use in coastal waters.

The Texas Municipal League and the Texas Association of Metropolitan Sewerage Agencies registered a concern about the method in the proposed rule to determine standards attainment and procedures used to establish a screening guidance document. They also expressed opposition to the inclusion of habitat criteria in the proposed rule and concern about procedures used for the development and application of the implementation procedures guidance document, particularly as it relates to stormwater permitting.

ANALYSIS OF TESTIMONY

In addition to the oral and written testimony presented at the public hearing summarized in the preceding section, other written comments were received before the close of the public comment period. The majority of the comments from individuals were received in the form of cards and form letters or petitions. These comments are addressed in the discussion which follows. The companies and organizations which submitted comments are listed along with the appropriate acronym used in the following discussion with respect to each of their comments.

Companies and organizations that submitted comments included: Department of Air Force (AF), Angelina County, Angelina County Chamber of Commerce (ACCC), Angelina & Neches River Railroad Company (A&NR), Aristech, City of Arlington (Arlington), Arthur Temple College of Forestry at Stephen F. Austin University (ATCF), City of Austin (Austin), City of Baytown (Baytown), City of Canyon (Canyon), Canyon Regional Water Authority (CRWA), City of College Station (CS), Colorado River Municipal Water District (CRMWD), Consultants in Epidemiology & Occupational Health (CEOH), City of Corpus Christi (Corpus Christi), Deep East Texas Council of Labor (DETCL), Deep East Texas Development Association (DETDA), City of Dennison (Dennison), Diamond-Koch (D-Koch), Donohue

Industries (Donohue), Dow Chemical Company (DOW), East Harris County Manufacturers Association (EHCMA), Eastman Chemical Company (Eastman), Eastman Kodak (EK), El Paso Public Service Board (El Paso PSB), Environmental Defense Fund (EDF), EPA, Fairbanks & Associates (F&A), United States Forest Service (USFS), Freshwater Angler Association (FAA), Friends United for a Safe Environment (FUSE), Galveston Bay Estuary Program (GBEP), Galveston Bay Foundation (GBF), Greater Houston Partnership (GHP), Gulf Coast Waste Disposal Authority (GCA), City of Henderson (Henderson), Houston Chronicle (HC), United States International Boundary & Water Commission (USIBWC), International Brotherhood of Electrical Workers (IBEW), City of Jacksonville (Jacksonville), Jones & Carter, Inc. (J&C), Kerr-McGee Corporation (Kerr), City of Kerrville (Kerrville), Lakeway Parents Concerned About Sewage Spray (LPCASS), Lloyd, Gosselink, Blevins, Rochelle, Baldwin, et al (Lloyd Gosslink), Louisiana Pacific Corporation (LP), Lower Colorado River Authority (LCRA), Lower Neches Valley Authority (LNVA), City of Lubbock (Lubbock), City of Lufkin (Lufkin), Lufkin/Angelina County Ecomonic Development Partnership (LACO), Lufkin Coca-Cola Bottling Company (LCCBC), Lufkin Convention & Visitors Bureau (LCVB), Lufkin Daily News (LDN), Main Street Lufkin (Lufkin), Martindale Water Supply Corporation (MWSC), City of Missouri City (Missouri City), Motiva Enterprises LLC (Motiva), City of Nacogdoches (Nacogdoches), Nacogdoches County Chamber of Commerce (NCCC), Nacogdoches Economic Development Corporation (NEDC), National Wildlife Federation (NWF), New Century Energies (NCE), City of North Richland Hills (NRH), Novartis, City of Odessa (Odessa), Paper, Allied-Industrial Chemical & Energy Workers (PACE), City of Pearland (Pearland), Perchlorate Study Group (PSG), Photo Marketing Association International (PMAI), City of Plainview (Plainview), Port of Corpus Christi Authority (POCCA), Public Interest Council of TNRCC (PIC), Rhodia, Inc. (Rhodia), Sabine River Authority (SRA), San Antonio Water System (SAWS), San Marcos River Foundation (SMRF), City of Schertz (Schertz), City of Sherman (Sherman), Sierra Club Houston Regional Group (SC-Houston), Sierra Club Lone Star Chapter (SCLS), Solutia, Inc. (Solutia), City of Sulphur Springs (Sulphur Springs), Tarrant Coalition for Environmental Awareness (TCEA), City of Temple (Temple), Texas AFL-CIO (TXAFL-CIO), Texas Association of Business & Chambers of Commerce (TABCC), Texas A & M University--Corpus Christi (TAMU-CC), Texas Center for Policy Studies (TCPS), Texas Chemical Council (TCC), Texas Coalition for Environmental Awareness (TCEA), Texas Committee on Natural Resources (TCONR), Texas Comptroller of Public Accounts (Comptroller), Texas Corn Producers Board (TCPB), Texas Department of Agriculture (Agriculture), Texas Department of Economic Development (TDED), Texas Department of Transportation (TXDOT), Texas Farm Bureau (TFB), Texas Forest Industries Council (TFIC), Texas Forestry Association (TFA), Texas General Land Office (TGLO), Texas Logging Council (TLC), Texas Metropolitan Sewerage Agencies (TAMSA), Texas Municipal League (TML), Texas Parks and Wildlife Department (TPWD), Texas Shrimp Association (TSA), Texas State Soil and Water Conservation Board (TSSWCB), Texas Utilities/Reliant Energy/Central & Southwest Services (Utilities), Texas Water Conservation Association (TWCA), TXU Electric and Gas (TXU), University of Texas Health Science Center--Houston (UTHSC), University of Texas at Tyler (UT-Tyler), City of Vernon (Vernon), City of Wichita Falls (WF).

Comments were also received from Senator Phil Gramm, Senator Kay Bailey Hutchison, Senator Drew Nixon, Congressman Jim Turner, and Representative Jim McReynolds. Comments were also received from the mayor and city council members of the City of Lufkin.

GENERAL COMMENTS

A variety of general comments were received which addressed broader or additional concerns than single sections of the proposed revisions to the water quality standards.

Several comments pertained to other rules, procedural documents, or water quality management activities of TNRCC.

UT-Tyler requested that water bodies listed as impaired under the federal CWA, §303(d), be left on the list until we are certain that the water is safe.

The commission responds that changes in water quality standards which affect the list of impaired waters will continue to be subject to a use-attainability analysis, public comment, and approval by EPA. In addition, the commission will seek substantial public input on changes to the list of impaired waters.

Lufkin requested that TNRCC continue to monitor the watershed of Sam Rayburn Reservoir for abuses from out-of-compliance septic systems, wastewater treatment plants, and other sources of chemical spills.

The commission responds that TNRCC will continue to obtain as much monitoring in the watershed as available resources will allow, and that such monitoring will include effluent sampling during inspections and additional measures of regulatory compliance.

An individual opposed additional regulations, associated fees, and other regulatory actions which are driving small business people out of business.

The commission acknowledges that care is needed to address any potential burden that environmental regulations impose on small businesses and other affected entities. The commission also notes that water-quality goals set by the standards apply broadly to water bodies in the state, and the revisions to the water quality standards do not impose specific, direct costs to small businesses such as additional fees. The potential indirect economic impact of the proposed standards were evaluated to the extent possible, and these evaluations were included in the preamble to the proposed revisions.

Several of the comments were recommendations for new additions to the standards. These recommendations included the development of numerical criteria for nutrients (TCONR), salinity standards for bays and estuaries (TCONR), toxic criteria for MTBE (LCRA), a new narrative criterion for assessing the biological conditions of water bodies (EPA), and adoption of regional indices of biological integrity for fish (LCRA).

The commission responds that narrative nutrient criteria will be considered for the next triennial revision of the water quality standards in coordination with the ongoing development of EPA guidance and requirements. Salinity criteria and freshwater inflow needs for bays and estuaries remains a broader issue, which may be considered for future revisions of the water quality standards in accordance with recommendations from ongoing interagency task forces. Toxic criteria for MTBE were preliminarily considered for the current standards revisions, but additional information and federal guidelines are needed before proposing and adopting criteria for MTBE. The commission will continue to use 15 micrograms per liter of MTBE for general screening purposes in drinking water sources. This aesthetic criterion is based

on studies which indicate that MTBE can cause detectable taste and odor in water at concentrations greater than 15 micrograms per liter. New information will be evaluated and considered for screening purposes as it becomes available. With respect to assessing biological conditions, the commission notes that the adopted addition of biological integrity as a means of assessing standards compliance in §307.9(f) does establish consideration of biological conditions. The development of regional indices of biological integrity will be considered in updates of the procedures for conducting receiving water assessments and related documents.

Several commenters asked that the commission not lower water quality standards and continue to protect water quality. Thirty-five of these comments were from individuals who submitted a form letter. The NWF commented that reference sites for evaluating appropriate standards in individual water bodies did not adequately reflect background conditions, and that many reference sites were impacted by human-induced point and nonpoint sources of pollution. One commenter thanked the commission for controlling pollution.

The commission responds that the adopted revisions include major provisions which result in more stringent water quality standards, such as most of the adopted changes to statewide toxic criteria to protect human health criteria. Most of the other changes in statewide standards are clarifications of existing provisions or the addition of new provisions which do not decrease the stringency of the water quality standards. A number of the adopted changes in site-specific standards in Appendices A, D, and E of §307.10 do establish criteria which are less stringent. The great majority of these changes use site-specific information and/or the results of use-attainability analyses. The use-attainability analyses in these specific instances rebut the conservative presumptions which apply "across-the-board" until such site-specific information is available. In order to implement protective statewide presumed standards, such as the presumed "high aquatic-life use" for perennial steams in §307.4(h)(3), the standards include reasonable provisions and mechanisms for addressing water bodies where standards cannot be reasonably attained under relatively unimpacted conditions. Criteria for particular water bodies are changed only if sufficient scientifically valid data confirms that the existing site-specific or presumed standards are inappropriate. With respect to the validity of reference sites to establish relatively unimpacted background conditions, the commission will continue to devote substantial resources to establish the best reference conditions available for use attainability analyses and continue to improve and clarify sampling procedures and evaluations to assign site-specific standards. Additional discussion concerning site-specific standards changes is provided in the response to comments on §307.10.

The NWF expressed concern that key components of the water quality standards were being moved to the implementation procedures and that because of this, there would be less public input. TCONR commented that the standards implementation procedures should be considered as a rule.

The commission responds that the standards implementation procedures contain a comprehensive level of detail and guidance which is not generally appropriate for the water quality standards. The commission's view is that the implementation procedures should be less prescriptive and more flexible than the rules set forth in Chapter 307. In the concomitant revisions of the standards implementation procedures, numerous changes are being considered to reduce and avoid inflexibility in the guidance. Significant opportunity for public input into revisions to the implementation procedures was provided and will continue to be provided in the future.

The NWF expressed concern that changes in site-specific standards to reflect actual aquatic-life uses of less than high quality also involve a corresponding loss of "Tier 2" antidegradation protection for these water bodies; and this loss of antidegradation protection was not considered when evaluating the changes.

TNRCC responds that specifying categories of water bodies for Tier 2 protection under the antidegradation policy is in accordance with EPA regulation in 40 CFR Part 131, as further explained in the Advanced Notice of Public Rulemaking in 40 CFR Part 131 (*Federal Register*, July 7, 1998). The commission notes that coupling the applicability of the antidegradation policy with designating aquatic-life uses in §307.4 and §307.10 ensures that the great majority of the perennial waters in the state are afforded Tier 2 protection and that a change in the applicability of Tier 2 is determined through a use-attainability analysis and site-specific standards revision in §307.10. The commission will continue to evaluate the applicability of Tier 2 of the antidegradation policy, in order to ensure that appropriate water bodies are included. Additional discussion is provided in responses to comments on §307.10--Appendix A.

Several commenters, in addition to their own comments, indicated their support of other organizations' comments. Six commenters (Cities of Odessa, Pearland, Canyon, Jacksonville, Kerrville, and North Richland Hills) supported comments made by TML and TAMSA. Two commenters (SAWS and Vernon) supported the technical comments of TAMSA. Sulphur Springs supported the TML's comments. DOW supported the comments of the TCC. TCEA echoed the comments made by TCONR.

SECTION 307.2

GCA, EHCMA, GHP, DOW, the Utilities, EPA, TCC, and Solutia commented that they support the proposed revisions to §307.2 since it allows temporary variances and temporary standards. Some of these commenters described the processes as a way to resolve permitting problems in limited, problematic situations.

The commission agrees with these commenters.

The EPA mentioned that it will continue to review and approve variances and variance extensions.

The commission acknowledges this comment and notes that EPA and the commission have a formal memorandum of agreement which describes this oversight requirement, as part of the existing TPDES permitting program. This agreement is described in §307.2(d)(5)(C).

The SC-Houston recommended that the commission not allow extensions to variances and indicates opposition to the proposal for temporary standards, since temporary standards encourage the commission to lower standards for industry or large polluters.

No change to the rules has been made based on these comments, because temporary variances are needed to avoid unfair imposition of final effluent limits in a permit when evidence exists that the current standard is inappropriate. The allowance for a variance, when justified, is particularly important when presumed standards are stringent. An example is the presumed standard of high quality aquatic life for perennial, unclassified

streams. In those cases where this standard can't be attained even under relatively unimpacted conditions, it would be unfair to use this presumed standard to set a final permit limit that might be irrevocable under the antibacksliding provisions of the federal CWA. Extensions to variances are sometimes necessary to allow time for the commission to adopt site-specific revisions to the surface water quality standards. Typically, this is done on a triennial basis requiring a substantial investment of time and commission resources. Therefore, extensions to variances are needed when a permittee has conducted a study with due diligence and the results support a less stringent standard. The results supporting the less stringent standard cannot be put into effect until completion of the revisions to the water quality standards. The commission is unaware of any administrative procedures it could use as an alternative to accomplish the same result of authorizing discharges while a site-specific standard is being considered and formally proposed. The provision allowing for temporary standards is consistent with federal water quality regulations. The commission anticipates situations where the provision may be a necessary administrative process to resolve complex permitting issues. For instance, technology may not have advanced to the point where any discharger into a water body can practically meet a standard. However, at regular intervals, the ability to attain the standard must be reviewed and renewed. This affords all interested parties the ability to participate in the process to renew or remove any temporary standard. The commission agrees that extensions to variances should be provided only in cases where justified and where needed to allow time for revisions of the standards.

The SC-Houston recommended that §307.2(d)(5)(E) be revised to indicate that a compliance schedule "must" be specified in a successive permit.

The commission responds that the option to disallow an additional compliance period is needed. As proposed, a compliance schedule will not be allowed when the permittee has not complied with the permit terms relating to the temporary variance.

The SC-Houston recommended that the commission, rather than the executive director, make the decision on a temporary variance. In this manner, the decision is subject to a more open forum.

The commission agrees with the commenter and notes that the proposed rule, as well as the existing practice of the commission is consistent with the commenter's recommendation. This requirement in §307.2(d)(5) states that "...the commission may allow a temporary variance to the water quality standards in a permit for a discharge of wastewater."

The Utilities recommended that proposed §307.2(d)(5)(B) be modified to clarify which public notices will include the proposal of a temporary variance. The Utilities noted that some variance requests will occur after an application is administratively complete and the "Notice of Application and Preliminary Decision" public notice is the most appropriate time for soliciting comments on a proposed variance.

The commission agrees with the general intent of the commenter. However, the specific term "Notice of Application and Preliminary Decision" may not be applicable to all pending and future permit actions, so the proposed language is slightly changed to indicate that a variance request will be included in a public notice during the permit application process.

The GBF and NWF recommended that §307.2(d)(5) be modified to strengthen the proposed language to indicate that a variance request must be justified based upon scientific information.

The commission agrees with the commenters and has made the requested change.

The NWF recommended that §307.2(d)(5)(A) be modified to clearly preclude a temporary variance in a permit which would be amended to allow for an expansion and further loading in a discharge to which the variance pertains. NWF suggested it is unclear what the term "existing" discharge means.

The commission responds that the term "existing discharger" refers to a discharger that is discharging at the time of a permitting action. This could include a discharger seeking an expansion in its pollutant discharge authorization. It is atypical for the commission to process or to approve a variance that would allow an increase in loading in the interim while the appropriate water quality standard is under investigation. Granting such a variance places a higher risk both on existing water quality, which might deteriorate relative to the existing standard, and on the discharger, who will construct facilities that may or may not be able to meet the eventual water quality goal. However, the commission disagrees that "existing discharger" should be narrowed to include only existing authorized loadings. Also, a measure of flexibility is appropriate. For example, there may be a need to address expansion caused by municipal growth, where there is a preliminary determination that the existing standard is not appropriate. Therefore, the commission retains the flexibility to address specific situations. Due to the potential risk to water quality, this type of case-by-case determination will necessarily be used only in rare instances where other administrative or technical remedies are not feasible and where adverse consequences to water quality are not anticipated.

The TML/TMSA recommended that §307.2(d)(5)(C) be modified to strike the wording that indicates the EPA must approve temporary variances.

The commission responds that EPA approval remains in the adopted rule. EPA and the commission have a formal memorandum of agreement which describes this oversight requirement, as part of the existing TPDES permitting program.

The NWF and TPWD recommended that §307.2(d)(5)(D) be modified to specify that any permit which is the subject of a variance must protect existing uses under Tier 1 of the antidegradation provisions.

The commission notes that such protection is afforded under its existing and proposed antidegradation policy. However, the commission agrees that further clarification of its intent is needed and has modified the language to incorporate the request.

The NWF recommended that §307.2(d)(5)(D) be modified to specify that a permit containing a temporary variance not be administratively continued when a permittee has failed to comply with the variance provisions of an expired permit.

The commission must comply with the Texas Government Code, §2001.054(b), of which prevents a permit from expiring if a permittee makes timely and sufficient application to renew a permit or for a new permit for an activity of a continuing nature. Commission rules §305.63(a)(4) and §305.65(a)(4) reflect this statutory requirement. These provisions could result in a permittee's authorization to discharge, under a permit containing a variance, to continue in effect until a final decision is made on the renewal

application. The commission plans to take action to avoid or minimize this type of administrative continuance when a permittee has failed to comply with the terms of its variance.

Under §305.63 and §305.65, a permittee must apply to renew its permit at least 180 days before the permit's expiration date. When renewal applications are received, it has been the agency's historical practice to promptly process the applications. The agency plans to continue this practice. The commission views the failure to adhere to the variance requirements as a serious matter, considering the potential impact of a discharge which could degrade existing water quality in receiving waters. The commission believes the response to this situation should be to promptly process the application to renew the permit with the effluent limitations based on the existing standard and to also consider enforcement action against the discharger due to noncompliance with the variance permit requirements.

The commission amended this section to revise the variance procedures in a manner that complements the assumption of National Pollutant Discharge Elimination System (NPDES). The terms and procedures for variances changed slightly with NPDES delegation. The commission no longer sets final effluent limitations into a permit with a variance, but the rule has been amended to specify that in the subsequent permit, a permittee will not receive a compliance period and an extension of interim effluent limitations when the requirements of the variance are unfulfilled.

The NWF recommended that §307.2(d)(5)(E) be clarified to describe that a variance extension must be approved only when a study supporting the request has been completed by the permittee and the commission agrees the study shows the standards change is justified. TPWD commented similarly and stated that language is needed to make it clear that the extension of a variance requires commission approval.

The commission agrees with these comments and notes that both provisions currently exist and are retained in the adopted amendments. The commission has modified the adopted language to make it clear that the extensions are approved by the commission and that the basis of the approval is a completed study supporting the standards change.

The EPA recommended that §307.2(e) and (g) be revised to include up-to-date references to the standards implementation procedures.

The commission agrees and the appropriate wording changes to both subsections have been made, as requested by the commenter.

The NWF recommended that the commission revise proposed §307.2(f) to specify that interim effluent limitations are not allowable in situations where a permittee is requesting an increase in loading or discharge volume.

The language referred to in this subsection was not proposed for revision, and the existing language is reasonable and appropriate. The existing rule identifies that interim discharge limits *may* be established upon permit amendment or permit renewal. The commission establishes interim effluent limitations only when necessary to allow time for construction of new, more stringent treatment which might be necessary when a new standard or a revised standard is imposed by commission requirements. It does not allow interim effluent limitations when a permit amendment for an expansion is the sole purpose for the construction of new treatment. However, the existing rule language addresses situations where the following two situations occur at the same time: (1) a permittee must expand its treatment capability, for instance due to population growth, and (2) the commission must implement a new, more stringent standard requiring additional treatment capability. For these reasons, the commission has not revised the rule based upon this comment.

The NWF suggested that the commission revise proposed §307.2(f) to specify that the "executive director and the commission, as appropriate" be named as decision makers who may establish interim effluent limitations. Austin suggested that the term "executive director" be defined in the rule.

In response, the subsection has been revised to note that either the executive director or the commission will act to establish interim effluent limitations. The term "executive director" has not been added to the definitions, since this term is already defined in Chapter 3 of this title (relating to Definitions). There, all general terms used throughout commission rules are established.

Austin recommended that proposed §307.2(g) specify that a temporary standard has certain geographical boundaries.

The rule as proposed does describe this mechanism as applying to particular water bodies. However, to better clarify how the mechanism will be implemented, the commission has revised the subsection to indicate that specific reasons and additional procedures for justifying a temporary standard are provided in the standards implementation procedures.

The SC-Houston requested that proposed §307.2(g) define what is meant by "reasonably attained."

The commission responds by removing the word "reasonably." The question of whether a standard under question can be attained is already described in detail in federal regulations cited in this subsection of the rule. Also, to better clarify how the mechanism will be implemented, the commission has revised the subsection to indicate that specific reasons and additional procedures for justifying a temporary standard are provided in the standards implementation procedures.

SECTION 307.3

Numerous comments were received on proposed changes to the definitions in §307.3.

With respect to the definition of "attainable use" in §307.3(3), Austin and POCCA requested additional guidance and procedures to be used to determine and review attainable use. SC-Houston asked that the term "reasonably achieved," which is used in the definition, also be defined. TML/TAMSA suggested adding an additional clause to the definition to indicate that the attainable use is " ... the designated use contained in the standards unless it is determined that attaining the designated use is not feasible because of the factors identified in 40 CFR Section 131.10(g)."

The commission responds that guidance and procedures to determine and review attainable use, including how to determine what can be "reasonably achieved," are described in the standards implementation procedure and related documents. The wording of the adopted definition has been changed in order to note that the attainable use may not be equivalent to the designated, existing, or presumed use.

DOW, Eastman, TML/TAMSA, and TCC commented on the proposed revision of the definition of "best management practices" (BMPs) in §307.3(a)(6). GHP and TCC requested that examples of BMPs be removed. Novartis specifically requested examples

of agricultural BMPs. Eastman and TACC stated that BMPs are site-specific, and Sulphur Springs stated that BMPs should be based on demonstrated measures. SC-Houston wanted "maximum extent possible" to be defined. GHP, TCC, and Utilities requested the removal of "maximum extent possible" from the definition of best management practices.

In response, the commission concurs that BMPs are site-specific and are based on industry standards. Which BMPs are used by the discharger are normally at the discretion of the discharger, as long as the BMP achieves the standard. If a BMP is proven ineffective, alternatives or additional BMPs may be recommended by the commission. BMPs are a preventative measure and do not necessarily require a demonstrated corrective need. The term "maximum extent practicable" is retained, since it is intended to provide for flexibility and effectiveness of BMPs and to note that BMPs should be reasonably attained. The definition of best management practices is adopted as proposed.

For the definition of "bioconcentration" factor in §307.3(a)(8), EPA requested that the definition state that the mechanism for uptake in bioconcentration is only through water.

In response, the commission adopts a definition which indicates that a bioconcentration factor applies to a chemical "... which is absorbed directly from the water."

Austin requested the term "biological integrity" in §307.3(a)(9) be related to the species composition, diversity, and functional organization of a community of organisms that would occur if a water body were relatively unaffected by human activities. TPWD requested that biological integrity be related to "that of the natural habitat of the region."

In order to address these requests, the phrase "contributes to overall stability and ecological vitality" was replaced by "in an environment relatively unaffected by pollution" in the adopted definition of biological integrity.

Concerning the definition of "chronic toxicity" in §307.3(a)(10), EPA recommended that the last sentence be modified to more explicitly indicate that seven or more days is applicable to "some chronic toxicity tests" rather than to "chronic toxicity."

In response, the commission has changed the definition of chronic toxicity as requested, since toxicity tests are the primary means of measuring chronic toxicity.

The EPA recommended using 7Q10 or 4Q3 streamflow in defining "critical condition" in §307.3(a)(15).

The commission responds that the critical condition for many of the numerical criteria is specified in §307.8 to be 7Q2 streamflows (which are low flow conditions that recur for a seven-day period once every two years instead of once every ten). A 7Q2 critical condition is appropriate for streams in Texas for several reasons: (1) the Texas Surface Water Quality Standards apply relatively stringent criteria for toxicants, dissolved oxygen, and other substances to any perennial stream, and the conservative assumptions of these criteria mitigate exceedances at low stream flows with a recurrence at two-year intervals; (2) assumptions for dissolved-oxygen models are also relatively stringent; (3) procedures to calculate toxic effluent limits are also stringent--particularly with respect to incorporating effluent variability; (4) major discharges in Texas are required to pass 24-hour biomonitoring tests with undiluted effluent; (5) streams and rivers where major discharges occur are typically effluent dominated during average dry-weather flows, and even using 7Q2 as the critical condition, major discharges in Texas are frequently required to achieve highly advanced treatment for biochemical oxygen demanding substances and for ammonia, and to pass effluent biomonitoring for chronic toxicity with little or no instream dilution allowed; and (6) intermittent streams are defined in the water quality standards as streams having a 7Q2 flow of less than 0.1 cfs, and less stringent criteria for dissolved oxygen and toxicants apply to intermittent streams; logically, the frequency at which numerical criteria may be exceeded should be the same as the frequency of near-zero flows which are used to define when streams are intermittent.

The TPWD recommended modification of the definitions of "*E. coli*," "Enterocci," and "fecal coliform" in §307.3(a)(19), (21), and (24) to note that these bacteria indicate "the potential presence of pathogens" rather than "potential pathogens."

The commission agrees that the suggested phrase is more accurate, and this change has been made in the adopted definitions of *E. coli*, Enterococci, and fecal coliform.

The EPA, NWF, SC-Houston, TCONR, and TPWD commented on the definition of "existing use" in §307.3(23). Commenters were particularly concerned that the definition as proposed did not clearly indicate that existing uses should be those uses which exist on or after November 28, l975 as specified in EPA regulations.

The adopted definition of "existing use" has been reworded as suggested by these comments.

Numerous comments were received concerning the definitions of "general recreation" in §307.3(a)(26) and "high-use recreation" in §307.3(a)(29). The NWF, TCPS, and TPWD, Austin, and EPA expressed concern about the imposition these categories for contact recreation, and Austin, EPA, NWF, and TPWD expressed concern about how these new categories of recreational suitability would be determined. The Utilities supported the new recreational use categories.

In response, the commission notes that the approach of measuring recreational indicators only during periods when recreation is physically and hydrologically suitable will continue to be developed for a future revision of the water quality standards. However, the definitions of general and high-use recreation have been deleted from the adopted rule for this triennial revision. A more detailed presentation of comments and the commission's responses on recreational uses and indicators is provided in the following discussion concerning §307.7(b)(1).

For the proposed definition of "incidental fishery" in §307.3(a)(30), GHP and TCC requested that evidence of an existing or potential fishery be demonstrated as a requirement of an incidental fishery. Utilities and Solutia specified that evidence of a commercial or recreational fishery be a requirement for incidental fishery. DOW suggested that the definition of incidental fishery should be applied only to waters which are open to the public, and that ditches and waste streams on private land are not meant for recreational or commercial fishing.

The commission responds that the existence of an aquatic life "use" is a reasonable determination of water bodies that constitute an incidental fishery, and this approach provides a practical means of assessing when criteria to protect an intermittent fishery should be applied. Streams which are large enough to have clear evidence of recreational fishery would be subject to the more stringent criteria that apply to a sustainable fishery. Because of the mobility of fish, it is difficult to protect fish tissue from

contamination in waters with public access without protecting an incidental fishery which doesn't have public access. Therefore, the definition of incidental fishery is adopted as proposed.

The SC-Houston opposed inclusion of the proposed definition of "intermittent with perennial pools" in §307.3(33). TML/TAMSA requested that a quantitative basis for the determination that perennial or persistent pools are present.

The commission responds that this definition was proposed in the standards because more stringent criteria are applicable to intermittent streams with perennial pools that create an aquatic life use. The commission does note that further evaluation is needed of procedures to better define perennial pools. However, this evaluation is not sufficiently well defined to add to the water quality standards at this time, and the definition of intermittent with perennial pools is adopted as proposed.

In the proposed revisions to the definition of "mixing zone" in §307.3(37), EPA asked that the definition specify that chronic toxic criteria may be exceeded in the mixing zone but not beyond it. The NWF commented that the definition creates ambiguity about which criteria are not applicable in mixing zones.

The commission agrees with the comments, and the adopted definition of mixing zone defines the applicability of chronic toxic criteria and also includes a more specific reference to the section of the standards where standards applicability in mixing zones is described.

Austin supported the proposed removal of the definition of "no significant aquatic life use" in §307.3.

The commission responds that the term "no significant aquatic life use" is removed, and that the corresponding proposed definition of "significant aquatic life use" will remain in the adopted rule.

Concerning the definitions of "pollutant" in §307.3(42) and "storm water discharge" in §307.3(58), there were a multitude of comments opposing the exclusion of agricultural runoff in the definitions. Commenters opposed to the exclusion of agricultural runoff from the definition of pollutant included Austin, CS, Corpus, Dennison, EPA, Henderson, NWF, SC-Houston, Sulphur Springs, Plainview, Missouri City, and WF. CS, Corpus, Dennison, Sulphur Springs, and WF opposed the exclusion of agriculture from the definition of storm water discharge. The majority of the comment letters indicated that the exclusion of agriculture from these definitions would result in an unfair burden to municipalities, particularly for water bodies listed as impaired, to control nonpoint source pollution and reduce loading. TCEA and TCONR also suggested that the definition of pollutant was too narrow and provided broader, more inclusive definitions. POCCA suggested excluding decant water from dredged material placement areas in the definition of pollutant. NWF commented that the definition of storm water discharge should be excluded from the standards.

The commission responds that the proposed definition of pollutant is consistent with the definition in TWC, §26.001, which includes the agricultural runoff exclusion. However, that definition is not appropriate for the term as it is used in the water quality standards. The term pollutant was not defined in the TWC until the agency assumed the NPDES program on September 14, 1998, and "pollutant" has not been defined in this chapter. As used in Chapter 307, "pollutant" has never excluded agricultural runoff.

The commission agrees with the commenters that the statutory definition of "pollutant" that was adopted in 1998 to delineate the limits of the NPDES permitting program is too narrow in scope for use in this chapter. The exclusion of agricultural runoff is inappropriate due to its inconsistency with existing TWC, §26.023, which states "...the commission shall consider the existence and effects of nonpoint source pollution...in developing water quality standards...." Therefore, the definition of pollutant has been deleted from Chapter 307. In its place, the commission is adopting the definition of "pollution" as it is stated in TWC, §26.001. Additionally, the term "pollutant" has been replaced with "pollution" in all appropriate places throughout this chapter. The term was suggested in comments on proposed §307.5, and is included in these definitions for convenience and clarity.

With respect to other comments, the commission responds that the proposed specificity of the definitions provides a useful tool for the permitting process, and the definition is included in the adopted revisions. Decant water from dredged material cannot reasonably be excluded from the definition of pollutant due to the potential to contribute total suspended solids in runoff.

The NWF commented that the proposed definition of "point source" in §307.3(43) is not necessary.

The commission responds that although this term is defined in the TWC, §26.001(21), the inclusion of the definition provides a convenient reference in §307.3, and the proposed definition of point source is adopted.

The NWF requested that the proposed definition of "public drinking water supply" in §307.3(45) be broadened to also include water bodies that are designated for this purpose (even if a drinking water intake is not yet in existence).

The commission agrees and the suggestion was incorporated into the adopted definition of public drinking water supply.

The NWF commented that the proposed definition of "saltwater" in §307.3(46) is overly broad and should be worded so that measurable tidal influence constitutes saltwater, that is provided that water bodies with a salinity of less than two parts per thousand are not normally considered to be saltwater.

The commission responds that the two measures of saltwater (tidal influence plus salinity) need to be available independently in order to adequately assess water bodies with limited data, and the proposed definition of saltwater is adopted.

The EPA, FUSE, GBF, UT-Tyler, TCEA, TCONR, TCPS, and TPWD supported the definition of "seagrass propagation" in §307.3(48) as an aquatic life use. One hundred twenty-three individuals submitted letters supporting the inclusion of "seagrass propogation" as an aquatic life use. An additional 287 individuals included support of this use as one of the proposed changes. The EPA, GBF, NWF, and TCPS suggested that this use be designated for specific water bodies in Appendix A of §307.10. EPA, GBF, NWF, TCPS, and TPWD recommended protection of seagrass use where seagrass historically occurred. SC-Houston requested clarification of the term "significant stand."

The commission responds that the term "existing use" is added in the adopted definition of seagrass propagation. The term "existing" incorporates consideration of historical uses, since existing uses are defined in §307.3 as those occurring since November 28, 1975. Inclusion of seagrass propagation in Appendix A will be considered in the next triennial revisions due to the timing of request late in the revision process and to allow time for full public review and comment. The term "significant stand" is left in

the adopted definition as proposed, since additional experience with applying seagrass use is needed before a more quantified definition of "significant" can be developed.

The TPWD commented that the definition of "significant aquatic life use" in §307.3(53) should include the provision that "some provision to protect aquatic life applies to every water body in the state" without noting exceptions to this provision.

The commission responds that the intent of citing exceptions to protection of aquatic life was to note that criteria for acute toxicity may be exceeded in zones of initial dilution at discharge points. However, the commission concurs that the general statements in this definition will not contradict the exemption afforded to zones of initial dilution, and this suggestion is incorporated into the adopted definition of "significant aquatic life use."

With respect to the definition of "surface waters in the state" in §307.3(60), EPA requested that the territorial limits of surface waters be more clearly explained.

In response, the commission adds a note in the definition of "surface waters in the state" that territorial limits of the state are from the mean high water mark out to 10.36 miles into the gulf. The commission acknowledges that EPA contends the state's delegated NPDES permitting authority extends only three miles offshore. Even if this is true, and the commission does not agree that it is, that is a matter of the boundaries of the administrative powers delegated under a particular statute; it does not change or limit the state's territorial jurisdiction.

With respect to the proposed definition of "total maximum daily load" (TMDL) in §307.3(64), EPA considered the definition acceptable but noted that a previous draft of the revised standards contained a more descriptive definition. TPWD and USIBWC commented that the term "limit" in the definition should be changed to "load."

In response, the commission has changed "limit" to "load" in the adopted definition of total maximum daily load, but the definition is not expanded in order to avoid possible contradictions with other, more detailed state and federal definitions of the same term.

The EPA suggested that the definitions of "total toxicity" in §307.3(67), "toxicity" in §307.3(68), and "toxicity biomonitoring" in §307.3(69) are confusing and should be consolidated.

The commission responds that these definitions are needed to explain the different terms which are in common usage to describe effluent toxicity testing.

Several comments addressed proposed revisions to the definition of "water-effects ratio" in §307.3(70). Eastman, TCC, and Utilities suggested that the term "lab toxicity tests" in the definition would be more accurately stated as "synthetic laboratory dilution water." POCCA suggested deleting the sentence which stated that "the water-effects ratio can be used to establish site-specific acute and chronic criteria to protect aquatic life from toxicity."

The commission responds that the sentence describing the general use of water-effects ratio is useful to provide a basic context for the purpose of the test. The commission concurs that the term "synthetic laboratory dilution water" is more accurate than "lab toxicity tests." This change is incorporated in the adopted definition but without the term "synthetic" because it would preclude the use of other dilution water that was not synthetic.

With respect to the proposed definition of "wetlands water quality functions" in §307.3(73), SCLS, Austin, TCONR, GBF, FUSE, TCPS, NWF, SC, TCEA, TGLO, TPWD, UT Tyler, and 287 individuals supported adding the definition. DOW, GHP, POCCA, TWCA, and Utilities objected to adding the definition indicating that it was unnecessary, since wetlands are already explicitly included in the standards. There were also concerns about the implications of habitat protection, lack of defined criteria for wetlands, and whether there was adequate authority to regulate water quality by regulating land use. SC-Houston suggested that shading be included as a wetlands water quality function. TCPS suggested that the definition should apply to existing, designated, and attainable uses. NWF suggested that the definition be expanded by including habitat for terrestrial life (in addition to aquatic life). POCCA suggested that the definition note that wetland water quality functions are affected by size, location, degree, and type of cover and proximity to other similar landscape features.

The commission responds that wetlands are statutorily classed as waters in the state and serve important water quality functions that are justifiably protected under the water quality standards. The definition describes many of those functions, which directly and indirectly, protect and maintain water quality. Habitat beneficial to aquatic and aquatic-dependent organisms is an attribute of intact, functional wetlands. Wetlands are waters in the state, and as with other water bodies, their protection requires thoughtful planning of surrounding land use. The commission also responds that suggestions for further additions or qualifications may have merit for further public evaluation, but the definition as proposed is reasonably inclusive of primary wetland functions. The proposed definition of wetland water quality functions is adopted.

Several commenters suggested definitions of terms which were not in the proposed revisions of 307.3. SC-Houston suggested that "riparian habitat" and "habitat protection" be defined, and that a broader definition of "fishery" be included. NCE suggested that "geometric mean" be defined. TCC and Utilities suggested a definition for "ephemeral stream." EPA suggested that a definition of "osmotic imbalance" be added with respect to effects of dissolved salts on toxicity tests.

The commission responds that these suggestions for new definitions may be potentially useful. However, the existing and proposed definitions establish an adequate explanation of terms for this triennial revision of the water quality standards. After additional development, definitions for these terms can be publicly considered at the next revision of the standards.

The commission adopts §307.3 with the previously noted changes and the definitions renumbered appropriately.

SECTION 307.4

The NWF objected to the language used to indicate that properly authorized dredge and fill activities were not a violation of the aesthetic parameter for settleable solids at §307.4(b)(3). They argued that the proposed language clarified that dredge and fill activities were exempt from the requirements of §307.4(b)(3), without providing for the evaluation, minimization, and mitigation of impacts as appropriate. The Utilities commented that the language was ambiguous and implied that activities authorized by a 404 permit might still violate water quality standards. They expressed concern that this raised issues of finality of a 404 permit.

The commission agrees with these comments and has modified the language. It is the commission's intent to indicate that activities authorized under Section 404 of the federal CWA be evaluated for compliance with the mitigation sequence of avoidance, minimization and compensatory mitigation. The mitigation sequence is a federal requirement under the 404(b)(1) Guidelines. The state also has adopted those criteria for evaluating whether a proposed Section 404 permit should be certified under Section 401 of the CWA as consistent with the antidegradation policy of this chapter. Since both the federal and state processes are triggered by the federal CWA and include the mitigation sequence, the revised §307.4(b)(3) simply states that this section does not prohibit dredge and fill activities that are permitted in accordance with the federal CWA.

The EPA and NWF recognized a typographical error in the §307.4(d) reference to §307.4(k).

Section 307.4(k) was changed to §307.4(l). Section 307.4(d) has been corrected to reflect this change.

The NWF suggested making it clear in §307.4(d) that "additional" toxic criteria are identified in other sections of these rules.

The commission agrees with this and, consistent with the existing rule language, has retained "additional" in the description of other toxic substance requirements.

The SC-Houston supported the proposed language relating to acute and chronic toxicity in §307.4(d). Utilities and TCC supported the changes to §307.4(d) with some suggested modifications to address mixing zones and the zone of initial dilution. Eastman, GHP, EPA, Utilities, and TCC raised issues with the applicability of acute criteria to all waters in §307.4(d). NWF suggested that all references to aquatic life in this section be changed to terrestrial or aquatic life to be consistent with the first sentence of the section.

A reference to the detailed discussion of acute criteria at §307.8(a)(2) was added to §307.4(d) to make the two sections consistent. The commission disagrees with changing all references to aquatic life to include terrestrial life. The first sentence of this section establishes the general criteria for toxic substances. Numeric criteria for aquatic life and human health are specified in §307.6. While these criteria are generally protective of terrestrial or aquatic life, the commission reserves the opportunity to make case specific determinations of the necessary level of protection for specific toxic substances for terrestrial life under the general criteria established in the first sentence.

The EPA suggested adding a reference in §307.4(e), concerning the general narrative criteria for nutrients, to the TNRCC screening guidance for assessing instream compliance with the water quality standards.

The commission responds that assessment of nutrient conditions is an important component of applying the narrative protections of §307.4(e). However, instream assessment of the other potential pollutants in the general criteria is also important, and the applicability of the guidance document to narrative parameters is noted in §307.9(g).

The EPA recommended adding language to §307.4(f) to address temperature requirements for cooling water impoundments.

The commission responds that the existing narrative provides an appropriate approach for cooling water impoundments. Existing language of this section states that cooling water impoundments are exempt from temperature requirements, and must not interfere with the reasonable use of such waters. The commission did not propose changes to this language and cannot consider changes of this nature for adoption.

The SC-Houston expressed concern over the term "balanced and desirable" in §307.4(g)(3). They commented that it was arbitrary and would be used as a weasel phrase. They requested definition of the term.

The commission agrees that there is a need for consistent use of terms relating to aquatic life uses. The commission has modified the language in this section to make it clear that salinity gradients in estuaries will be maintained to support attainable estuarine dependent aquatic life uses.

J&C opposed the presumption in §307.4(h)(3) that perennial streams have high aquatic life uses. They acknowledged the opportunity to set site specific standards where the presumption can be rebutted but suggested that effluent dominated streams, particularly in the Houston area, be presumed to have limited aquatic life uses. NWF commented that the term "maintained" in the last sentence of §307.4(h)(3) created ambiguity regarding attainable uses and suggested the term should be replaced with "protected."

The commission disagrees with changing the presumption of high aquatic life use for perennial streams. The aquatic life use presumptions are based on statewide ecoregion studies. While the presumption language is shown as a new section, this presumption is not changed from the existing rule. To help address streams where attainable life uses are less than high, TNRCC has conducted a number of receiving water assessments and established site-specific standards in Appendix D in §307.10. The commission agrees that the term protected is more appropriate because it includes attainable uses and existing uses. This change has been made to the rule.

The SC-Houston commented that they were opposed to the presumption that intermittent streams have no significant life. TPWD raised concerns whether the presumption that intermittent streams with perennial pools have limited aquatic life uses affords sufficient protection for those streams. TPWD also questioned whether the presumption regarding intermittent streams with perennial pools had been validated by studies and data. NWF commented that the term "maintained" in the last sentence of §307.4(h)(4) created ambiguity regarding attainable uses and suggested the term should be replaced with "protected."

The commission disagrees with changing the presumption for intermittent streams. While the presumption language is shown as a different section, this presumption is not changed from the existing rule. The definition of significant aquatic life use recognizes that some aquatic life is expected to be present in water bodies not designated for a specific category of aquatic life use. However, it also identifies some provisions to protect aquatic life in any water body. These aquatic life use presumptions are based on statewide ecoregion studies. The commission agrees that the term "protected" is more appropriate because it includes attainable uses and existing uses and this change has been made to the rule. The reference to development of additional definitions of significant aquatic life, perennial pools, and seasonal uses in the standards implementation procedures has been deleted.

Austin, EPA, F&A, FUSE, GBF, NFW, SCLS, TCEA, TCONR, TCPS, TPWD, and 287 individuals supported the adoption of

the proposed habitat criteria in §307.4(i). Many of these commenters identified the proposal as meeting the federal CWA's goal for restoring and maintaining the physical and biological integrity of water. Several commenters also identified the proposal as a clarification of existing procedures which include consideration of habitat in determining aquatic life uses.

The commission agrees that the proposed habitat language is consistent with the goal of the federal CWA regarding the physical and biological integrity of water in the state. The commission also agrees that the language is a better description of existing procedures which consider habitat in determining aquatic life uses, not a new feature. Since the mid-1980s, habitat has been a consideration in determining appropriate aquatic life uses, such as in a use attainability analysis (UAA). The commission points out that habitat is the determining factor that justifies many of the proposed site specific aquatic life classifications proposed in Appendix D of §307.10.

Several commenters expressed concern that the proposed language only addressed "existing" uses and suggested that it should be consistent with other sections of the rule by addressing designated and attainable uses also.

The commission agrees that the term "existing" as a modifier of aquatic life uses is too narrow and has deleted that term from §307.4(i). However, because habitat can be mitigated, the commission is not including the phrase "existing, designated, and attainable" as modifiers to the aquatic life use in this section.

A number of commenters expressed concern that the proposal was limited to only Section 404 permits. Many comments supported the proposal to recognize that aquatic habitat is a necessary component for supporting aquatic life.

The proposed habitat language is not limited to dredge and fill activities. The statement in the preamble regarding questions about the role of habitat in dredge and fill activities was intended to identify the origin of the need for the proposed clarification. This background information was not a statement of the limit of the existing policy. The statement in the proposed and adopted rule regarding the procedures for dredge and fill activities is to make it clear that the state's role in 401 certifications is administered under a separate rule (30 TAC Chapter 279). The commission agrees that habitat is a necessary component for supporting aquatic life and adopts the amendment as modified.

The cities of Arlington, College Station, Corpus, Dennison, Henderson, Jacksonville, Missouri City, Odessa, Plainview, Schertz, Sherman, Sulphur Springs, and Temple, GHP, Lloyd-Gosselink, SAWS, TCC, TML/TAMSA, TWCA, Utilities, and WF opposed the adoption of the proposed habitat criteria in §307.4(i). Most of these commenters were concerned that the proposed language would limit the flexibility of dischargers regarding regionalization of treatment facilities, reuse of effluent, water conservation, and storm water management. The commenters stated that the proposed language would require regulation of both increases and decreases in discharge flows.

The commission agrees that the language should not add a new provision to require wastewater discharges permitted under Chapter 26 to continue. The commission issues Chapter 26 authorizations only to set the terms and conditions under which a discharger can discharge. The rules do not and, as amended today, will not, require an existing discharger to continue an historical volume of discharge as a condition for renewing or amending a permit issued under TWC, Chapter 26. Therefore, the commission disagrees with the concerns of these commenters that the proposal will result in the consequence that a discharger permitted under Chapter 26 will be required to continue its prior discharge for the maintenance of artificially created habitat. The commission emphasizes that there are independent obligations on some discharges that require continued habitat maintenance, such as mitigation commitments, other contractual agreements, and the requirements of their authorizations under TWC, Chapter 11, which require protection of environmental in-stream uses of water in the context of a permit or an amendment to a permit to use state water.

Many of the commenters expressed that the TNRCC failed to comply with the procedural requirements imposed by Texas Government Code, §2001.0225, in proposing §307.4(i), and that a full regulatory implementation analysis must be prepared.

The commission disagrees with the commenters' assertion that the commission is required to prepare a full regulatory impact analysis (RIA). First, the addition of §307.4(i) does not create a new use to the water quality standards. The section merely further articulates what has consistently been the antidegradation policy of previous rules. The antidegradation policy in Chapter 307 has always stipulated that water quality will be maintained so that aquatic life and other existing "uses" will be protected (see 30 TAC §307.5(b)(1)). Major disturbances of aquatic habitat affect both water chemistry (the most direct component of water quality) and the capacity of an aquatic ecosystem to sustain aquatic life. Thus, maintaining aquatic habitat is an important component of protecting and maintaining aquatic life, which is required by the antidegradation policy (see 30 TAC §307.5 and 40 CFR §131.12). Because this provision is not a new requirement, the commission is not required to prepare a full RIA.

Second, the Texas Government Code, §2001.0225, does not require the commission to prepare a RIA because §307.4(i) does not exceed a standard set by federal law, state law, or any requirements of the TPDES delegation agreement between the TNRCC and EPA, and it is not adopted solely under the commission's general powers.

The proposed rule does not exceed standards set by federal law. Federal law requires states to establish water quality standards ". . .to protect the public health or welfare, [and] enhance the quality of water . . . ." CWA, §303(c), 33 USC, §1313(c). The standards are to account for the water's use and value for public water supplies, propagation and protection of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes (*id.* See 40 CFR §131.10). As stated above, aquatic habitat is necessary and important for aquatic life propagation and protection. To protect and maintain these uses, like aquatic life use and habitat, the states are required to develop and adopt statewide antidegradation policies and to include the policy in their water quality standards (see 40 CFR §131.6(d)). A state's antidegradation policy must, at a minimum, protect existing instream water uses (see 40 CFR §131.12(a)(1)). Because, federal law requires states to protect and maintain instream water uses, including the aquatic life and habitat use, §307.4(i) does not exceed a standard set by federal law.

Similarly, §307.4(i) of the rules does not exceed a requirement set by state law. Section 26.003 states that the purpose of Chapter 26 is ". . .to maintain the quality of water in the state consistent with . . . the propagation and protection of terrestrial and aquatic life . . . ." The water quality standards developed under TWC, §26.023, are the mechanisms by which the commission maintains the quality of water for the propagation and protection of terrestrial and aquatic life. Aquatic habitat is necessary

and important for aquatic life propagation and protection. Therefore, the commission is required to protect and maintain aquatic life use and habitat of a water body and accomplishes this goal through its antidegradation policy. Because state law provides for the protection and maintenance of aquatic life use and habitat, these rules do not exceed a standard set by state law.

The proposed rule does not exceed the requirements of the TPDES delegation agreement between the TNRCC and EPA. Under the agreement, the commission is required to operate the TPDES program in accordance with the CWA and applicable federal requirements (see Memorandum of Agreement (MOA) between the Texas Natural Resource Conservation Commission and the U.S. Environmental Protection Agency concerning the National Pollutant Discharge Elimination System, page 2). As part of that agreement, the TNRCC will include water quality based effluent limitations in TPDES permit to ensure compliance with EPA approved water quality standards (MOA, page 24). Thus, because the water quality standards are consistent with the CWA, they do not exceed a requirement of the TPDES MOA.

Finally, the proposed rule is not adopted solely under the commissions general powers. Rather, this rule is adopted under TWC, §26.023, which specifically requires the commission, by rule, to set water quality standards for the water in the state.

Because the rule did not meet any of the four applicability standards in Texas Government Code, §2001.0225(a), the TNRCC is not required to prepare a full RIA.

Several commenters claimed the addition of this section is not within the jurisdiction of the TNRCC, including comments that the vegetative and physical components are not water quality parameters.

The commission disagrees with the commenters. The commission has authority and the statutory mandate to protect the aquatic life and habitat use of a water body.

Section 26.003 states that the purpose of Chapter 26 is ". . .to maintain the quality of water in the state consistent with . . . the propagation and protection of terrestrial and aquatic life ... ." The water quality standards developed under TWC, §26.023, are the mechanisms by which the commission maintains the quality of water for the propagation and protection of terrestrial and aquatic life. Major disturbances of aquatic habitat affect both water chemistry (the most direct component of water quality) as well as the capacity of an aquatic ecosystem to sustain aquatic life. Thus, maintaining aquatic habitat is an important component for the propagation and protection of aquatic life and is required by state law.

Further, federal law requires that states establish water quality standards "to protect the public health or welfare, [and] enhance the quality of water . . . ." CWA, §303(c), 33 USC, §1313(c). The standards are to account for the water's use and value for public water supplies, propagation and protection of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes (*id.* See 40 CFR §131.10). Aquatic habitat is necessary and important for aquatic life propagation and protection. To protect and maintain these uses, like aquatic life use and habitat, the states are required to develop and adopt statewide antidegradation policies and to include the policy in their water quality standards (see 40 CFR §131.6(d)). The water quality standards developed by the commission are intended to implement these federal requirements, which are an important component of the TPDES permitting process (see TWC, §5.102 and §26.027(a)). Thus, protecting aquatic life use and habitat is within the jurisdiction of the commission.

Several commenters opposed the proposal because they believed it violates the legislative intent of Rider 27 of the House Bill 1, General Appropriations Act of 1999.

The water quality standards do not violate the legislative intent of Rider 27. Rider 27 prohibits the expenditure of funds to conduct CWA, §401 certifications in the 2000/2001 biennium except when necessary for a federally delegated program or to comply with a requirement of federal law. Rider 27 is limited to 401 certifications and does not apply to the adoption of the water quality standards. The water quality standards are used to set effluent limits in TPDES permits among other things and are not limited to 401 certifications of dredge and fill projects.

Several commenters stated the language was unclear and that if the intent was to only address dredge and fill activities, it should be clearly stated that way.

The proposed habitat language is not limited to dredge and fill activities. The statement in the preamble regarding questions about the role of habitat in dredge and fill activities was intended to identify the origin of the need for the proposed clarification. This background information was not a statement of the limit of the existing policy. The statement in the proposed rule regarding the procedures for dredge and fill activities is to make it clear that the state's role in 401 certifications is administered under a separate rule (30 TAC Chapter 279).

Several commenters requested criteria for the implementation of the habitat provisions. Several commenters opposing the proposal stated it was unnecessary because habitat characteristics are already a factor in determining the aquatic life use of a water body.

The proposed implementation procedures for this chapter provide information on the current practice of habitat assessment for aquatic life use determination. The commission is not proposing any additional habitat criteria in this revision, but will consider additional criteria as appropriate in the future. The commission agrees with the comments that habitat is already a factor in determining the aquatic life use of a water body. As identified in the preamble to this proposed rule, there has been considerable discussion about the existing role of habitat in water quality standards, specifically for dredge and fill activities. This amendment is intended to clarify the commission's existing policy.

One commenter stated that the proposed language could be interpreted as imposing "Tier 3 like" provisions to physical and vegetative components.

The commission responds that general narrative to protect habitat does not invoke the prescriptive protection of water quality in Tier 2 and Tier 3 of the antidegradation policy in §307.5. The narrative on habitat protects uses for aquatic life, and use-protection is the fundamental level of protection afforded throughout the general criteria.

Several commenters expressed concern about the proposed general criteria for aquatic recreation in §307.4(j). Austin requested clarification on how to distinguish "lakes, reservoirs, and saltwater bays" from other similar categories of water bodies, since high-use contact recreation is presumed for lakes, reservoirs, and saltwater bays. NWF expressed opposition to applying different levels of recreational use to different categories of water bodies. NWF also noted that applying these presumptions to water bodies "not specifically listed

in Appendix A" is not accurate, and that any presumptions should apply to "all water bodies for which a use category is not specifically listed in Appendix A." TCONR, TPWD, and TCPS also expressed concerns about presuming different levels of recreational use for different types of water bodies. Conversely, TSSWCB recommended that "general contact recreation" be assumed for lakes, reservoirs, and saltwater bays. These commenters provided additional comments which are reviewed in the discussion concerning §307.7(b)(1), where the details of recreational criteria are presented in the water quality standards.

In response to concerns about the proposed recreational categories, the commission has deleted the different categories of contact recreation from the general criteria, and a single category of "contact recreation" is adopted as a presumed use for all water bodies except where specifically listed for a different recreational use in Appendix A. A more detailed presentation of comments and the commission's responses on recreational uses and indicators is provided in the discussion concerning §307.7(b)(1).

The NWF commented that in §307.4(h)(4)(I) that the "commission," in addition to the "executive director," should be noted as potentially taking regulatory action that could affect a particular water body.

The commission concurs and both terms are included.

SECTION 307.5

Solutia and TCC expressed support for the revisions to §307.5. SC-Houston expressed disagreement with the provision allowing Tier 2 degradation of water quality for important economic or social development.

The existing language in §307.5(a)(2) is consistent with federal requirements for the antidegradation policy in 40 CFR §131.12. The commission notes that §307.5(c)(2)(F) allows interested parties to provide comments and additional information regarding the necessity of the discharge for important economic or social development if degradation of water quality is expected under Tier 2. The commission has made no changes to §307.5(a)(2) and retains the existing language of the rule.

The TSSWCB recommended that TMDL terminology be removed from §307.5 on the grounds that inclusion of TMDLs would lead to confusion regarding the purpose of a TMDL and may hinder the stakeholder process if the antidegradation policy supplants the load allocation power from the stakeholders group. If the term must remain, TSSWCB concurs with including the language in §307.5(c)(2)(G).

The commission responds that inclusion of TMDLs in the antidegradation section is appropriate and has retained TMDLs in this section since they are subject to the antidegradation provisions. TMDLs are included in the antidegradation policy to clarify that the TMDL must be consistent with the antidegradation policy. The commission also notes that the antidegradation policy applies only to authorized increases in loading. Many TMDLs will require a reduction in existing loading. Permits issued consistent with an approved TMDL would not require additional, individual review for potential degradation concerning the permit loadings of the constituents in the TMDL. Nothing in the antidegradation policy will limit the stakeholder process for TMDL development. This approach to TMDLs is consistent with the commission's practice of approval of traditional waste load evaluations.

The GBF and NWF requested that "existing uses," in addition to "water quality sufficient to protect existing uses," be included in §307.5(b)(1) to achieve consistency with federal requirements.

The commission agrees with these comments and has modified the language to make the policy consistent with §307.(c)(2)(A). This modified language is also consistent with the federal antidegradation policy requirements of 40 CFR §131.12(a)(1).

A request to define *de minimus* in §307.5(b)(2) was submitted by EPA. Austin commented that the rule should specify criteria for what statistically constitutes a greater than *de minimus* effect.

The commission agrees that additional guidance is needed for the implementation of this term and has attempted to provide more detail on the range of parameters considered for degradation in the standards implementation procedures. This approach is more feasible than a statistical definition, given the natural variability of water bodies in the state.

Austin expressed concern that no designations for outstanding national resource waters (ONRW) were proposed for addition to the standards in §307.5(b)(3) and suggested that Barton Creek (Segment 1430) would fit the description of an ONRW.

The commission responds that valid public and legislative concern was expressed over previous draft proposals for designating outstanding national resource waters. EPA has indicated in guidance for ONRWs (e.g., in the second edition of the EPA Water Quality Standards Handbook), that the prohibition of any increased pollutant loadings to ONRWs is to be stringently applied. However, there is still substantial uncertainty about how federal requirements for ONRW protection would be implemented on a case-by-case basis, and no designations were considered for this revision of the standards.

The GBF and NWF commented that the term "pollution" rather than "pollutant" should be used in the general description of the antidegradation policy in §307.5(b)(4), and (c)(1) and (2). The use of the term "pollutant" limits the state's ability to protect waters through the antidegradation policy.

The commission agrees that the term "pollution" is consistent with TWC, §26.023. The definition of pollution in the TWC, §26.001, has also been included in §307.3 for clarity. Additional discussion on this issue is provided in the commission's response to comments on 307.3.This change of terms has been made throughout §307.5.

The GHP commented that the rule needs to clarify in §307.5(c)(1)(B) that 401 reviews are limited to those aspects of United States Army Corps of Engineers actions that affect water quality.

The commission responds that 401 Certifications are an opportunity for the state to review a proposed federal discharge permit for consistency with the state water quality standards. The evaluation of uses is not limited to protection of water chemistry. The purpose of §307.5(c)(1)(B) is to show that for state certification of federal permits to allow the discharge of fill material under Section 404 of the federal CWA, the antidegradation policy is implemented according to Chapter 279. The uses and criteria of the water quality standards remain applicable to 401 Certifications of 404 permits.

The NWF suggested that the requirement for standards to be attained in §307.5(b)(4) should not be limited only to discharges authorized by the TWC and the federal CWA. The scope of activities subject to the water quality standards is controlled through statutes and external rules. The language in the water quality standards rules should use more expansive language to avoid unnecessary, and potentially unanticipated, limitations on their scope.

The commission agrees with this suggestion and has clarified that discharges which cause pollution that are "authorized by other applicable law" are also subject to §307.5(b)(4).

With respect to §307.5(e)(2)(E), EPA indicated that evidence regarding the implementation of the antidegradation policy could be introduced through the public comment process.

The commission responds that explicit allowance of public comment on specific regulatory actions under the antidegradation policy is appropriate and intended, and language to this effect is added to §307.5(e)(2)(E).

SECTION 307.6

A variety of comments were received concerning proposed revisions to water quality standards for toxic pollutants in §307.6.

One individual indicated that the fiscal note did not reflect the impact that changes in Tables 1 and 3 would have on pretreatment programs and suggested that the changes not be adopted until the impacts were recognized, understood, and evaluated.

The commission responds that the potential impacts of the proposed revisions on dischargers to municipal sewerage systems, which might be affected by pretreatment programs, were analyzed in the section of the preamble to the proposed rule entitled Small Business and Micro-business Analysis. Facilities that discharge into municipal waste systems are required to pre-treat their waste prior to discharge. Complying with more stringent water quality standards is the responsibility of the city holding the TPDES permit. Since the revisions to the toxic criteria are not expected to affect municipalities, it is anticipated that small and micro-businesses will not be directly affected by the proposed amendments.

The SC-Houston expressed concern that there were too few herbicides on the toxic materials list (in Tables 1 and 3 in §307.6).

The commission acknowledges that criteria are not listed for some herbicides, but the development of these criteria is dependent on the availability of sufficient technically valid data on the toxicity of specific herbicides. Such data and EPA guidance criteria are not always available, particularly for newer herbicides. The provisions in §307.6(c)(7) and (d)(8) for developing criteria that are not in Tables 1 and 3 can be applied when criteria are needed for specific cases when sufficient information is available. EPA guidance criteria have also not been established.

The EPA questioned why criteria values were rounded and recommended that the commission retain the unrounded criteria. The EPA stated that the rounding makes it more difficult for readers to determine which criteria are based on EPA recommended values and which criteria have been recalculated.

The commission reevaluated the rounding and is retaining three significant digits for criteria where appropriate.

The NCE indicated that TNRCC needed to better explain the basis and reasons for the proposed changes which were made to Tables 1, 2, and 3 of §307.6 and also Table 5 in §307.7, so that the public could comment on the changes.

The commission notes that specific calculations of toxic criteria in Tables 1 and 3 were too detailed to include in the preamble of the proposed rule, although these calculations are available. The procedures for these calculations are already described in the text of §307.6. With respect to justification and evaluation, the commission responds that the preamble for the proposed changes did contain substantial discussion and evaluation. Effects of the changes were evaluated to the extent that available information would reasonably allow in the fiscal note.

The NCE, USIBWC, and NWF indicated that the proposed reference to "five" kinds of toxic exposure routes in §307.6(b)(4) was incorrect.

The commission agrees and the reference to number in the adopted language has been changed to "three."

The NWF questioned whether the general narrative provisions in §307.6(b)(4) were sufficiently inclusive of various categories of wildlife which could be exposed to toxic pollutants in water. The question was raised since the commission had proposed to add the term "birds" along with the existing term "terrestrial wildlife."

The commission clarifies the narrative protection by removing the proposed term "birds" from the adopted language in §307.6(b)(4). The term "terrestrial wildlife" remains, and the commission intends that this term includes birds and other forms of wildlife which can fly.

The TCC noted a typographical error in Table 1, in which the exponential portion of the metals criteria was printed with a "1" instead of an "e."

The commission responds that this error has been corrected in the adopted version of the rule.

D-Koch proposed using the biotic ligand model, rather than pH and hardness, to determine the bioavailability and toxicity of metals instead of pH and hardness in §307.6(c)(1).

The commission notes that the biotic ligand model or similar approaches might eventually improve estimates of changes in the toxicity and bioavailability of metals with respect to water chemistry. However, current EPA guidance criteria and toxicity databases are still largely based on hardness and other variables. This comment can be considered for development of future revisions of the water quality standards.

With respect to the water-effects ratio proposed for the copper criteria in Table 1 in §307.6(c)(1), and with respect to the site-specific criteria for copper in Appendix E of §307.10, one individual expressed opposition to increases in copper criteria anywhere in the state.

The commission responds that site-specific criteria for copper and other metals are appropriate when sufficient data is available to incorporate local effects of water chemistry. These adjustments of the statewide criteria as noted in Table 1 and the proposed additions to Appendix E are supported by EPA guidance.

The EPA supported the proposed changes in §307.6(c)(1) (Table 1) to the criteria for metals, in order to compensate for expressing these criteria as the dissolved portion. The EPA noted corrections needed for CAS numbers for chromium (tri and hex) and for endosulfan I and II.

The commission responds that the CAS numbers have been corrected, and the numerical criteria for metals in Table 1 are adopted as proposed.

The EPA commented with respect to §307.6(c)(4) that chemical specific criteria would be appropriate for ammonia and chlorine toxicity, since direct measurements of chemical concentration avoid chemical degradation during whole effluent toxicity testing, and since some streams may not be protected from minor discharges by whole effluent testing.

The commission responds that whole effluent testing, in conjunction with typical permitting requirements for dechlorination, remains a reasonable approach for assessing toxicity from chlorine and ammonia. No change was proposed for this standards revision, and the appropriate controls for ammonia and chlorine toxicity may be subject to review during the next revision of the water quality standards.

Austin objected to a proposed change in §307.6(c)(6), which indicated that acute toxic criteria to protect aquatic life may be exceeded at extremely low streamflow conditions (one-fourth of critical low-flow conditions). Similarly, NWF commented that acute criteria should apply during all flow conditions. The EPA interpreted the change as a clarification which would not affect permitting, and more information would be needed if this is not the case. The EPA also recommended adding language to state that any exceedances of acute criteria in the zone of initial dilution will not affect compliance with permit limits.

The commission responds that the implementation of a critical low-flow for acute criteria is needed in order to establish an in-stream design flow for calculating effluent limits for wastewater discharge permits. In addition, this proposed change is compatible with the existing water quality standards, which already state in §307.8(b)(2)(A) that ". . .ZIDs (zones of initial dilution) in streams and rivers shall not encompass more than 25 percent of the volume of stream flow at or above seven-day, two-year low-flow stream conditions." The proposed change will create internal consistency within the standards. It is not intended to change current permitting procedures, nor to change measures of compliance with existing permits. The commission notes that this change, and the commensurate change in §307.8(a)(2), is in accordance with the EPA's guidance document, *Technical Support Document for Water Quality-based Toxics Control* (1991). This guidance indicates that water quality standards should protect water quality for designated uses in critical low-flow situations, and the guidance document also recommends the kinds of extremely low stream flow conditions below which numerical toxic criteria do not apply. The commission agrees that in establishing water quality standards, states may designate a critical low-flow below which numerical criteria do not apply. The commission does note, however, that exceedances of acute criteria may occur only "below" rather than "at" one-fourth of critical low-flow conditions. With this editorial correction, the change is adopted as proposed.

Eastman, GHP, and TCC suggested moving Table 2 in §307.6(c)(8), which contains average hardness and pH values for major river basins, to the Implementation Procedures.

The commission acknowledges that the values in Table 2 are default values that are generally used as screening tools. However, there is utility in having these regulatory default values in the rules, in order to provide a uniform reference value, in the absence of better information, for the magnitude of toxic criteria that vary with hardness or pH.

The GCA, EHCMA, TCC, Kodak, Utilities, and GHP supported the proposed inclusion of a variable for water-effects ratios in the criteria for metals in Table 1, as described in §307.6(c)(9). The TPWD indicated that adequate public notice is needed when a site-specific water-effects ratio is used, and NWF commented that §307.6(c)(9) should ensure that opportunity is provided for public comment and hearing.

The commission responds that the water-effects ratio will be included in criteria for metals in Table 1 as proposed. In §307.6(c)(9), a sentence was added to indicate that public notice will be provided during the permit application process which will note water-effects ratios which affect the effluent limit of the permit and which have not yet been incorporated into Appendix E of §307.10.

The UTHSC requested that TNRCC clarify whether the test toxicant for a water-effects ratio in §307.6(c)(9) is added to stream water or if only stream water is used for a comparison bioassay.

The commission responds that water-effects ratio analyses are conducted using EPA guidelines, and these procedures are documented in EPA's *Interim Guidance on Determination and Use of Water-Effect Ratios for Metals.* Current procedures do specify that the toxicant of concern is added in various concentrations to instream water for conducting the comparison bioassays.

The NCE suggested that more explanation of the proposed addition of perchlorate and a related footnote to Table 3 in §307.6(d)(1) is needed for public comment. PSG, USAF, CEOH, and Kerr-McGee commented that it was premature to adopt a criterion for perchlorate in Table 3 to protect drinking water sources, because a federal review is currently being conducted to develop federal guidance criteria, and because the appropriate reference dose for perchlorate remains under debate in the federal review process. The EPA supported the addition of criteria for perchlorate.

The commission responds that procedures which were used to calculate the proposed criterion for perchlorate were in accordance with procedures which were used by the commission to develop a recommended general criterion for drinking water sources. The commission acknowledges that federal guidance has still not been completed, and that some changes may eventually occur in the applicable reference dose for perchlorate. Therefore, the proposed criterion for perchlorate is not adopted in Table 3 of the rule at this time. However, the commission emphasizes the relevance of §307.6(d)(8), which establishes provisions for applying criteria to regulatory actions of the agency when toxic substances are not in Table 3. For such regulatory actions, the commission will continue to use the agency guideline criterion of 22 micrograms per liter of perchlorate until and unless better information indicates that a different criterion is appropriate. In response to questions about the assumptions that were used for the proposed perchlorate criteria, the commission revised proposed language in §307.6(d)(8)(A) and (B) to note that site-specific guideline criteria for protecting surface sources of drinking water may default to the agency's calculations and guidelines for general protection of drinking water sources in addition to an adopted MCL for drinking water.

With respect to Table 3 in §307.6(d)(1), Agriculture, Novartis, TCPB, TFB, and TSSWCB suggested that the TNRCC postpone adopting criteria for atrazine until EPA completes their review using the newest risk assessment and data, because preliminary data indicates that the current federal MCL for atrazine to protect drinking water will be raised. EPA supported the addition of criteria for atrazine.

The commission acknowledges that federal guidance has still not been completed, and that some changes may eventually occur in the federal drinking water MCL, which was the basis for the proposed criterion. Therefore the proposed criterion for atrazine is not adopted in Table 3 of the rule at this time. As with perchlorate, however, the commission emphasizes the relevance of §307.6(d)(8), which establishes provisions for applying criteria

to regulatory actions of the agency when toxic substances are not in Table 3. For such regulatory actions, the commission will continue to use the existing MCL of three micrograms per liter as the criterion for surface water sources of drinking water until and unless better information indicates that a different criterion is appropriate.

DOW, Utilities, and TCC suggested that the proposed human health criteria for 1,3-dichloropropene and acrylonitrile in Table 3 of §307.6(d)(1) are unnecessary and unjustified. Commenters know of no water quality problem with the use of these chemicals in Texas and stated that they are not discharged in sufficient amounts in Texas or found in ambient waters to justify including them in the standards. Similarly, Solutia was opposed to including acrylonitrile, and TSSWCB was opposed to including 1,3-dichloropropene. Conversely, EPA supported the addition of 1,3-dichloropropene and acrylonitrile.

The commission agrees that numerical criteria are not needed for substances which do not occur in pollutant sources or in surface waters. However, the agency's review indicated that permittees are already required to test for 1,3-dichloropropene and acrylonitrile in applications for wastewater discharge permits. Therefore, the proposed criteria will not impose an additional requirement for effluent screening by permit applicants. In addition, both of these toxicants are already included in monitoring of surface waters that is conducted by TNRCC. Detections of these substances are indeed very infrequent, as is the case with most volatile compounds, but a water quality standard for them is still appropriate to ensure that localized impacts are precluded, and the criteria for 1,3-dichloropropene and acrylonitrile are adopted as proposed.

The EPA suggested that in Table 3 in §307.6(d)(1) the toxic equivalency factors for 1,2,3,4,8-PeCDD should be adjusted from 0.5 to 1.0, OCDD and OCDF should be included in the list of dioxin/furan congeners.

The commission responds that the proposed dioxin/furan criteria, which already contain toxicity equivalency factors for seven congeners, are reasonably protective. The proposed changes in the criteria, which are expressed as the summed TCDD equivalents, are substantially more stringent than in the previous standards. The suggested adjustments in equivalency factors were not proposed, but they can be evaluated at the next standards revisions. The proposed changes for the criteria for dioxins/furans in Table 3 are adopted as proposed.

Several changes are adopted in Table 3 in §307.6(d)(1) which were not specifically proposed, but which are needed for editorial clarity or to resolve a contradiction in the existing rule. The criterion for chloroform for drinking water sources (Column A in Table 3) was proposed to be 181 micrograms per liter. However, the existing criterion for the sum of total trihalomethanes, which includes chloroform, is 100 micrograms per liter. In order to maintain internal consistency in Table 3, the proposed criterion of 181 micrograms per liter for chloroform is changed to 100 micrograms per liter in the adopted rule. The criterion for pentachlorophenol for drinking water sources (Column A in Table 3) was proposed to be changed from 129 to 19.1 micrograms per liter. However, the current drinking water MCL is 1.0 micrograms per liter. Section 307.6(d)(3)(G) in the water quality standards indicates that the drinking water MCL supercedes if the calculated criterion is greater than the drinking water MCL; therefore, the MCL value of 1.0 micrograms per liter is adopted for pentachlorophenol in Column A of Table 3. The name "nitrate-nitrogen" in Table 3 is changed to "nitrate-nitrogen as total nitrogen" to clarify that the way in which the nitrate for this criterion is expressed. The commission also notes that a lower MCL for arsenic is under consideration by EPA; and if adopted in federal and state drinking water regulations, the MCL value may be appropriate as a surface water criterion for specific regulatory actions that affect drinking water sources.

The TPWD pointed out an editorial error in §307.6(d)(5), with respect to the phrase "...water in the state which have...."

This phrase was changed to "...water in the state which has ..." in the adopted rule.

The TCC, Solutia, and GHP expressed concern that the proposed procedures in §307.6(d)(8) for developing criteria for substances not listed in Table 3 are too broad. Comments indicated that data quality objectives for "available information" should be specified, and at a minimum, the data used for human health criteria must be peer-reviewed scientific studies published in reputable scientific journals with general circulation.

The commission acknowledges that care is needed in selecting appropriate data for developing toxic criteria, but the specific restrictions that were recommended may be too restrictive to allow potentially useful sources such as manufacturer's tests on a new pesticide. The importance of considering data adequacy is noted in general by changing "available information" to "technically valid available information" in the adopted rule.

With respect to §307.6(e)(2)(C), EPA supported the proposed addition which notes that approval by the executive director and by EPA is needed for the use of alternate procedures for conducting biomonitoring (whole effluent testing).

This change is adopted as proposed.

The EPA indicated that in §307.6(e) the terms "lethality" and "toxicity" are sometimes used interchangeably and assumes that the proposed language is to clarify the existing provision in the current standards. The EPA assumed that lethality is still prohibited at all flows including those below one-fourth of the critical low flow.

The terms are not used interchangeably. Lethality is used in reference to passage through a ZID and at flows below one-fourth of the critical low flow. EPA's assumption is correct in that lethality is still prohibited at all flows.

SECTION 307.7

307.7(b)(1)

Numerous comments were received on proposed changes in the criteria for recreation in §307.7(b)(1). A variety of commenters, including EPA, Eastman, SAWS, Solutia, TCC, UTHSC, and GHP supported the change to *E. coli* and Enterococci as bacterial indicators for recreation. However, many commenters, including FUSE, GBF, LPCASS, NWF, TCEA, TCONR, SC-Houston, SCLS, USIBWC, and 110 individuals expressed concern that the transition to different indicators will result in difficulties in assessing standards attainment, and these commenters generally recommended that dual sampling be conducted of current and proposed bacterial indicators before incorporating the proposed indicators in the water quality standards. NWF also expressed concern that the change in indicators would cause a loss in the ability to track long-term trends, and TPWD suggested that dual sampling of old and new indicators should be conducted in order to allow development of trend analyses.

The commission acknowledges that the change will have some adverse effect in the continuity of the data on indicator bacteria. However, epidemiology studies indicate that the new indicators provide an improved estimation of the relative risk of swimmer illness. The new indicators are in accordance with current federal guidance, and an independent evaluation by a commission workgroup has recommended switching to the alternative indicator bacteria. In addition, the utility of trend analyses with fecal coliform is already limited by interference with non-fecal sources of bacteria, high sampling variability, and changes in sampling procedures and analytical methods over the years. *E. coli* and Enterococci are therefore adopted as bacterial indicators for recreation. The commission recognizes that some difficulties will be inherent during the transition period. Sampling of both indicators will be conducted for a two- to three-year period where monitoring resources allow, but dual sampling for both indicators at an extensive number of sites is not feasible whether the new criteria are adopted now or whether they are postponed until the next triennial revision of the standards. The commission intends to continue to assess support of recreational uses for approximately the same water bodies. The proposed changes include the use of fecal coliform as a bacterial indicator until such time as sufficient data is obtained for minimum requirements of assessment with the new indicators. Currently, minimum requirements are nine samples, and one to five years of data are used for the assessment. At sites where monitoring is conducted only for the new indicators, the historically available data for fecal coliform will continue to be used for assessing long-term standards attainment until an adequate data set is obtained for the new applicable indicator. The gap in assessment for sites where this approach is needed will generally be about two years. To facilitate the transition, the commission adopts the proposed language which specifically allows the continued use of fecal coliform as an indicator until sufficient data is available for the new indicators. The commission also adopts the proposed language which allows the long-term continued use of fecal coliform for some purposes, such as in oyster waters.

The proposed criteria were expressed as a geometric mean, but the preamble for proposal also requested specific comments on whether to apply any recreational criteria to shorter time frames, such as the single-sample criteria in current federal guidance. The EPA, F&A, NWF, TCONR, and nine individuals requested that a criterion for a single sample be included if the new recreational criteria are adopted.

The commission notes that adding a single-sample criterion has the disadvantage of complicating the evaluation of standards attainment for recreational use. However, a single-sample criterion does provide a better indication of potential short-term problems than the geometric mean, and there is substantial public support for a short-term indicator. Therefore, the commission adopts single-sample criteria for recreational indicators. The single-sample criterion for contact recreation in freshwater is an *E. coli* concentration of 394 per 100 milliliters, which is based on an upper confidence level of 82% and a log standard deviation of 0.52. The upper confidence level of 82% is taken from the current federal guidance for applying *E. coli* criteria to moderate full body contact recreation, and the log standard deviation is the average of the log standard deviations which were calculated individually for 126 sampling stations in Texas waters. The single-sample criterion for contact recreation in saltwater is an Enterococci concentration of 89 per 100 milliliters, which is based on an upper confidence level of 82% and a log standard deviation of 0.7. The upper confidence level of 82% is taken from current federal guidance for applying Enterococci to moderate full body contact recreation, and the log standard deviation is the default value in the current federal guidance. The single-sample indicator for fecal coliform for contact recreation is set at 400 per 100 milliliters, as it was in the previous standards. Standard deviations and other information used to establish these general-purpose single-sample indicators are subject to re-evaluation upon the next triennial revision of the standards. Both the criteria for geometric mean and the criteria for single samples are applicable to evaluations of standards attainment. Appropriate sample size and the frequency of exceedance of single-sample criteria which constitutes an impairment of a recreational use are addressed in *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data*. The commission also adopts the proposed narrative concerning areas where local jurisdictions provide public notice or closure based on water quality at designated swimming areas. However, the adopted narrative does not specify a single-sample criterion for the purpose of providing notice or closure at designated swimming areas. Instead, the adopted narrative allows substantial local flexibility and alternative measures, such as turbidity or local rainfall that can be related to bacteria levels. Examples of applicable criteria for designated bathing beaches and similar designated swimming areas are noted in documents such as EPA's *Ambient Water Quality Criteria for Bacteria--1986*, which recommends a single-sample criterion for *E. coli* in freshwater of 235 per 100 milliliters, and a single-sample criterion for Enterococci in saltwater of 61 per 100 milliliters.

In addition to the change in indicator bacteria for contact recreation, the commission received substantial comments on the proposed change in the way that data is used to assess standards attainment for recreation. For water bodies designated for general recreation, attainment would be assessed by including only those samples which were collected when contact recreation was considered to be suitable in terms of flow, depth, and weather. For water bodies designated for high-use contact recreation, samples collected at all conditions would be included in assessing attainment. General contact recreation would apply to rivers and streams, and high-use contact recreation would apply to lakes, reservoirs, saltwater bays, and the Gulf of Mexico. The UTHSC specifically expressed support for this change, but numerous commenters, including Austin, FUSE, LPCASS, NWF, SC-Houston, TCONR, TPWD, and 227 individuals objected to or expressed concerns about the way that attainment would be assessed for general recreation. Concerns were expressed that the methodology for determining when recreation was considered suitable was not established, and that general recreation would be inappropriately applied to some rivers which were extensively used for contact recreation under a variety of conditions. The EPA commented that procedures for designating additional water bodies for high-use contact recreation should be developed. The LCRA and SC-Houston requested that specific riverine areas be designated for high-use contact recreation. The TCONR recommended a designation of high-use contact recreation for riverine areas in or adjacent to state parks, local parks, and other locations known to be used frequently for contact recreation.

In response to these numerous comments and concerns, the commission deleted the proposal to assess contact recreation only when conditions are suitable. Similarly, the proposal to divide contact recreation into general and high-use categories was deleted from §307.7(b)(1) and from the presumed application of these categories to unclassified water bodies in §307.4(j); and

the proposed definitions of these two categories were deleted from §307.3. However, the commission affirms the merit of assessing recreational criteria only when conditions are suitable for recreation. The EPA guidance criteria were developed entirely from data at swimming beaches in good weather and with suitable swimming conditions; therefore, the criteria were not designed to effectively address streams during the very high or low flows that are included in routine monitoring. Inaccurate assessments of recreational impairment can occur without a procedure to consider flow variability, physical conditions, and the high bacteria concentrations common even in relatively unpolluted rainfall runoff. Procedures to implement this approach will continue to be developed, so that it can be fully considered in the next revision of the water quality standards. To the extent possible, the agency will obtain additional information during sampling of bacterial indicators in the interim period, so that recreational suitability can be estimated from available data when and if this approach is adopted.

Numerous commenters expressed concern that the proposed changes in recreational criteria might inappropriately remove water bodies from the state list of impaired waters which is established under Section 303(d) of the federal CWA. F&A, NWF, and 287 individuals requested that the commission provide an evaluation of how the proposed changes to recreational criteria would affect the state list of impaired waters. The TCONR requested that the commission provide written assurance that water bodies would not be removed from the list without adequate supporting data to indicate that the new criteria are met, and TCONR also requested that the criteria for fecal coliform continue to be used to add new water bodies to the list until sufficient data for the new indicators is available. Two hundred eighty-seven individuals requested that the water bodies not be removed from the state list of impaired waters until they are cleaned up.

The commission responds that water bodies which are listed as impaired for recreational use will not be removed from the list solely because of the change in bacterial indicators. As indicated in previous responses, the assessment of recreational attainment will continue to use fecal coliform as the criterion for recreation until sufficient data is available to apply the newly adopted indicators. However, the commission anticipates a water body will be delisted if and when adequate data using the new indicator demonstrates the standard is met under the new indicator.

The TCONR requested that additional specificity be added to the water quality standards, rather than in a guidance document, concerning the minimum number of samples and other data requirements for assessing attainment of recreational uses. The TCONR also suggested that the geometric mean criterion be evaluated with five or more samples collected over a 30-day period. The TML/TAMSA suggested that the annual geometric mean of *E. coli* be based on a minimum of nine samples taken during conditions that are representative of flow and seasonal variations.

The commission responds that the adopted standards establish a reasonable framework for the criteria, and further details on recommended procedures for assessing standards attainment are provided in *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data*. Additional discussion concerning the appropriate role of this guidance document in assessing standards attainment is provided in the responses to comments on §307.9.

Austin suggested that the provisions for assessing recreational indicator bacteria should not include the requirements that five samples be collected in 30 days.

The commission concurs and notes that the proposed and adopted procedures for assessing criteria do not include a requirement for five samples collected in 30 days.

The EPA requested clarification concerning if and how permit limits for fecal coliform, *E. coli*, or Enterococci would be established for various averaging periods.

The commission responds that the recommended procedures for determining permit limits for indicator bacteria will be considered in revisions of the standards implementation procedures. The commission notes that recreational criteria are not presumed to be directly applicable to discharge effluent at "the end of pipe." In addition, averaging periods and other permit conditions may be different than those specified for instream criteria. Consideration of permit conditions for recreational bacteria may also consider the same kinds of factors that are considered for assessing instream compliance, such as evaluating a frequency of exceedance for single-sample indicators. Limits for the geometric mean and individual grab samples may also reflect performance expectations for a particular type of discharge and expected instream conditions during discharge.

In §307.7(b)(1), SC-Houston requested that the term "reasonably controlled" be defined in the statement that "Classified segments are designated for contact recreation unless elevated concentrations of indicator bacteria frequently occur due to sources of pollution which cannot be reasonably controlled by existing regulations or contact recreation is considered unsafe for other reasons such as ship or barge traffic."

The commission responds that a specific definition of this term is not necessary. In practice, the designation of noncontact recreation has only been applied in very limited circumstances, and a use-attainability analysis and a site-specific revision in §307.10 would be required for this designation.

The TCONR requested that the commission acknowledge that additional or different recreational indicators may be considered in future rulemaking as more information on pathogens in the water becomes available.

The commission acknowledges that the adopted recreational indicators are still imperfect, and future scientific evidence may eventually provide better indicators. The commission will consider incorporating improved indicators in future revisions of the water quality standards. Better indicators are unlikely to be readily available in the near future, however, and the adopted indicators are expected to be the best available for an extended period of time.

Solutia and TCC requested an additional sentence which stipulates that standards for contact recreation do not apply to navigation areas such as barge slips and turning basins, since these areas are not safe for recreation.

The commission responds that the following statement, which is now in §307.7(b)(1), adequately addresses noncontact recreation: "Classified segments are designated for contact recreation unless ... contact recreation is considered unsafe for other reasons such as ship or barge traffic." In accordance with EPA requirements in 40 CFR §131, designations of noncontact recreation for individual water bodies will require a use-attainability analysis and a site-specific revision in §307.10.

In conjunction with the above responses, the commission also updates the reference to recreational criteria in buffer zones of oyster waters in §307.7(b)(3)(B).

SECTION 307.7(b)(3)

The NWF opposed application of Table 5 to classified segments as proposed in §307.7(b)(3)(A) and expressed the following concerns. The proposal would expand calculating dissolved oxygen (DO) concentrations in streams to all waters in east Texas and would override segment criteria. The study of least impacted streams is not applicable to larger streams, such as those which are classified segments. In §307.7(b)(3)(A)(iv), TNRCC is allowing further, apparently unlimited, deviation from the provisions of the standards by allowing further modification of Table 5 factors which could be used to modify designated criteria. The commenter proposed that the commission delete proposed §307.7(b)(3)(A)(iv). NCE stated that an explanation for the changes in Table 5 is needed for public comment.

The commission disagrees and responds that the application of Table 5 flow values to classified and unclassified water bodies will be limited to streams and rivers that have 7Q2 flows that fall within the range of flows shown in Table 5 for an applicable aquatic life use. There are several segments in the eastern portion of the state that have 7Q2 flows within the flow range covered by Table 5. Twelve percent of the ecoregion streams sampled in the eastern portion of Texas are classified segments. The application of the regression equation is therefore equally valid for classified streams as it is for unclassified streams since the data is from least impacted streams, regardless if the streams were classified or unclassified. The ability to adjust factors at a particular site is justified since the original regression equation uses data from multiple streams to predict average DO. Also Table 5 is actually a simplified version of the regression equation depicting expected average DO at a given bedslope and stream flow, with a third factor being held constant. When investigating a particular site, other factors such as local hydrology or temperature may become important factors in determining DO concentrations. These factors are consistent with those used in TNRCC water quality simulation models. The commission responds that the changes in Table 5 were summarized in the preamble to the proposed revisions, and the explanation of how Table 5 is employed is adequately explained in §307.7(b)(3)(A) and in the standards implementation procedures and adopts the revisions as proposed.

The TPWD wondered if the language in the third to the last sentence in §307.7(b)(3)(A)(ii) should state "...at or above an assigned, designated or presumed aquatic life" use rather than ". . .at or below . . .."

The commission responds that the wording is correct as stated in the proposed revisions. The level of dissolved oxygen which is specified in Table 5 is applicable at the assigned, designated or presumed aquatic life use at the indicated stream flows; and the dissolved oxygen criteria applicable for lower aquatic life uses are applicable at the lower indicated stream flows.

SECTION 307.7(b)(5)

Numerous comments were received on proposed §307.7(b)(5) concerning additional uses. The ED, EPA, F&A, FUSE, GBEP, GBF, LPCASS, NWF, SCLS, TAMU-CC, TCEA, TCONR, TCPS, TGLO, TML/TAMSA, TPWD, TSA, UT-Tyler, and 410 individuals expressed general support of the proposed language to add seagrass propagation as an additional use and FUSE, GBF, NWF, TML/TAMSA, UT-Tyler, and 287 individuals expressed general agreement to add wetland water quality functions as an additional use. TAMU-CC, TCONR, TCPS urged the commission to adopt stronger language to protect seagrass by establishing water quality criteria for seagrass. POCCA and TSSWCB did not agree with the proposed seagrass language and DOW, TWCA, and Utilities did not agree with the proposed language for wetland water quality functions. TML/TAMSA suggested that seagrass propagation and wetland water quality functions be maintained where these uses occur naturally. EPA recommended that seagrass be established as a designated use similar to the oyster waters use under the subcategory of aquatic life use and also recommended that seagrass propagation be included as a designated use and described segment by segment in Appendix A in §307.10.

Seagrass propagation and wetland water quality functions are important uses that need to be protected. The commission agrees that seagrass propagation should be a separate use but is not proposing specific numerical water quality criteria for seagrass at this time. The commission may consider additional numerical criteria needed to support the seagrass use in future water quality standards revisions. The adopted additions of separate uses for seagrass propagation and wetland water quality functions apply to existing significant stands of submerged seagrass and wetlands. Existing uses are defined in §307.3(23). The commission recognizes the utility of designating seagrass as a use under the subcategory of aquatic life use and including the designated use in Appendix A. However, additional evaluation is needed before designating seagrass uses to specific water bodies in Appendix A, and these designations may be considered in future revisions of the water quality standards.

SECTION 307.8

Austin, D-Koch, and NWF suggested that the condition to preclude acute criteria at flows less than one-fourth of the 7Q2 in §307.8(a)(2) should be removed and that acute criteria should apply at all flows. D-Koch also commented that not applying acute criteria below one-fourth 7Q2 would not provide for a zone of passage for aquatic organisms. The EPA noted that they interpreted the standards as indicating that lethality is prohibited at all stream flows.

The commission responds that the implementation of a critical low-flow for acute criteria is needed in order to establish an in-stream design flow for calculating effluent limits for wastewater discharge permits. In addition, this proposed change is compatible with the existing water quality standards, which already state in §307.8(b)(2)(A) that ". . .ZIDs (zones of initial dilution) in streams and rivers shall not encompass more than 25 percent of the volume of stream flow at or above seven-day, two-year low-flow stream conditions." The proposed change will create internal consistency within the standards. It is not intended to change current permitting procedures, nor to change measures of compliance with existing permits. The narrative existing language for protection of zones of passage in §307.8(b)(6), and for protection from lethality in zones of initial dilution in §307.8(b)(2) still apply. The commission notes that this change, and the commensurate change in §307.6(c)(6), is in accordance with the EPA's guidance document, *Technical Support Document for Water Quality-based Toxics Control* (1991). This guidance indicates that water quality standards should protect water quality for designated uses in critical low-flow situations, and the guidance document also recommends the kinds of extremely low stream flow conditions below which numerical toxic criteria do not apply. The

commission agrees that in establishing water quality standards, states may designate a critical low-flow below which numerical criteria do not apply. For these reasons, this change is adopted as proposed.

The NWF stated that the inapplicability of numerical criteria to storm water as stated in the second sentence in §307.8(e) may provide for a specific regulatory exception. The EPA suggested that the statement, "numerical criteria are frequently not applicable to the short term effects of storm water" could be changed to "may be temporarily exceeded."

The commission agrees that this statement is unclear, and this sentence has been removed. In addition, descriptive language dealing with the short-term effects of storm water on water quality does not apply to this specific rule and is more suitable within regulatory guidance, and this proposed language is also removed from §307.8(e) in the adopted rule.

The CS, Lloyd, Gosselink, NWF, TML/TAMSA, and SC-Houston indicated that the determination of water quality violations based upon the presence or absence of human activity as stated in §307.8(e) would be difficult and creates ambiguity when assessing water quality exceedances. Many of the watersheds that are assessed are impaired to some degree by human activity. Therefore, determinations of violations due to these influences would not appear to be realistic. The NWF suggested that the determination as to whether the exceedance is caused by human activity creates an obstacle for the protection of water quality. It would be difficult to discern whether the exceedance was due solely to human activity and thus would prevent the commission from taking action when a violation did indeed occur.

The commission agrees that this statement introduces confusion and as a result the sentence concerning violations and human activity has been removed. Violations will be determined based upon the implementation of best management practices, technology based effluent limitations, or both in combination with instream monitoring.

The TML/TAMSA suggested that the violation should not be considered unless the exceedance is caused by human activity and persists during normal flow periods.

The commission responds that this approach could potentially allow designated or existing uses to be impaired as a result of additional discharges during high flow events. References to storm water and human activity have been removed from this section, as discussed in previous comments and responses.

The NWF suggested that a definition should be included for "wet weather" as it pertained to storm water discharge.

Due to other changes in response to comments in this section, the words "wet weather" have been removed and thus, does not require definition.

Austin stated that the applicability of standards is unclear in §307.8(e) and that the *Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data* states that screening may also include data collected at high-flow periods.

The application of standards during storm water conditions refers to instream standards and not to storm water discharges. Any exceedances of water quality standards would be determined by instream monitoring during low-flow periods.

Corpus Christi objected to the imposition of best management practices to protect water quality uses, and stated that there is no basis for a city to demonstrate when a particular BMP is inappropriate, nor are there safeguards to prevent TNRCC from imposing requirements affecting land use management and development. SAWS commented that implementation of BMPs is proposed without fully identifying criteria for assessing need, efficacy, or cost/benefits. Conversely, TXDOT and TCC supported the use of BMPs in storm water permitting.

The commission responds that the potential use of BMPs is an important option for storm water permitting, particularly as one alternative to storm water outfall effluent limits, which are extremely difficult to develop and which may not be achievable. Compliance with the requirements of BMPs to control pollution during high-flow events will be done through the use of instream monitoring during normal-or low-flow periods. The commission also notes that this approach is in accord with current federal NPDES storm water permits, and these provisions do not establish new regulatory authority or requirements.

SECTION 307.9

Several commenters stated that the TNRCC guidance for screening and assessing Texas surface water quality data (referred to in the proposed rule as the most recently adopted edition of *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data*) should not be used for determining standards attainment. They argued that the document should be used only for screening purposes and not for assessing standards compliance. Most all of these commenters also made the specific recommendation that the document be subject to a formal public review, comment period, and rule making process. TCC commented that the information contained in the document needs to be adopted by rule, arguing that the procedures for adopting the document currently do not require a response to comments. TML/TAMSA commented that frequency, duration, and magnitude of exposure to a pollutant are important components to a determination of standards attainment which should be described in the agency rule rather than a guidance document. TML/TAMSA also raised the concern that the guidance document changes too often for those affected by it to be able to keep abreast of the commission's methods.

The commission disagrees with the commenters who suggest that the guidance document must be adopted by rule. The commission responds that the adopted standards rule provides the framework for regulatory determination of standards attainment. The latest adopted version of the guidance document is used to provide additional details concerning how numerical criteria can be compared to instream conditions. In most instances, instream criteria are compared to numerical criteria established in the water quality standards. In the case where sufficient monitoring data for exact comparisons do not exist or where numeric criteria have not yet been developed, compliance is sometimes estimated using screening levels. Screening levels are intended to provide the best comparisons that can be reasonably attained with available data and numerical criteria in the water quality standards. The guidance document has resulted from the available science; it is not intended to be exclusive or unchanging. The commission believes it represents the best use of available data and current assessment methodologies.

It would be unreasonable to revise the water quality standards at the frequency necessary to keep information current in the guidance document. The recent, typical pattern has been to revise the document cyclically, prior to completing the assessment of surface water quality conditions in the state. The cycle has run

either annually, corresponding to the commission's basin cycle, or once every two years, corresponding to the federal minimum requirements for a surface water quality inventory. An additional consideration is the need to adjust the guidance to allow for evaluation and possible incorporation of changes evolving at the federal level. In the past few years, the EPA has placed considerable focus on the methods which each state should use to assess attainment of water quality standards. For all these reasons, making the more flexible guidelines into a rule is not a practical solution to the concerns commenters may have with the current guidance.

The commission recognizes the high level of stakeholder interest in guidance for assessing standards attainment.

The guidance document has received external public review, particularly by Clean River Program partners and other monitoring entities. However, the commission responds that it agrees with the commenters that additional public participation is desirable and has already initiated a process to implement improvements on the next update of the guidance document. This year, the commission is convening an *ad hoc* work group composed of a broad spectrum of interests to receive input into an amended guidance document. The next revision of the guidance document will be subject to more public review and comment than have past versions. A response to comments will be developed. If there are comments which reveal the need for rule making, they will be considered by the commission for incorporation into the water quality standards. In deciding whether to prepare a CWA §303(d) List for submittal in April, 2001, the commission will consider the need for additional time to develop this enhanced process of public involvement. It is important to take the necessary time for greater involvement of stakeholders and the general public before proceeding with a new assessment of impaired water bodies.

The commission has adopted revised language in this section in the various references to the guidance document. Rather than referring to *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data* as the "latest version" or the "latest adopted version," all references now refer to it as the "latest approved version." What this means administratively is that before the executive director begins using a revised guidance, it will have been approved by the commission, after completion of the public participation process described above.

The LCRA suggested that the procedures manual referenced in §307.9, entitled *TNRCC Receiving Water Assessment Procedures Manual*, needs incorporation into rules. LCRA commented that the document needs a process for the river authorities and other Clean Rivers Program partners to review and recommend changes to TNRCC. TCC commented that it does not object to this procedures manual being referenced in the rule, since it pertains to methods used to collect and analyze samples.

In response to these comments, the commission believes that procedures for collection and analysis of scientific data falls outside of the scope of the water quality standards and need not be identified by rule. Nonetheless, since river authorities like LCRA are often asked to follow the procedures in the *TNRCC Receiving Water Assessment Procedures Manual*, the commission does agree with the comment that there should be efforts to receive and incorporate appropriate comments into the document before it is finalized. The commission will do so on future revisions of the existing procedures manual.

The SRA stated that the guidance document entitled *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data* does not include methods for determining compliance with the new proposed contact recreation standards.

The commission acknowledges this comment and responds that it has awaited the final adoption of revised water quality standards before it will proceed with revisions to the guidance document. Indeed, the adopted version of the contact recreation standards includes several modifications from what was proposed, to incorporate substantial public comment, as described earlier in this preamble.

The SRA commented that the guidance document entitled *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data* describes the support or nonsupport of the contact recreation standard in contradictory terms, when comparing the guidance document to proposed §307.9.

The commission responds that with the adoption in the water quality standards of a single sample maximum for contact recreation use attainment, the new criterion will be implemented more accurately into the guidance document. As previously described, the commission is seeking to revise the guidance this year and will ensure it is consistent with the water quality standards prior to completing the April, 2002 list of impaired waters.

Austin stated that the revised language in §307.9(b) needs clarification to include the technical staff in decisions to accept samples collected from unapproved locations.

The commission agrees and has revised the language to clarify that the agency will review alternate sample locations. The commission notes that it is a crucial role of the agency to determine the appropriateness of surface water quality sampling locations. The agency puts considerable effort into setting up a coordinated monitoring schedule each year. Approved monitoring locations must be consistent with data needs and represent the water body being assessed. Also, after further evaluation of the proposed amendment of this subsection, the commission believes the proposed title of the subsection "Sampling Locations" narrowed the scope beyond what the existing standards specified. For this reason, the proposed title has been deleted to make it clearer that the agency is responsible for judging both the representativeness of samples and their location of collection.

The EPA commented that procedures for assessing the vertical extent of a mixed surface layer for tidal waters and non-tidal flowing streams should be included in the rule.

The commission responds that recommended procedures for assessing the extent of the mixed surface layer in tidal waters is more appropriately included in the guidance document, as referenced in §307.9(c)(2). In the current guidance, a mixed surface layer for a tidally-influenced water body is described as the portion of the water column from the surface to the depth at which the specific conductance is 6,000 µmhos greater than the conductance at the surface. For reservoirs, it is described as the portion of the water column from the surface to a depth at which the water temperature decreases by greater than 0.5 degrees Celsius. However, this recommendation for the mixed layer has been changed several times in the guidance as additional statewide data on vertical stratification is collected and evaluated, and the same recommendation for the mixed layer may not always be appropriate for every water body. Therefore, these guidelines for determining the mixed layer are currently

presented in the guidance document rather than in the standards.

The EPA commented that the rule should clarify where in a water column the dissolved oxygen minima apply. Also, EPA and NWF commented on §307.9(c)(3) that dissolved oxygen criteria should be applied to the whole water column, not just the mixed surface layers of tidal water and non-tidal flowing streams. The NWF commented that the wording changes proposed for non-tidal flowing streams and tidal waters is a lowering of the existing standards since a mixed surface layer would be expected to have a higher dissolved oxygen concentration.

The commission responds the proposed language, the revisions it has made to §307.9(e)(6)(B), and the definitions of mixed surface layer, taken together describe where and how the dissolved oxygen minima are to be applied for standards attainment purposes. The commission disagrees that the changes to §307.9(c)(3) result in a lowering of the standards and has adopted the proposed changes. For non-tidal flowing streams, thermal stratification is only likely to occur, if at all, when stream discharge, velocity, and turbulence are low. The commission concludes that in such a situation, the conditions in the mixed surface layer are representative of the stream's aquatic life use attainment. This corresponds to dissolved oxygen profiles in a reservoir when stratification occurs and oxygen is consumed through respiratory processes in the hypolimnion. The commission's proposal for tidal waters represents a rewording of the previous requirements that separately described bays and tidal streams. The previous standard included consideration of only the mixed surface layer in a tidal stream with density stratification. For bays, the revision replaced a standard that did not consider unnaturally-occurring bottoms (dredged channels) in bays as subject to the dissolved oxygen criteria. The commission also notes that bays in Texas are shallow and generally well-mixed. Stratification occurs in association with deeper and less mixed dredged channels. For these reasons, the commission believes these changes to the rule do not lessen the stringency of how the dissolved oxygen criteria are applied and the revisions improve and clarify the commission's procedures for measuring attainment.

Austin, EPA, and TML/TAMSA commented that the sampling periodicity and evaluation for chloride, sulfate, and TDS, as proposed in §307.9(e)(1), is unclear and may cause non-representative sampling.

The commission agrees and has revised the language to provide clarity to reflect sampling periodicity and evaluation procedures. Additional details beyond the basic framework of the water quality standards are provided in the guidance document.

The NWF and TCEA commented that they object to the absence of a single sample maximum as a measure of standards attainment for contact recreation uses.

The commission agrees with the commenters, as previously described in the commission's response to comments on §307.7(b)(1). Additionally, §307.9(e)(3) has been adopted with revised wording to correspond to §307.7(b)(1).

The TML/TAMSA commented on §307.9(e)(4) and §307.9(f) with specific proposals for measurement of standards attainment for numerical acute toxic criteria, numerical chronic toxic criteria, determinations of total toxicity attainment, attainment of numerical human health criteria, and determinations of biological integrity.

The commission responds that it appreciates the comments and the effort taken to develop these suggested measures. These comments are useful in the dialogue the commission will begin this year with interested parties to refine and revise the current guidance established in *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data*. However, the commission believes it would be inappropriate to adopt any suggested measures at this time since specific proposals must first be considered and receive public comment.

The TPWD, EPA, and NWF commented on proposed §307.9(e)(6)(B) that the proposed language removes the requirement to measure dissolved oxygen during the periods when it will be at its lowest. They suggest that an effort should be made to assess 24-hour dissolved oxygen or take instantaneous measurements in the early morning hours.

The commission responds that over the years it has collected extensive data which has assisted in evaluating diel trends of dissolved oxygen in Texas waters. While early morning may generally result in observations of a dissolved oxygen minimum, the minimum can occur later in the day as well. For instance, this occurs in streams with heavily shaded banks. It is for this reason that the proposed language deleted the phrase referring to collections within two hours after sunrise. Nonetheless, the comments have led the commission to further evaluate this issue. In response, the commission has adopted language which clearly states its protocol for dissolved oxygen attainment. The language states that it will compare a 24-hour average dissolved oxygen criterion to the average of values measured over a diel period. The commission will compare a minimum dissolved oxygen criterion to the result obtained from a single sample measurement.

The commission notes that time of day is an important factor in evaluation of instream dissolved oxygen values. However, it is but one of several considerations in the evaluation of these type data. Other important considerations determine how representative a dissolved oxygen sample may be. These include, but are not limited to, sample location within a water body which has a variety of habitats, depths, and mixing, the range of values by depth, the discharge flow of a stream, whether the discharge flow is at or below its assessed seven-day, two-year low flow, the percent saturation of dissolved oxygen, and the extent to which the water body has been assessed. For these reasons, it is critical that any person, group, or monitoring entity evaluating any one criterion or data set should be cautious in making a binding attainment decision based on the data set.

The GBF, SC-Houston, and NWF commented on proposed §307.9(f) and stated that the inclusion of biological integrity to the components being assessed is a positive step, but the commenters expressed concern with the possible manner in which the commission might apply biological integrity to assess aquatic life use attainment. The commenters urged the commission to undertake further public participation before proceeding with the rule's adoption. NWF questioned the manner in which the commission will use biological integrity as an assessment tool. The commenter expressed concern that the commission will use biological integrity as one of many factors in evaluation of aquatic life use attainment, with a weight of evidence approach. For instance, determining aquatic life use is attained due to the biological integrity assessment, in spite of numeric dissolved oxygen criteria showing nonattainment.

The commission responds that it is a positive step to formalize biological integrity in the water quality standards as an assessment

tool. This approach is consistent with the existing permitting program which uses receiving water assessments to characterize the aquatic life use which can be attained in receiving waters. The commission's intent is to note that biological integrity is an additional measure for assessment of water quality standards compliance. The commission has adopted the new subsection and will use this new framework as a starting point. The commission will seek the refinement of the guidance document entitled *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data,* which will include a broad-based effort to describe guidelines for assessing biological integrity. Simple inclusion of this measure is not intended to contravene compliance with other existing requirements of the water quality standards.

The SC-Houston and TPWD commented that the proposed language in §307.9(f) describes species abundance and diversity but precludes other aspects of biological integrity such as the health of organisms. The commenters suggested a more broad definition.

The commission agrees and has amended the language to avoid conflict with the definition of biological integrity as provided in §307.3 of this title (relating to Definitions and Abbreviations).

The NWF commented on proposed §307.9(g) by indicating that the method for making narrative criteria meaningful is through the determination of standards attainment. The commenter urges the commission to make the process of approval of guidance such as *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data* more participatory.

The commission has responded to the concern, as is previously described.

SECTION 307.10--APPENDIX A

Numerous comments were received relating to proposed site-specific revisions in §307.10 Appendix A. The LPCASS expressed opposition to downgrades for individual stream segments. Fifty-six individuals expressed opposition to all downgrades. Some individual commenters, NFW, and TPWD expressed concern that the downgrades have removed some water bodies from Tier 2 degradation consideration. The GCA, EHMCA, and TCC supported all proposed site-specific criteria and use designations.

The commission responds that water quality standards and criteria were originally established to provide a high level of protection to most waters in the state based on a limited amount of data. The commission used conservative presumptions where information was lacking, so as to ensure that the highest uses which could occur were protected. As more data are collected and evaluated, it is appropriate to establish revised site-specific standards from time-to-time to reflect actual existing and attainable uses and criteria. When such revisions occur, they do not downgrade water quality, but rather set standards that reflect actual stream conditions in relatively unimpacted areas. The commission will continue to evaluate the applicability of Tier 2 of the antidegradaton policy, in order to ensure that appropriate water bodies are included. The site-specific revisions are based on additional and more accurate data, and the commission is adopting them as proposed.

The PIC supported public participation in the Use Attainability Analyses process.

The commission responds that the public hearing on the proposed water quality standards provides an opportunity for public participation regarding the results of use attainability analyses.

The SC-Houston expressed opposition to any weakening of water quality standards for chloride, sulfate, TDS, or other criteria in §307.10, Appendix A. The TPWD expressed concern that the criteria are being changed to accommodate pollution and would like more information on the rationale of the changes.

The commission discussed the issue of dissolved minerals (chloride, sulfate and TDS) with the Water Quality Standards workgroup and stated that those criteria that are less than the secondary constituent levels for public drinking water as specified in 30 TAC §290.113 would be grouped into classes. No overt opposition to this approach was raised during the workgroup sessions. The commission chose the following groups for chloride and sulfate criteria (all values in mg/L):50, 100, 150, and 200. TDS criteria were generally grouped by 100 mg/L increments from a minimum of 200 mg/L to 1,000 mg/L. Criteria were calculated from period of record data for each segment using the commission's procedure for deriving dissolved mineral criteria and then assigned to the appropriate group. Segments with very low existing criteria were assigned proposed criteria based on the general groups. The secondary constituent levels are: chloride (300 mg/L); sulfate (300 mg/L); and TDS (1000 mg/L). Current federal guidance contained in the EPA document entitled *Ambient Water Quality Criteria for Chloride-1988* recommends 230 mg/L of chloride for chronic protection of freshwater aquatic life. A concentration of 230 mg/L of chloride is protective of most aquatic invertebrate and vertebrate communities. Of the 107 segments with a proposed change to at least one of the dissolved mineral criteria, only six segments (0229, 1217, 1242, 2004, 2310, and 2312) were proposed with one or more of the dissolved mineral criteria higher than the secondary constituent levels or a chloride criteria higher than 230 mg/L. Of these, only Segments 1242 and 2310 are designated as public water supplies. The justification for the revision to Segment 2310 is presented in the response to comments provided by USIBWC. The proposed criteria for Segments 1242 and 2312 are all lower than the existing criteria. The other three segments did not exhibit any trends of increasing concentrations since 1987. The existing chloride criteria for all six segments already exceeds 230 mg/L; however, the proposed criteria are reflective of ambient chloride concentrations in the segments and are protective of the aquatic life that exists in these segments. The proposed change in the sulfate criteria to 500 mg/L for Segment 0613 was a typographical error as it should have been 50 mg/L which is being adopted. Data was supplied by the LCRA and Austin on segments in the Colorado River Basin and some changes in the proposed criteria were made after the commission reviewed the data. These changes are discussed under the responses to LCRA and Austin comments. The sulfate criteria for Segment 2115 is revised back to the existing criteria. The proposed criteria are adopted as modified.

The EPA supported the addition of aquifer protection in Appendix A to 14 segments in the Brazos, Guadalupe, and San Antonio River basins.

The commission adopts the revisions as proposed.

The EPA accepted the changes in Appendix A for Segments 0501, 0502, 0503, 1242, 1256, 1257, 1802, and 1803. It also accepts the more protective criteria for minerals in Segments 1242 and 1256.

The commission adopts the revisions as proposed.

The EPA recommended that the seagrass propagation use be designated for appropriate water bodies.

The commission did not propose this change because additional evaluation is needed in order to assign a seagrass propagation use to specific water bodies. These designations can be developed and considered for subsequent revisions to the standards.

The TCONR, TCPS, and NWF expressed opposition to the proposed intermediate aquatic life use for new Segment 0230, Pease River, which currently is a portion of Segment 0220, Upper Pease River/North Fork Pease River. Rhodia supported the proposed intermediate aquatic life use for new Segment 0230, Pease River.

The commission responds that the proposed creation of Segment 0230 with an intermediate aquatic life use and associated dissolved oxygen criteria is supported by a use attainability analysis. The use attainability analysis determined that physical habitat and biological community characteristics upstream of the City of Vernon were indicative of a limited aquatic life use. Naturally occurring elevated concentrations of chlorides, sulfates and TDS may also limit the biological community. Downstream of the waste water discharges, both physical habitat and biological community characteristics improved to intermediate quality. The commission concludes that an intermediate aquatic life use is an appropriate attainable use for segment 0230 and adopts the revision as proposed.

General opposition to the creation of Segment 0615 with an intermediate aquatic life use was expressed in post cards and letters from over 1,109 individuals. Petitions with over 3,000 signatures were also received which expressed opposition to this change. The FUSE, F&A, TCEA, UT-Tyler, LPCASS, PIC, SC-Houston, TCONR, and TCPS opposed the creation of Segment 0615 and the change in aquatic life use from high to intermediate. SC-Houston opposed the intermediate aquatic life use designation for the upper reaches of Sam Rayburn Reservoir. The TPWD expressed opposition to intermediate aquatic life use designation for proposed Segment 0615 and stated that the UAA was inadequate. They recommended that more sampling is necessary before the proposed change is adopted and that TNRCC should explore options that would limit the scope of the downgrade in permitting decisions. The NWF expressed opposition to the proposed revision because it sets a precedent to lower small portions of streams when dischargers have difficulty meeting standards, that Tier 2 of the antidegradation no longer applies, and that the studies do not support lowering the aquatic life use. They also stated that the proposed change seems to be based more on economic considerations than on science.

One individual, a biologist, commented that the study to support the change in aquatic life use from high to intermediate was flawed and should not be used to support the change. Several individuals wrote in opposition to lowering water quality standards on the riverine portion of Sam Rayburn Reservoir. Several individuals are local fishermen and expressed concern about the fishery. Some of these commenters requested that TNRCC not lower the standards to accommodate industry. Two individuals commented that if standards are lowered the water quality and fishing industry will suffer and asked that TNRCC protect the lake. One individual requested that TNRCC not let anyone pollute water of the state and that TNRCC do the right thing. Another individual requested that the TNRCC stop the dumping of waste into Sam Rayburn Reservoir. One individual commented that they wanted Sam Rayburn Reservoir off the impaired list and urged TNRCC to bring industrial and septic tank polluters into compliance. One commenter requested that the pollution laws be strengthened. Another, in opposition to the lowering of aquatic life use and creation of Segment 0615, also opposed any variances for the paper mill.

Seven hundred nine individuals submitted post cards which expressed opposition to the proposed change in aquatic life use from high to intermediate in the upper arm of Sam Rayburn Reservoir. They noted that Sam Rayburn Reservoir was listed on the 303d list and expressed added concern that this change would allow additional aluminum to be discharged to the reservoir.

Seventy-five individuals submitted form letters which included the same language as on the post cards listed above to express their opposition to the creation of the new segment in the Angelina River Basin.

Twenty-nine individuals submitted form letters which referenced three documents available to the commission as evidence that the proposed change in designated use for Segment 0615 of the Angelina River is not supported. They also expressed concern that Sam Rayburn Reservoir has been identified as having water quality impairments and the proposed change is not consistent with water quality improvement goals of the agency.

Twenty-two individuals submitted form letters which strongly opposed the proposed change in designated use and the creation of a new segment for the upper portion of Sam Rayburn Reservoir.

Concerned Citizens for Clean Water provided a petition with 2,763 signatures opposing the proposal to establish Segment 0615 in the Angelina River Basin with an intermediate aquatic life use. The statement on this petition also expressed concern that Sam Rayburn Reservoir was being considered for listing on the 303d list as an impaired water.

Another petition with 241 signatures was received which expressed opposition to the establishment of an intermediate aquatic life use for a portion of Sam Rayburn Reservoir and about the proposed changes to criteria for aluminum as it relates to Segments 0611 and 0615 in the Angelina River Basin. It also expressed concern about the listing of Sam Rayburn Reservoir on the 303d list.

Under current federal regulations states have the primary responsibility for establishing surface water quality standards for waters in the state within the boundaries of the federal and state regulations and guidelines. In earlier versions of the standards rule uses and criteria for some segments were established without sufficient on-site water quality data and were based on limited information available at the time. The statute provides for a three-year cycle for review to allow appropriate revisions to be made that more accurately reflect existing water quality and attainment goals for a particular body of water. Current federal regulations also include provisions which outline procedures by which states can develop information to support revisions to standards which more accurately reflect appropriate site-specific conditions and goals. Approved approaches that states may use to evaluate water body specific standards include a determination of site-specific criteria that more accurately reflect peculiar characteristics of the water body (primarily related to water effects ratios dealing with toxic criteria), a use attainability analysis to determine water body specific conditions which determine uses that can reasonably be expected to be achieved, and

an evaluation of significant economic and social circumstances which may require standards adjustment. The State of Texas has focused on the first two approaches because these are based on recognized technical evaluations of the water bodies in question.

The use attainability analysis conducted for the upper reaches of Sam Rayburn reservoir was conducted to determine the highest use that could be achieved in that water body if it were relatively unimpacted by pollution. The study achieved this by examining reference sites, as explained in the next comment. The study resulted in a proposal to adjust the standards by creating a new segment with uses and criteria which more appropriately reflect conditions in this water body. The study was conducted exclusive of economic and significant social circumstances in accordance with state and federal guidelines and regulations related to quality control and quality assurance. Procedures used to conduct the analysis are recognized as technically sound and have been used in other areas of the state, such as segment 0704 Hillebrandt Bayou, segment 0841--Lower West Fork Trinity River, segment 1245--Upper Oyster Creek, segment 1255--Upper North Bosque River and several others to develop standards which more appropriately reflect local conditions and water quality goals.

The study conducted by Donohue Industries Inc. (previously Champion International Corp.) was conducted in accordance with a work plan developed in 1994 using existing sampling protocols which were acceptable to the executive director at that time. The sampling technique (boat electrofishing) selected by Donohue's consultant was in their professional opinion the most suitable for use at all the sites so that a representative comparison of the data could be made. In 1996, after Donohue's study was complete, the executive director revised the sampling protocols to stress that fish sampling should be conducted using both electrofishing and seines, when possible. As indicated in the consultant's report to the commission, seining was not possible at all of the sites sampled during their study. Starting in 1998, the commission began sampling the Angelina River at two sites located upstream and one site located downstream of the Paper Mill Creek confluence. Although these sites were not at the same locations as those used in the Donohue study, the commission personnel were able to use both boat electrofishing and seining at the sites. The commission collections averaged three more species per sampling event as compared to the Donohue study for the upstream Angelina River sites. The majority of the fish species collected in the commission samples was by the electrofishing technique. Overall, the results of the sampling at the upstream Angelina River sites in both studies are similar based on the average scores of the Index of Biotic Integrity. The commission data also indicate that a high aquatic life use is not attained at the upstream Angelina River site. The commission has reviewed data collected from several sources, including substantive and extensive public comment, and concludes that it is appropriate to create Segment 0615 in the Angelina River basin with a designated aquatic life use of intermediate. The commission further makes clear that this revision affects only a limited, riverine portion of the watershed where the Angelina River enters Sam Rayburn Reservoir. The amendment which is adopted does not affect the existing, designated high aquatic life use for the main body of Sam Rayburn Reservoir.

Individual commenters challenged the validity of the scientific study conducted to provide data to lower the aquatic life use and pointed out short comings of the study. The commenters used other documents and information to indicate that the reference sites were not appropriate. Some commenters requested more information to help them understand how TNRCC determines the adequacy of reference sites.

Much of the criticism of the Donohue study centers on the lack of seining and the assumption that electrofishing tends to under represent smaller species such as minnows and darters which are important components of the Index of Biotic Integrity (IBI). It should be noted that the electrofishing effort in the Donohue study considerably exceeded the effort normally considered adequate in the TNRCC sampling protocols. Comparing the three Donohue samples at the upstream Angelina River site to seven TNRCC samples at upstream Angelina River sites, the TNRCC samples averaged one more minnow species and one less darter species than the Donohue samples. The individual scores of the IBI at the Angelina River site of the Donohue study fell within the range of scores of the IBI at the Angelina River site of the TNRCC study. Therefore, the TNRCC concludes that the Donohue sampling effort was adequate and comparable to the TNRCC sampling effort. Reference sites are always used to determine aquatic life use where there is an existing discharge. Reference sites are chosen in two ways, either a site upstream or an adjacent watershed. A site is chosen that is as similar as possible in hydrology, habitat, geology, and water chemistry. The goal is to select a site that would be representative of the area downstream of the discharge if the discharge were not present. For Segment 0615, sample sites were located both upstream of Donohue's discharge and on an adjoining watershed, Attoyac Bayou. Rarely are reference sites identical to those to which they are to correspond. Attoyac Bayou is similar in hydrology and habitat to that of the Angelina River, and therefore, serves as an adequate reference site in conjunction with the upstream Angelina River sites.

One individual indicated that he had reviewed the report "Site-Specific Dissolved Oxygen Criteria Development for the Riverine Reach of Segment 0610" and offered questions concerning the relationship of water quality to desired species and commented on holding times of samples. The individual believes that the study should not be used to lower water quality standards because of its short comings.

The studies collected fish and benthic invertebrates to determine aquatic life use, but were not used and are not intended to be used to determine if conditions were ideal for any particular species. The method for determining aquatic life use takes into consideration feeding characteristics, numbers and types of fish or benthic invertebrates, tolerance to stressful conditions, hybridization, and diseases. The chemical and physical characteristics also play a role in the types of fish and benthic invertebrates that would be expected to occur. The proposed change in dissolved oxygen criteria would not alter the types of organisms the agency would expect to occur in the newly proposed segment. The agency has documented naturally occurring dissolved oxygen concentrations of less than 5.0 mg/L as a 24-hour average in many East Texas streams which still maintain a diverse fishery. The commission is unable to respond to the comment concerning deterioration of samples because the comment did not state what type of samples. The alleged shortcomings of the study noted by TPWD, TNRCC regional staff, and others are responded to in the previous paragraph.

Some individual commenters raised concerns that the report "Site-Specific Dissolved Oxygen Criteria Development for the Riverine Reach of Segment 0610" indicates certain data collected at one of the reference sites was not used and the commenters questioned the validity of not using this data.

The commission reviewed all of the data collected by Donohue and the regional staff and used all of the data in determining the appropriate aquatic life use to assign to Segment 0615.

One individual commenter with a mathematics background questioned the results from Table 19 in the study "Site-Specific Dissolved Oxygen Criteria Development for the Riverine Reach of Segment 0610" and commented that the results indicate the reference sites support high aquatic life uses.

The method for determining aquatic life use in Table 19 was not used in determining aquatic life use for Segment 0615. The TNRCC used the IBI, which is widely used to assess fish communities and was adapted to Texas streams and fish communities. This method of measuring biotic integrity directly evaluates characteristics of a fish community, which provides a better picture of the community than dissolved oxygen and habitat. The results from the two methods would not necessarily be the same. The commission also evaluated the data using a draft regional IBI developed by TPWD, which also resulted in a calculation of an intermediate aquatic life use.

One individual expressed opposition to the creation of Segment 0615 and the change from high to intermediate aquatic life use. This individual opposed breaking up the existing segment into parts and commented that it was irresponsible to alter the segment boundaries.

The new segment separates the riverine portion of the Angelina River from Sam Rayburn Reservoir proper. The hydrology of Segment 0615 is different from that of the reservoir. The new segment water levels fluctuate from riverine to lake-like depending on the level of the reservoir, and therefore the creation of the new segment is appropriate.

Some individual commenters noted that chemical measurements in the study "Site-Specific Dissolved Oxygen Criteria Development for the Riverine Reach of Segment 0610" and other data indicate the reference sites exhibit a dissolved oxygen concentration above 5.0 and questioned why that information does not result in TNRCC concluding the appropriate aquatic life use as high.

The commission bases aquatic life use on aquatic communities, not on dissolved oxygen levels. Fish and benthic invertebrates are collected to assess those communities. As previously noted, East Texas streams can have uncharacteristically low dissolved oxygen levels but still support a diverse fish and invertebrate community.

Some individual commenters cited letters and memoranda from technical staff at TNRCC and at TPWD, which they stated supports a conclusion that the high aquatic life use is appropriate. A TPWD letter in 1996 indicated that water quality upstream from the Paper Mill Creek confluence is indicative of a high aquatic life use. A 1996 interoffice memorandum from the TNRCC Beaumont Region critiqued the study done for Donohue paper mill and recommended the standard not be revised.

Subsequent sampling by TNRCC regional staff on the Angelina River addressed the comments and concerns in both the letter from TPWD and the memorandum from TNRCC technical staff.

Some individual commenters also included or referenced correspondence from the United States Forest Service from 1996, which opposed downgrading of water quality standards for East Texas waters.

The commission responds that the letter cited was one in opposition to a proposal by the Donohue paper mill's predecessor. This request (to revise the aquatic life use of the now adopted Segment 0615 to "low" with a corresponding dissolved oxygen criteria of 3.0 mg/L) was not approved by the executive director.

The referenced letter also states a strong support for retaining a presumed standard of high aquatic life use, and a corresponding dissolved oxygen criterion of 5.0 mg/L. The commission responds and notes that it has no disagreement with the statements in the letter, when in the context of denoting general environmental conditions in streams in the state. However, this presumption is modified when streams are accurately assessed and assigned actual or attainable designated uses.

One individual submitted data from samples collected in the receiving waters below the discharge of the Donohue paper mill and provided discharge information from Donohue. Concerns were raised over the water quality conditions resulting from the discharge into Paper Mill Creek, Angelina River, and Sam Rayburn Reservoir. Several individuals opposed to the revision charged that the creation of Segment 0615 was so that Donohue can continue to pollute Sam Rayburn Reservoir. The comments included data collected on the Angelina arm of Sam Rayburn Reservoir by two masters degree candidates. One individual commented that the upper end of Sam Rayburn Reservoir and the Angelina River were dying due to drought and poor water quality. The commenter stated that only gar (fish) were able to survive and that there was black sludge filling in the lake. This individual indicated that he provided the paper mill with information on ways to improve water quality. The commenter has seen ducks stained by the black water and fish dead because of the lack of oxygen. A commenter submitted a picture of the confluence of Paper Mill Creek with the Angelina River which notes a black plume of water associated with the paper mill effluent. One commenter provided pictures of Sam Rayburn Reservoir following heavy rains in 1999 and the impact of releases from sludge ponds at the paper mill. The commenter stated that previous efforts to stop dumping into the river by the paper mill had been unsuccessful. The individual mentioned that some plant and bird life had disappeared and attributed it to the discharges from the paper mill. One individual commented that TNRCC should not allow discharges into the lake, suspend any discharges, and require those that have polluted Sam Rayburn Reservoir to pay for studies and clean up and restoration, and stated that other industries as well as individuals have to pay to clean up their pollution and so should the paper mill.

The commission responds that it does not intend to allow surface water pollution and that its goal is maintaining and improving the water quality of Sam Rayburn/Angelina River watershed. Designation of uses and criteria are made on the basis of specific quality-assured data collected to indicate attainable uses. Significant water quality assessments of the watershed have been performed by commission staff and by regional staff and private entities. The TNRCC Beaumont regional office regularly monitors permit compliance and effluent quality from the Donohue paper mill. The commission actively responds to noncompliances with enforcement actions.

Water quality maintenance is achieved through permitting and enforcement. A permit for discharge must include effluent limitations that will cause the stream to meet or exceed the water quality standards. The Donohue paper mill does not currently discharge at a quality that is necessary meet dissolved oxygen

requirements in the warm weather months. But, since the paper mill currently operates under a variance from the current aquatic life use designation, the adoption of the intermediate aquatic life use will result in a permit amendment request. In the amended permit, the executive director will draft final effluent limitations, a schedule for construction of wastewater treatment facilities, and a deadline for completion not to exceed three years.

The executive director's draft amended permit is expected to include significantly more stringent requirements compared to the current variance and is expected to reduce biochemical oxygen demand (BOD) loading into the river and headwater area of the reservoir. Consequently, the commission disagrees with commenters who believe that existing water quality will degrade as a result of the standards change. Based on current modeling protocol, the executive director expects it will recommend the 30-day BOD daily average loading from the paper mill will be reduced in the warm weather months by greater than 50%. The commission suggests that the public and interested parties should participate in the anticipated permitting process when the paper mill requests a permit amendment.

However, several individual commenters expressed concerns over stream conditions outside the scope of today's rule amendments. The commission is not amending these rules to revise its standards relating to color. As described elsewhere in this response to comments, the commission is not adopting a site-specific aluminum water-effects ratio. There are no Angelina River/Sam Rayburn Reservoir site-specific revisions to the dioxin criteria being adopted.

One individual stated that the standard revision would result in an adverse fiscal impact to the fishing industry because of the pollution in the reservoir.

As detailed above, the commission responds that its adoption of the intermediate aquatic life use will likely result in the improvement of existing water quality. The worsening of pollution would not likely occur. The commission disagrees there would be a negative fiscal impact, because water quality is expected to improve, and the reservoir will continue to support a healthy fishery.

One individual requested that TNRCC table the change in aquatic life use or creation of a new segment until after the presidential election, and requested that TNRCC talk to local individuals living in the area about the water quality, and use local skills in making a decision. Another individual commented that TNRCC should delay a change in the segment until after the modernization of the paper mill was completed.

The commission responds that it has enough information supporting its decision to adopt the standards change. However, it will continue to assess water quality in the watershed and will continue to work closely with regional and local governments in the area. Opportunities for interaction between the agency and interested parties in the watershed exist for exchanging information, setting water quality priorities, coordinating surface water quality monitoring schedules, and targeting monitoring. Through the Angelina & Neches River Authority, the agency implements many stakeholder participation efforts, associated with the Clean Rivers Program, identification of water quality impairments, and in development of TMDLs.

The commission disagrees that the paper mill should be modernized before the standard is revised. Consistent with federal and state environmental requirements, construction of required wastewater treatment facilities occurs once all commission and EPA approvals for a standard change occur and the construction and proposed discharge are authorized.

One individual commented that with modernization of the plant, jobs will be lost, and the jobs that support the fishing and recreation on the lake outweigh those that will be lost from the paper mill. Another individual suggested a change in the standard be delayed until an economic study of the reservoir is prepared by the TPWD. One individual commented that the paper mill would remain profitable even if the aquatic life use remained high and that it would just cost them more money to comply with the use. The commenter also questioned why the Donohue paper mill would continue to spend $230 million if the mill didn't think they could get the aquatic life use lowered. Several individuals opposed to the change commented that retaining the high aquatic life use would not result in closure of the paper mill, but would only reduce the profit from the mill. Some individuals supplied references and other information on zero discharge systems that should be an option for Donohue paper mill instead of revision of the standard.

The commission responds that the decision to revise the standard is based upon the results of the scientific studies carried out. The Donohue paper mill did provide information on the feasibility of various treatment alternatives. However, the commission's decision is not the result of an economic analysis of options for management and disposal of wastewater at the Donohue paper mill. The commission has not analyzed profitability of the paper mill. The commission notes that other commenters on this rule amendment also offer points of view on the issue of the paper mill's viability. The commission disagrees there would be a negative fiscal impact on the fishing industry from this adoption. The amendment of this rule will not result in a lowering of the existing water quality.

The Cities of Lufkin and Nacogdoches, Agriculture, Angelina County, DETCL, DEC, DETDA, Donohue Industries, the Honorable Jim Turner, LP, LCVB, LCCBC, Lufkin Daily News, TXAFL-CIO, TFA, and TFIC, expressed support of the creation of Segment 0615 and the assignment of an intermediate aquatic life use. Twenty-eight commenters sent in a form letter which supported the new segment. One thousand seven hundred ninety-nine commenters sent in post cards which supported the segment creation and assignment of intermediate aquatic life use. One commenter who supported the segment creation included a history of the paper mill in Angelina County. Several commenters indicated that the commission was assigning the appropriate aquatic life use to this section of the Angelina River. One commenter who supported the new segment and criteria included extensive technical information on the paper mill's biomonitoring, discharge, and permit limits and on ambient conditions of dissolved oxygen and aluminum in Sam Rayburn Reservoir. Nine commenters, including the Honorable Phil Graham and the Honorable Kay Bailey Hutchison, requested that the commission consider science and/or all of the facts when considering whether to adopt Segment 0615 and an intermediate aquatic life use. One individual requested that the commission reclassify the segment to reflect the studies performed. The chairman and executive director of the Freshwater Angler Association supported the commission's use of sound science in designating the segment and its aquatic life use. A large number of commenters discussed the economic support the paper mill provides Angelina County. Eight commenters supported Donohue Industries, Inc. Three commenters, including LNVA, stated that they had never seen any evidence of

ecological concern in the portion of the Angelina River being designated Segment 0615.

One individual pointed out that the paper mill was very important to Angelina County and that there should be a way to accommodate all sides of the issue. One individual requested that the commission take a realistic look at the paper mill and what it means to the City of Lufkin. One individual requested that the commission consider the people of Lufkin as well as the scientific, economic, and environmental data to create Segment 0615 and assign it an intermediate aquatic life use. TLC requested that the commission aid Donohue in whatever technical endeavors they are pursuing.

The Angelina County Chamber of Commerce submitted a petition with 128 names and the International Brotherhood of Electrical Workers submitted a petition with 60 names in support of the proposal to establish Segment 0615 in the Angelina River Basin with an intermediate aquatic life use.

The commission appreciates the support for the proposed revision.

Comptroller provided comments relating to the economy of Angelina County and notes that the county has been designated as a "Strategic Investment Area" for the year 2000. This means that the county's unemployment rate is higher than the statewide average and per capita personal income is lower than the statewide average. The commenter stated that if the paper mill halts operations, there would be an immediate loss of sales and employment in that industry, plus indirect loss to businesses supported by the employees and operations of the paper mill, particularly the services, retail trade, forestry and construction industries. The loss of approximately 850 jobs at the paper mill would result in a total loss of 4,300 jobs statewide within the first year of the paper mill closing. The loss in employment would also result in the reduction in Texas personal income of approximately $217 million.

The commission appreciates the receipt of the economic information.

Diamond-Koch supported the change in TDS from 400 to 700 milligrams per liter on Segment 0902, Cedar Bayou Above Tidal.

The commission adopts the revision as proposed.

The EPA recommended that an aquatic life use be adopted for Segments 1006 (Houston Ship Channel Tidal) and 1007 (Houston Ship Channel/Buffalo Bayou Tidal), and that the dissolved oxygen criteria be changed from 1.0 to 2.0 mg/L for Segment 1007 and from 2.0 to 3.0 mg/L for Segment 1006.

The commission responds that the existing uses and dissolved oxygen criteria for Segments 1006 and 1007 are based on an EPA-approved use attainability analysis. Furthermore, the EPA approved waste load evaluation does not indicate that higher dissolved oxygen criteria can be achieved. Therefore, the commission does not agree that reliable data indicates that the dissolved oxygen criteria for Segments 1006 and 1007 should be raised at this time.

The LCRA expressed opposition to the increases in chloride, sulfate, and TDS for the majority of the segments in the lower Colorado River. The LCRA expressed concern that the proposed revisions do not include segment-specific criteria for Segment 1433 for dissolved minerals and recommend a UAA for the segment.

The commission responds that the LCRA provided data and recommendations for revising some of the proposed dissolved minerals (chloride, sulfate, and TDS) criteria for 14 segments (1402-1408, 1414-1417, 1428, 1429 and 1434) in the Colorado River Basin. LCRA agrees with the proposed revisions for two segments (1409 and 1427). After review of the LCRA data, the commission agrees with some of the LCRA recommendations for changing the proposed criteria and modifies some others. One or more of the dissolved minerals criteria are revised from the proposal and adopted for the following segments: 1402-1408, 1414-1416, 1428, 1429, and 1434. The commission did not propose any change for Segment 1417 or Segment 1433, and therefore, cannot make any changes at this time because the public would not be afforded an adequate comment period. Revision of dissolved mineral criteria for Segment 1417 may be considered during the next revision of the standards. Currently, a TMDL project relating to dissolved minerals is underway for Segment 1411 and associated segments. Results of the TMDL and other data will be used to develop criteria, as appropriate, for these segments, including 1426 and 1433, in future standards revisions.

Odessa provided data on O.H. Ivie Reservoir, Segment 1433; E.V. Spence Reservoir, Segment 1411; Lake J.B. Thomas, Segment 1413; and Moss Creek. The city requested that the commission take this data into consideration in proposing criteria for these water bodies.

The commission did not propose changes for these segments, and therefore will not make the changes at this time because the commission has not fully considered the proposals, and because the public has not been given the opportunity to comment. Currently, a TMDL project relating to dissolved minerals is underway for Segment 1411 and associated segments. Results of the TMDL and other data will be used to develop criteria, as appropriate, for these segments, including 1426 and 1433, in future standards revisions.

Austin commented that it opposed the changes in chloride (Cl), sulfate (SO_4), and TDS criteria for Barton Creek and Onion Creek and that separate historical data should be used to evaluate Barton Creek. The changes are higher than the upper 95th percentile confidence limit above the mean and changing the criteria would suggest that degradation could occur. Data indicates that the increased values are associated with development. As some development impacts are already being observed in Onion Creek, its assessment should evaluate the baseline conditions as defined for antidegradation. If lack of variability in the data provides tighter confidence limits, the upper confidence limit should be implemented as the criteria for that segment rather than a number exceeding it. The city also objected to raising criteria concentrations in streams with Aquifer Protection designated uses. These values exceed those currently found in springs in Barton and Onion creeks. The proposed standards will allow degradation of recharge to an extent that the aquifer protection use may be impaired.

The commission responds that neither the public water supply or aquifer protection uses for Onion or Barton creeks would be affected by the proposed revisions to the dissolved minerals criteria. The criteria are well below secondary constituent levels as specified in §290.113. The commission calculated Cl and SO_4 criteria from data provided by the city on Barton Springs and will revise proposed criteria for Segment 1430, Barton Creek, to 50 mg/L for Cl and SO_4. Commission data on Onion Creek was re-evaluated and stations downstream and upstream of I-35

were pooled into two groups. Based on separate calculations on the two sets of data, the proposed criteria are appropriate for Onion Creek downstream of I-35. A footnote will be added to Appendix A indicating that the aquifer protection reach of the creek will have the following criteria: 50 mg/L for Cl and SO_4, and 400 mg/L for TDS. The commission adopts the proposed revisions as modified.

The CRWA objected to the increase in parameters applicable to stream segments in the Guadalupe River Basin (Segments 1804 and 1814) from which they draw water for drinking water.

The commission responds that the proposed criteria for dissolved minerals are well below the commission's secondary constituent levels for drinking water. The proposed criteria are protective of both the high aquatic life use and the public water supply designations for the Segment 1804, and of the exceptional aquatic life use and aquifer protection designations for Segment 1814. As an example, the proposed criteria are substantially below the current federally recommended criterion of 230 mg/L of chloride for chronic protection of freshwater aquatic life. The commission adopts the revisions as proposed.

The EPA supported the proposed temperature change for the Comal River, Segment 1811.

The commission appreciates the support of the proposed revision and adopts the revision as proposed.

The MWSC objected to increases in Cl, SO_4, and TDS criteria given in Appendix A which are applicable to stream segments in Basin 18 from which they draw water for drinking water. They have a diversion on the San Marcos River four miles below the confluence of the Blanco River. The SMRF opposed the changes because existing historical data indicates that the existing criteria are appropriate. The SMRF expressed concern about a proposed power plant and how the change in criteria and the effect the proposed discharge may have on endangered species. The SMRF also expressed opposition to setting one criteria for the watershed since the source and quality of the various rivers in the watershed differ.

The commission notes that no changes were proposed for Segment 1808-Lower San Marcos River where MWSC will divert water, and that the criteria proposed for chloride for Segment 1814-Upper San Marcos River is lower than the existing criteria for Segment 1808. The proposed criteria for sulfate and TDS for Segment 1814 are identical to the existing criteria for Segment 1808. The proposed criteria for dissolved minerals are also well below the commission's secondary constituent levels for drinking water. The commission notes that current federal guidance contained in the EPA document entitled *Ambient Water Quality Criteria for Chloride-1988* recommends 230 mg/L of chloride for chronic protection of freshwater aquatic life. Therefore, the proposed criteria are protective of both the exceptional aquatic life use and the aquifer protection designations for Segment 1814. The executive director has instituted procedures to carefully scrutinize discharges to waters that contain endangered species and can require additional control measures, as necessary, to protect endangered species. The commission adopts the revisions as proposed.

The SAWS requested that the public water supply designation for Segment 1906, Leon Creek, be removed since there are no drinking water intakes in this segment. They stated that the use was assigned when Applewhite Reservoir was proposed to be built and since the reservoir was not built, the use is not necessary.

The commission did not propose a change to the designated public water supply use for Segment 1906; therefore, the change will not be made at this time because the commission has not evaluated this change and because the public has not been given the opportunity to comment. The comment may be considered in subsequent revisions to the standards. It should be noted that the current designation for public water supply does not apply to the lower reaches of the segment.

The SAWS recommended that a notation be added that the public water supply and aquifer protection use designations apply to those portions of Segment 1910 which are upstream of the southern boundary of the Edwards Aquifer Recharge Zone.

The commission did not propose a change to the designated public water supply use for Segment 1910--Salado Creek; therefore, the change will not be made at this time because the commission has not evaluated this change and because the public has not been given the opportunity to comment. The comment may be considered in subsequent revisions to the standards. The aquifer protection use is limited to that portion of the segment that can potentially affect the Edwards Aquifer.

Corpus Christi supported the change to Segment 2101, Nueces Tidal, from exceptional aquatic life use to high aquatic life use. The TCPS, TCONR, and PIC expressed opposition to the revision. F&A and two individuals opposed the changes to Segment 2101, particularly because the EPA Office of Pollution has ranked Texas as number one in 1) pollution released by manufacturing plants and 2) pollution by industrial plants in violation of the Texas Clean Air Act. The TPWD also opposed the revision from exceptional to high aquatic life use for Segment 2101 and provided details in support of their opposition. The NWF expressed opposition to the change in aquatic life use.

The proposed change in the aquatic life use designation for Segment 2101--Nueces River Tidal is based on a use attainability analysis which compared the physical and biological characteristics of the Nueces River to four other tidal segments. The weight of evidence presented indicates that the appropriate classification of the Nueces River Tidal is high aquatic life use. A river can be ecologically unique and still have a high aquatic life use classification. A review of the TPWD list of ecologically unique rivers and streams reveals that many of the streams so listed have a high aquatic life use designation and some even have an intermediate aquatic life use designation. EPA considers the commission's high aquatic life use designation as meeting the §101(a) goals of the federal CWA. The commission adopts the revision to Segment 2101 as proposed.

The USIBWC opposed the changes in Cl, SO_4, and TDS for Segment 2303, Falcon Reservoir and stated that the data indicates that the average concentrations of these constituents exceed the current criteria. The USIBWC also recommended that additional data be gathered to address the increasing salinity gradient and account for drought conditions.

The commission responds that the proposed criteria for dissolved minerals are well below the commission's secondary constituent levels for drinking water. The proposed criteria are protective of the high aquatic life use and the public water supply designations for Segment 2303. As an example, the proposed criteria are below the current federally recommended criterion of 230 mg/L of chloride for chronic protection of freshwater aquatic life. The commission adopts the revisions as proposed.

The EPA supported the addition of public drinking water supply in Segment 2308, Rio Grande Below International Dam. El Paso

PSB and USIBWC expressed opposition to adding a public drinking supply use to the segment.

The use was proposed because the commission had information that a drinking water supply was established on the Riverside Diversion Canal which diverts water from Segment 2308. Based on information provided by the USIBWC and El Paso PSB, the commission concludes that this information is no longer accurate. Since the completion of the Rio Grande American Canal Extension in 1999, the drinking water supply is on the American Canal which obtains its water from Segment 2314. Segment 2314 is already designated as a public water supply. The proposed addition of a public water supply to Segment 2308 is withdrawn.

The USIBWC is opposed to increasing the Cl and SO_4 criteria for Segment 2309, Devils River. They stated that the five-year averages are below the current criteria and that there have been no exceedances of these criteria in the five years from 1993 to 1998.

The commission responds that the proposed criteria for dissolved minerals are well below the commission's secondary constituent levels for drinking water. The proposed criteria are protective of both the exceptional aquatic life use and the public water supply designations for Segment 2309. As an example, the proposed criteria are substantially below the current federally recommended criterion of 230 mg/L of chloride for chronic protection of freshwater aquatic life. The commission adopts the revisions as proposed.

The USIBWC expressed opposition to changing the Cl, SO_4, and TDS criteria for Segment 2310, Lower Pecos River until further data collection is performed. The data indicates a decreasing trend in average concentrations of Cl, SO_4, and TDS in the river.

The commission responds that Segment 2310 exhibits a decreasing trend of dissolved minerals from the upstream portion of the segment to the downstream portion due to dilution flows from springs and tributaries. The commission data base contains records from the downstream portion of the segment since 1968; however, the upstream portion of the segment has been sampled only since the mid-1980s. The segment boundary was extended upstream in the 1995 water quality standards revision but the criteria were not revised to account for the higher concentrations of dissolved minerals that occur in the upper end of the segment. The proposed criteria are adopted to reflect the addition of the newer data from the upstream portion of the segment.

The USIBWC supported the lowering of criteria for Cl, SO_4, and TDS for Segment 2312, Red Bluff Reservoir.

The commission adopts the revisions as proposed.

The USIBWC expressed opposition to changing the Cl and SO_4 criteria for Segment 2313, San Felipe Creek because the averages of available data are below the current criteria which are adequate. The USIBWC supported the lowering of TDS criteria.

The commission responds that the proposed criteria for dissolved minerals are well below the commission's secondary constituent levels for drinking water. The proposed criteria are protective of both the high aquatic life use and the public water supply designations for Segment 2313. As an example, the proposed criteria are substantially below the current federally recommended criterion of 230 mg/L of chloride for chronic protection of freshwater aquatic life. The commission adopts the revisions as proposed.

SECTION 307.10--APPENDIX B

Eastman, GHP, and TCC suggested that Appendix B should be removed from the rule and placed in the implementation procedures. They noted that the low-flow criteria are updated by the commission periodically, and therefore, the flow data used in permit actions might not correspond with those in the rule.

The commission acknowledges that the values in Appendix B represent default criteria, in that they apply until better information becomes available. They are included in the rules so that there will be a regulatory default value in effect for all segments for which they remain pertinent.

One commenter noted that some gage numbers in Appendix B are identified as being in Segment 1242 when they should be in new Segments 1256 or 1257.

The commission appreciates the comment. The segment numbers in Appendix B were not changed inadvertently. The United States Geological Survey (USGS) gage number 08093100 and 08092600 are changed from Segment 1242 to new Segment 1257. Also, USGS gage number 08030500 is changed from Segment 0503 to new Segment 0502. The commission adopts the proposed revisions as modified.

SECTION 307.10--APPENDIX C

The EPA accepted the changes to Segments 0501, 0502, 0503, 1242, 1256, 1257, 1802, and 1803 and stated that other changes to clarify boundaries of 18 segments were also acceptable. The EPA commented that the UAAs for segments 0230 and 0615 are under review.

The commission adopts the revisions as proposed.

The SAWS pointed out that the current description for Medio Creek, Segment 1912, was in error because the stream actually originates several miles to the northwest instead of a point only 0.6 mile upstream of IH-35.

It is typical for the commission to classify only portions of streams, as it has in this situation. The TNRCC is not proposing a change to the description for Segment 1912--Medio Creek; therefore, the change will not be made at this time because the commission hasn't fully evaluated it, and because the public has not had an opportunity to comment. The comment may be considered in subsequent revisions to the standards.

SECTION 307.10--APPENDIX D

The SC-Houston requested that the upstream boundary for Harmon Creek (0803) be applicable to the boundary line of Sam Houston National Forest before the confluence with East Fork Creek. They also requested that the boundary for Tarkington Bayou (1002) be extended beyond the City of Cleveland to include the Sam Houston National Forest to the headwaters of Tarkington Bayou.

The commission responds that requested extensions of the designated boundaries for Tarkington Bayou and Harmon Creek would require additional sampling and analysis. A presumed high aquatic life use in accordance with §307.4 applies to perennial portions of the streams not otherwise designated in Appendix D. The commission adopts the revision as proposed.

The SCLS, TCONR, and an individual opposed all of the proposed revisions that are less than a high aquatic life use with a 5.0 mg/L dissolved oxygen criteria. They stated that the revisions just define away the problem and want the highest level of protection, instead.

The commission responds that all of the proposed revisions with aquatic life uses less than high for perennial streams in Appendix D are based on use attainability analyses conducted in accordance with EPA regulations (40 CFR §131.10(g)). The revisions are adopted as modified as noted in the response to EPA's comments.

Motiva requested that the aquatic life use for Alligator Bayou (Main Canal D in Segment 0702) be lowered to limited. They also request that Alligator Bayou be listed as a stand-alone water body with the following description: perennial canal from confluence with JCDD 7 Main Canal A to north of Savanna Avenue at the Port Arthur city limits.

The commission responds that the use attainability analyses conducted on the Jefferson County Drainage District Canals support an intermediate aquatic life use as a reasonably attainable use with a 3.0 mg/L 24-hour average dissolved oxygen concentration. The commission adopts the revision as proposed.

The EPA submitted comments noting which use attainability analyses they have reviewed and those which they have not yet completed reviewing. They also noted that there were a few proposed revisions for which they have not yet received a use attainability analysis from the commission and they also noted that a use attainability analysis for Spring Branch in Segment 0801 was reviewed but is not in the proposed revision.

The commission appreciates EPA's review of the numerous use attainability analyses that have been submitted by the commission. The commission will submit the outstanding use attainability analyses prior to submitting an adopted standards package to EPA for approval. The revision for Spring Branch, an unclassified tributary within the drainage basin of Segment 0801, was inadvertently left out of the proposed revision to the water quality standards. It will be included in the next revision to the standards. After discussions with EPA and further review, the commission changes the proposed aquatic life use for East Fork White Oak Creek in Segment 1004 from limited to intermediate. Also, as the result of discussions with EPA, the description of where the proposed aquatic life use for Box Creek applies in Segment 0804 is changed from the ". . .confluence of the Trinity River. . ." to the ". . .confluence of Elkhart Creek. . ." to limit the linear extent to which the intermediate use applies. Also, the commission proposed the addition of Wards Creek in segment 0505; however, the proposal should have only been a modification of the site description for the existing Wards Creek. Therefore, the revision for Wards Creek affects only the site description rather than the addition of a new stream. The commission withdraws the proposed revision to the site description for the existing Prairie Creek in segment 0606 since the revision conflicts with the site description for the new proposed reach of Prairie Creek. The commission adopts the proposed revisions as modified.

The TCC supported the proposed revisions to Appendix D.

The commission adopts the revisions as modified.

SECTION 307.10--APPENDIX E

DOW and TCC expressed support of the proposed site-specific toxic criteria and the corresponding water-effects ratios in Appendix E in §307.10.

The commission responds that these proposed changes are adopted, with the noted clarifications and corrections.

Eastman noted that the description for the proposed site-specific criterion for copper for Segment 0505, Sabine River above Toledo Bend Reservoir, was incorrectly attributed to an unnamed tributary in Appendix E in §307.10. The site-description should define the portion of the Sabine River where this criterion should apply.

The commission responds that the site description for the proposed site-specific standard for copper for Segment 505 is corrected as requested in the adopted revisions.

the TCONR, seven individuals, and a number of individuals who signed a petition opposed the change in site-specific aluminum criterion for Segments 0611 and 0615 of the Angelina River in Appendix E in §307.10. One of the individuals opposed any resulting change in aluminum permit limits for Donohue Industries, Inc., TPDES Number 00368. One commenter supported the site-specific aluminum criterion for Segments 0611 and 0615.

The commission responds that the proposed site-specific criterion for aluminum was supported by substantial instream testing of toxicity to aluminum in this area. However, additional evaluation of this data has indicated that the pH in some of the laboratory toxicity tests using synthetic lab water was outside the acceptable range. Therefore, further toxicity testing and determination of the appropriate "water-effects ratio" is needed to complete a site-specific criterion for aluminum for Segment 0611, Segment 0615 or Papermill Creek; and this proposed change is not adopted by the commission. The commission notes that future incorporation of site-specific toxic criteria based on water-effects ratios do not require prior revision of Appendix E in §307.10 of the water quality standards. If adequate information is developed for a site-specific criterion for aluminum in this area, it will be included in public notices about affected permit applications. Additional responses on incorporating site-specific standards for metals are provided in this preamble in the discussion concerning §307.6(c)(9).

The GCA, EHCMA, and Arstech supported the site-specific criteria for copper in the Houston Ship Channel (Segments 1005, 1006, and 1007) and San Jacinto Bay (Segment 2427) in Appendix E in §307.10.

The commission responds that the proposed site-specific criteria for copper for these segments, which were supported by extensive sampling and toxicity testing throughout the Houston Ship Channel complex, are adopted as proposed. In addition, the commission includes Segments 1001 and 1013 in the segments listed since data was collected in these segments also.

In addition to these responses to specific comments concerning §307.10, the commission corrects several sections of Chapter 307 to refer to site-specific standards in Appendices A, D, and E, rather than to site-specific standards only in Appendix A. The commission also incorporates changes in Appendix E based on the EPA's review of the studies to set site-specific standards for selenium and to set water-effects ratios (WER). The site specific standard for selenium has been changed from 220 to 219 based on a rounding error in the original publication that provided information on the standard. For Segment 0501, the WER was changed to 1.9. The results of one of the test series greatly exceeded the others and was deleted. Segment 0505 WER was changed to 6.7. Water for the first test series was collected when the Sabine River flow was 81.6 times greater than the 7Q2 flow. The data from this series was deleted. Segments 1001, 1005, 1006, 1007, 1013, and 2427 WER changed to 1.8 when it was recalculated after removing data from samples that were held

too long before testing commenced. Footnote 5, which is now 6, was never referenced in the table, but applies to Segment 1201.

STATUTORY AUTHORITY

These amendments are adopted under the TWC, §26.023, which provides the commission with the authority to make rules setting water quality standards for all waters in the state; §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of this state; and §5.105, which authorizes the commission to establish and approve all general policy by rule.

No other codes or statutes will be affected by this adoption.

§307.2. Description of Standards.

(a) Contents of the Texas Surface Water Quality Standards.

(1) Section 307.1 of this title (relating to General Policy Statement) contains the general standards policy of the commission.

(2) This section lists the major sections of the standards, defines basin classification categories, describes justifications for standards modifications, and provides the effective dates of the rules.

(3) Section 307.3 of this title (relating to Definitions and Abbreviations) defines terms and abbreviations used in the standards.

(4) Section 307.4 of this title (relating to General Criteria) lists the general criteria, which are applicable to all surface waters of the state unless specifically excepted in §307.8 of this title (relating to Application of Standards) or §307.9 of this title (relating to Determination of Standards Attainment).

(5) Section 307.5 of this title (relating to Antidegradation) describes the antidegradation policy and implementation procedures.

(6) Section 307.6 of this title (relating to Toxic Materials) establishes criteria and control procedures for specific toxic substances and total toxicity.

(7) Section 307.7 of this title (relating to Site-specific Uses and Criteria) defines appropriate water uses and supporting criteria for site-specific standards.

(8) Section 307.8 of this title sets forth conditions under which portions of the standards do not apply--such as in mixing zones or below critical low-flows.

(9) Section 307.9 of this title describes sampling and analytical procedures to determine standards attainment.

(10) Section 307.10 of this title (relating to Appendices A - E) lists site-specific standards and supporting information for classified segments (Appendices A - C), partially classified water bodies (Appendix D), and site-specific criteria that may be derived for any water in the state (Appendix E). Specific appendices are as follows:

(A) Appendix A--Water Uses and Numerical Criteria;

(B) Appendix B--Low-Flow Criteria;

(C) Appendix C--Segment Descriptions;

(D) Appendix D--Site-specific Receiving Water Assessments; and

(E) Appendix E--Site-specific Criteria.

(b) Applicability. The Texas Surface Water Quality Standards apply to surface waters in the state--including wetlands.

(c) Classification of surface waters. The major surface waters of the state are classified as segments for purposes of water quality management and designation of site-specific standards. Classified segments are aggregated by basin, and basins are categorized as follows:

(1) River basin waters. Surface inland waters comprising the major rivers, their tributaries, including listed impounded waters, and the tidal portion of rivers to the extent that they are confined in channels.

(2) Coastal basin waters. Surface inland waters, including listed impounded waters but exclusive of paragraph (1) of this subsection, discharging, flowing, or otherwise communicating with bays or the gulf, including the tidal portion of streams to the extent that they are confined in channels.

(3) Bay waters. All tidal waters, exclusive of those included in river basin waters, coastal basin waters, and gulf waters.

(4) Gulf waters. Waters which are not included in or do not form a part of any bay or estuary but which are a part of the open waters of the Gulf of Mexico to the limit of the state's jurisdiction.

(d) Modification of standards.

(1) The commission reserves the right to amend these standards following the completion of special studies.

(2) Any errors in water quality standards resulting from clerical errors or errors in data may be corrected by the commission through amendment of the affected standards. Water quality standards not affected by such clerical errors or errors in data remain valid until changed by the commission.

(3) The narrative provisions, designated uses, and numerical criteria of the Texas Surface Water Quality Standards may be amended for a specific water body to account for local conditions. A site-specific standard is an explicit amendment to this title, Chapter 307 (Texas Surface Water Quality Standards), and adoption of a site-specific standard requires the procedures for public notice and hearing established under the Texas Water Code, §26.024 and §26.025. An amendment which establishes a site-specific standard will require a use-attainability analysis which demonstrates that reasonably attainable water-quality related uses will be protected. Upon adoption, site-specific amendments to the standards will be listed in §307.10 of this title.

(4) Factors which may justify the development of site-specific standards are described in §§307.4, 307.6, 307.7, and 307.8 of this title.

(5) Temporary variance. When scientific information indicates that a site-specific standards amendment is justified, the commission may allow a corresponding temporary variance to the water quality standards in a permit for a discharge of wastewater.

(A) A temporary variance is only applicable to an existing discharge.

(B) A permittee may apply for a temporary variance prior to or during the permit application process. The temporary variance request shall be included in a public notice during the permit application process. An opportunity for public comment will be provided, and the request may be considered in any public hearing on the permit application.

(C) A temporary variance for a TPDES permit will also require review and approval by the EPA during the permitting process.

(D) The permit shall contain effluent limitations that protect existing uses and preclude degradation of existing water quality, and the term of the permit shall not exceed three years. Effluent limitations that are needed to meet the existing standards will be listed

in the permit and will go into effect immediately as final permit effluent limitations in the succeeding permit, unless the permittee fulfills the requirements of the conditions for the variance in the permit.

(E) When the permittee has complied with the terms of the conditions in the temporary variance, then the succeeding permit may include a permit schedule to meet standards in accordance with subsection (f) of this section. The succeeding permit may also extend the temporary variance in accordance with subsection (f) of this section in order to allow additional time for a site-specific standard to be adopted in this title. This extension can be approved by the commission only after a site-specific study that supports a standards change has been completed and the commission agrees the completed study supports a change in the applicable standard(s).

(F) Site-specific standards which are developed under a temporary variance will be expeditiously proposed and publicly considered for adoption at the earliest opportunity.

(e) Implementation procedures. Provisions for implementing the water quality standards are described in a document entitled *Procedures to Implement the Texas Surface Water Quality Standards*.

(f) Permit schedules to meet standards. Upon permit amendment or permit renewal, the executive director or commission, as appropriate, may establish interim effluent limitations to allow a permittee time to modify effluent quality in order to attain final effluent limitations. The duration of any interim effluent limitations may not be longer than three years from the effective date of the permit issuance, except in accordance with a temporary variance as described in subsection (d)(5) of this section.

(g) Temporary standards. Where a criterion is not attained and cannot be attained for one or more of the reasons listed in 40 Code of Federal Regulations (CFR) §131.10(g), then a temporary standard for specific water bodies may be adopted in §307.10 of this title as an alternative to changing uses. A criterion which is established as a temporary standard must be adopted in accordance with the provisions of subsection (d)(3) of this section. Specific reasons and additional procedures for justifying a temporary standard are provided in the standards implementation procedures. A temporary standard shall identify the water body or water bodies where the criterion applies. A temporary standard will identify the numerical criteria that will apply during the existence of the temporary standard. A temporary standard does not exempt any discharge from compliance with applicable technology-based effluent limits. A temporary standard shall expire no later than the completion of the next triennial revision of the Texas Surface Water Quality Standards. When a temporary standard expires, subsequent discharge permits will be issued to meet the applicable existing water quality standards. If a temporary standard is sufficiently justified in accordance with the provisions of subsection (b)(3) of this section, it can be renewed during revisions of the Texas Surface Water Quality Standards. A temporary standard cannot be established which would impair an existing use.

(h) Effective date of standards. Except as provided in 40 CFR §131.21 (EPA review and approval of water quality standards), these rules shall become effective 20 days after the date on which they are filed in the office of the secretary of state. As to actions covered by 40 CFR §131.21, the rules shall become effective upon approval by EPA.

(i) Effect of conflict or invalidity of rule.

(1) If any provision of this chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the provisions contained in this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

(2) To the extent of any irreconcilable conflict between provisions of this chapter and other rules of the commission, the provisions of this chapter shall supersede.

§307.3. Definitions and Abbreviations.

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

(1) Acute toxicity--Toxicity which exerts a stimulus severe enough to rapidly induce an effect. The duration of exposure applicable to acute toxicity is typically 96 hours or less. Tests of total toxicity normally use lethality as the measure of acute impacts. (Direct thermal impacts are excluded from definitions of toxicity.)

(2) Ambient--Refers to the existing water quality in a particular water body.

(3) Attainable use--A use which can be reasonably achieved by a water body in accordance with its physical, biological, and chemical characteristics whether it is currently meeting that use or not. Guidelines for the determination and review of attainable uses are provided in the standards implementation procedures. The designated use, existing use, or presumed use of a water body may not necessarily be the attainable use.

(4) Background--Refers to the water quality in a particular water body that would occur if that water body were relatively unaffected by human activities.

(5) Bedslope--Stream gradient, or the extent of the drop in elevation encountered as the stream flows downhill. One measure of bedslope is the elevation decline in meters over the stream distance in kilometers.

(6) Best management practices--Schedules of activities, maintenance procedures, and other management practices to prevent or reduce the pollution of water in the state from point and nonpoint sources, to the maximum extent practicable. Best management practices also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

(7) Bioaccumulative toxic--A chemical which is taken up by aquatic organisms from water directly or through the consumption of food containing the chemicals.

(8) Bioconcentration factor--A unitless value describing the degree to which a chemical can be concentrated in the tissues of an organism in the aquatic environment and which is absorbed directly from the water. The bioconcentration factor is the ratio of a chemical's concentration in the tissue of an organism compared to that chemical's average concentration in the surrounding water.

(9) Biological integrity--The species composition, diversity, and functional organization of a community of organisms in an environment relatively unaffected by pollution.

(10) Chronic toxicity--Toxicity which continues for a long-term period after exposure to toxic substances. Chronic exposure produces sub-lethal effects, such as growth impairment and reduced reproductive success, but it may also produce lethality. The duration of exposure applicable to the most common chronic toxicity test is seven days or more.

(11) Classified--Refers to a water body that is listed and described in Appendix A or Appendix C in §307.10 of this title (relating to Appendices A - E). Site-specific uses and criteria for classified water bodies are listed in Appendix A.

(12) Contact recreation--Recreational activities involving a significant risk of ingestion of water, including wading by children, swimming, water skiing, diving, and surfing.

(13) Criteria--Water quality conditions which are to be met in order to support and protect desired uses.

(14) Critical low-flow--Low-flow condition (e.g., 7Q2 flow) below which some standards do not apply. The impacts of permitted discharges are analyzed at critical low-flow.

(15) Designated use--A use which is assigned to specific water bodies in Appendix A or in Appendix D in §307.10 of this title. Typical uses which may be designated for specific water bodies include domestic water supply, categories of aquatic life use, recreation categories, and aquifer protection.

(16) Discharge permit--A permit issued by the state or a federal agency to discharge treated effluent or cooling water into waters of the state.

(17) EC_{50}--The concentration of a toxicant that produces an adverse effect on 50% of the organisms tested in a specified time period.

(18) *E. coli--Escherichia coli*, a subgroup of fecal coliform bacteria that is present in the intestinal tracts and feces of warm-blooded animals. It is used as an indicator of the potential presence of pathogens.

(19) Effluent--Wastewater discharged from any point source prior to entering a water body.

(20) Enterococci--A subgroup of fecal streptococci bacteria (mainly *Streptococcus faecalis* and *Streptococcus faecium*) that is present in the intestinal tracts and feces of warm-blooded animals. It is used as an indicator of the potential presence of pathogens.

(21) Epilimnion--The upper mixed layer of a lake (including impoundments, ponds, and reservoirs).

(22) Existing use--A use which is currently being supported by a specific water body or which was attained on or after November 28, 1975.

(23) Fecal coliform--A portion of the coliform bacteria group which is present in the intestinal tracts and feces of warm-blooded animals; heat tolerant bacteria from other sources can sometimes be included. It is used as an indicator of the potential presence of pathogens.

(24) Freshwaters--Inland waters which exhibit no measurable elevation changes due to normal tides.

(25) Halocline--A vertical gradient in salinity under conditions of density stratification that is usually recognized as the point where salinity exhibits the greatest difference in the vertical direction.

(26) Harmonic mean flow--A measure of mean flow in a water course which is calculated by summing the reciprocals of the individual flow measurements, dividing this sum by the number of measurements, and then calculating the reciprocal of the resulting number.

(27) Incidental fishery--A level of fishery which applies to water bodies that are not considered to have a sustainable fishery but which have an aquatic life use of limited, intermediate, high, or exceptional.

(28) Industrial cooling impoundment--An impoundment which is owned or operated by, or in conjunction with, the water rights permittee, and which is designed and constructed for the primary purpose of reducing the temperature and removing heat from an industrial effluent.

(29) Intermittent stream--A stream which has a period of zero flow for at least one week during most years. Where flow records are available, a stream with a 7Q2 flow of less than 0.1 ft^3/s is considered intermittent.

(30) Intermittent stream with perennial pools--An intermittent stream which maintains persistent pools even when flow in the stream is less than 0.1 ft^3/s.

(31) LC_{50}--The concentration of a toxicant that is lethal (fatal) to 50% of the organisms tested in a specified time period.

(32) Method detection limit--The minimum concentration of a substance that can be measured and reported with 99% confidence that the analyte concentration is greater than zero and is determined from analysis of a sample in a given matrix containing the analyte. The method detection limit (MDL) is estimated in accordance with 40 CFR 136, Appendix B.

(33) Minimum analytical level--The lowest concentration at which a particular substance can be quantitatively measured with a defined accuracy and precision level, using approved analytical methods. The minimum analytical level is not the published method detection limit for an EPA-approved analytical method, which is based on laboratory analysis of the substance in reagent (distilled) water. The minimum analytical level is based on analyses of the analyte in the matrix of concern (i.e., wastewater effluents). The executive director will establish general minimum analytical levels that will be applicable when information on matrix-specific minimum analytical levels is unavailable.

(34) Mixing zone--The area contiguous to a discharge where mixing with receiving waters takes place and where specified criteria, as listed in §307.8(b)(1) of this title (relating to Application of Standards), can be exceeded. Acute toxicity to aquatic organisms is not allowed in a mixing zone, and chronic toxicity to aquatic organisms is not allowed beyond a mixing zone.

(35) Noncontact recreation--Aquatic recreational pursuits not involving a significant risk of water ingestion; including fishing, commercial and recreational boating, and limited body contact incidental to shoreline activity.

(36) Nonpersistent toxic--A toxic substance that readily degrades in the aquatic environment, exhibits a half-life of less than 96 hours, and does not have a tendency to accumulate in organisms.

(37) Oyster waters--Waters producing edible species of clams, oysters, or mussels.

(38) Persistent toxic--A toxic substance that is not readily degraded and exhibits a half-life of 96 hours or more in an aquatic environment.

(39) Pollution--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property or to the public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.

(40) Point source--Any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants or wastes are or may be discharged into or adjacent to any water in the state.

(41) Presumed use--A use which is assigned to generic categories of water bodies (such as perennial streams). Presumed uses are

superceded by designated uses for individual water bodies in Appendix A or Appendix D of §307.10 of this title.

(42) Public drinking water supply--A water body designated to provide water to a public water system as defined in Chapter 290 of this title (relating to Public Drinking Water).

(43) Saltwater--A coastal water which has a measurable elevation change due to normal tides. In the absence of tidal information, saltwater is generally considered to be a coastal water which typically has a salinity of two parts per thousand or greater in a significant portion of the water column.

(44) Salinity--The total dissolved solids in water after all carbonates have been converted to oxides, all bromide and iodide have been replaced by chloride, and all organic matter has been oxidized. For most purposes, salinity is considered equivalent to total dissolved salt content. Salinity is normally expressed in parts per thousand.

(45) Seagrass propagation--A water-quality-related existing use which applies to saltwater with significant stands of submerged seagrass.

(46) Segment--A water body or portion of a water body which is individually defined and classified in the Texas Surface Water Quality Standards. A segment is intended to have relatively homogeneous chemical, physical, and hydrological characteristics. A segment provides a basic unit for assigning site-specific standards and for applying water quality management programs of the agency. Classified segments may include streams, rivers, bays, estuaries, wetlands, lakes, or reservoirs.

(47) Settleable solids--The volume or weight of material which will settle out of a water sample in a specified period of time.

(48) Seven-day, two-year low-flow (7Q2)--The lowest average stream flow for seven consecutive days with a recurrence interval of two years, as statistically determined from historical data. As specified in §307.8 of this title, some water quality standards do not apply at stream flows which are less than the 7Q2 flow.

(49) Shellfish--Clams, oysters, mussels, crabs, crayfish, lobsters, and shrimp.

(50) Significant aquatic life use--A broad characterization of aquatic life which indicates that a subcategory of aquatic life use (limited, intermediate, high, or exceptional) is applicable. Some aquatic life is expected to be present even in water bodies which are not designated for specific categories of aquatic life use. Some provisions to protect aquatic life applies to any water body in the state whether an aquatic life use is assigned or not. These provisions include the general criteria in §307.4 of this title (relating to General Criteria), the numerical acute aquatic life criteria in §307.6(c) of this title (relating to Toxic Materials), and the whole effluent toxicity requirements to preclude acute toxicity to aquatic life in §307.6(e) of this title.

(51) Standard Methods for the Examination of Water and Wastewater--A document describing sampling and analytical procedures, which is published by the American Public Health Association, American Water Works Association, and Water Environment Federation. The most recent edition of this document is to be followed whenever its use is specified by these rules.

(52) Standards--The designation of water bodies for desirable uses and the narrative and numerical criteria deemed necessary to protect those uses.

(53) Standards implementation procedures--Procedures entitled *Procedures to Implement the Texas Surface Water Quality Standards*, which are adopted by the commission and approved by EPA as part of the State Continuing Planning Process.

(54) Storm water--Rainfall runoff, snow melt runoff, surface runoff, and drainage.

(55) Storm water discharge--A point source discharge that is composed entirely of storm water associated with an industrial activity, a construction activity, a discharge from a municipal separate storm sewer system, or other discharge designated by the agency.

(56) Stream order--A classification of stream size, where the smallest, unbranched tributaries of a drainage basin are designated first order streams. Where two first order streams join, a second order stream is formed; and where two second order streams join, a third order stream is formed, etc. For purposes of water quality standards application, stream order is determined from USGS topographic maps with a scale of 1:24,000.

(57) Surface water in the state--Lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, wetlands, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state (from the mean high water mark (MHWM) out 10.36 miles into the Gulf), and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all water-courses and bodies of surface water, that are wholly or partially inside or bordering the state or subject to the jurisdiction of the state; except that waters in treatment systems which are authorized by state or federal law, regulation, or permit, and which are created for the purpose of waste treatment are not considered to be water in the state.

(58) Sustainable Fisheries--Descriptive of water bodies which potentially have sufficient fish production or fishing activity to create significant long-term human consumption of fish. Sustainable fisheries include perennial streams and rivers with a stream order of three or greater; lakes and reservoirs greater than or equal to 150 acre-feet and/or 50 surface acres; all bays, estuaries, and tidal rivers. Water bodies which are presumed to have sustainable fisheries include all designated segments listed in Appendix A unless specifically exempted.

(59) Tidal--Descriptive of coastal waters which are subject to the ebb and flow of tides. For purposes of standards applicability, tidal waters are considered to be saltwater. Classified tidal waters include all bays and estuaries with a segment number that begins with 24xx, all streams with the word tidal in the segment name, and the Gulf of Mexico.

(60) To discharge--Includes to deposit, conduct, drain, emit, throw, run, allow to seep, or otherwise release or dispose of, or to allow, permit, or suffer any of these acts or omissions.

(61) Total Maximum Daily Load (TMDL)--The total amount of a substance that a water body can assimilate and still meet the Texas Surface Water Quality Standards.

(62) Total dissolved solids--The amount of material (inorganic salts and small amounts of organic material) dissolved in water and commonly expressed as a concentration in terms of milligrams per liter. The term is equivalent to the term filterable residue, as used in the publication entitled, *Standard Methods for the Examination of Water and Wastewater*.

(63) Total suspended solids--Total suspended matter in water, which is commonly expressed as a concentration in terms of milligrams per liter. The term is equivalent to nonfilterable residue, as used in the publication entitled, *Standard Methods for the Examination of Water and Wastewater*.

(64) Total toxicity--Toxicity as determined by exposing aquatic organisms to samples or dilutions of instream water or treated effluent. Also referred to as whole effluent toxicity or biomonitoring.

(65) Toxicity--The occurrence of adverse effects to living organisms due to exposure to toxic materials. Adverse effects caused by conditions of temperature and dissolved oxygen are excluded from the definition of toxicity. With respect to the provisions of §307.6(e) of this title, which concerns total toxicity and biomonitoring requirements, adverse effects caused by concentrations of dissolved salts (such as sodium, potassium, calcium, chloride, carbonate) in source waters are excluded from the definition of toxicity. Source water is defined as surface water or groundwater that is used as a public water supply or industrial water supply (including a cooling-water supply). Source water does not include brine water that is produced during the extraction of oil and gas, or other sources of brine water that are substantially uncharacteristic of surface waters in the area of discharge. In addition, adverse effects caused by concentrations of dissolved salts which are added to source water by industrial processes are not excluded from the requirements of §307.6(e) of this title, except as specifically noted in §307.6(e)(2)(B) of this title, which concerns requirements for toxicity testing of 100% effluent. This definition of toxicity does not affect the standards for dissolved salts in this chapter other than §307.6(e) of this title. The standards implementation procedures contain provisions to protect surface waters from adverse effects of dissolved salts and methods to address the effects of dissolved salts on total toxicity tests.

(66) Toxicity biomonitoring--The process or act of determining total toxicity. Documents which describe procedures for toxicity biomonitoring are cited in §307.6 of this title. Also referred to simply as biomonitoring.

(67) Water-effects ratio--The water-effects ratio is calculated as the toxic concentration (LC_{50}) of a substance in water at a particular site, divided by the toxic concentration of that substance as reported in laboratory dilution water. The water-effects ratio can be used to establish site-specific acute and chronic criteria to protect aquatic life. The site-specific criterion is equal to the water-effects ratio times the statewide aquatic life criterion in §307.6(c) of this title.

(68) Water quality management program--The agency's overall program for attaining and maintaining water quality consistent with state standards, as authorized under the Texas Water Code, the Texas Administrative Code, and the Clean Water Act, §§106, 205(j), 208, 303(e) and 314 (33 United States Code, §§1251 et seq.).

(69) Wetland--An area (including a swamp, marsh, bog, prairie pothole, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation. The term "hydric soil" means soil that, in its undrained condition, is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation. The term "hydrophytic vegetation" means a plant growing in: water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content. The term "wetland" does not include irrigated acreage used as farmland; a man-made wetland of less than one acre; or a man-made wetland for which construction or creation commenced on or after August 28, 1989, and which was not constructed with wetland creation as a stated objective, including but not limited to an impoundment made for the purpose of soil and water conservation which has been approved or requested by soil and water conservation districts. If this definition of wetland conflicts with the federal definition in any manner, the federal definition prevails.

(70) Wetland water quality functions--Attributes of wetlands that protect and maintain the quality of water in the state, which include storm water storage and retention and the moderation of extreme water level fluctuations; shoreline protection against erosion through the dissipation of wave energy and water velocity, and anchoring of sediments; habitat for aquatic life; and removal, transformation, and retention of nutrients and toxic substances.

(71) Zone of initial dilution--The small area at the immediate point of discharge where initial dilution with receiving waters occurs, and which may not meet certain criteria applicable to the receiving water. A zone of initial dilution is substantially smaller than a mixing zone.

(b) Abbreviations. The following abbreviations apply to this chapter:

(1) AP--aquifer protection.

(2) BMP--best management practices.

(3) AS--agricultural water supply.

(4) CASRN--Chemical Abstracts Service Registry number.

(5) CFR--Code of Federal Regulations.

(6) Cl^{-1}--chloride.

(7) CR--contact recreation.

(8) DO--dissolved oxygen.

(9) E--exceptional aquatic life use.

(10) EPA--United States Environmental Protection Agency.

(11) degrees F--Degree(s) Fahrenheit.

(12) ft^3/s--cubic feet per second.

(13) H--high aquatic life use.

(14) I--intermediate aquatic life use.

(15) IS--industrial water supply.

(16) L--limited aquatic life use.

(17) MCL--maximum contaminant level (for public drinking water supplies).

(18) mg/L--milligrams per liter.

(19) ml--milliliter.

(20) MS4--municipal separate storm sewer system.

(21) N--navigation.

(22) NCR--noncontact recreation.

(23) NPDES--National Pollutant Discharge Elimination System, as set out in the Clean Water Act, §402 (33 United States Code 1342).

(24) O--oyster waters.

(25) PS--public water supply.

(26) 7Q2--seven-day, two-year low-flow.

(27) SO_4^{-2}--sulfate.

(28) TDS--total dissolved solids.

(29) TMDL--total maximum daily load.

(30) TPDES--Texas Pollutant Discharge Elimination System.

(31) TSS--total suspended solids.

(32) USFDA--United States Food and Drug Administration.

(33) USGS--United States Geological Survey.

(34) WF--waterfowl habitat.

(35) WQM--water quality management.

(36) µg/L--micrograms per liter.

(37) ZID--zone of initial dilution.

§307.4. General Criteria.

(a) Application. The general criteria set forth in this section apply to surface water in the state and specifically apply to substances attributed to waste discharges or the activities of man. General criteria do not apply to those instances in which surface water, as a result of natural phenomena, exhibit characteristics beyond the limits established by this section. General criteria are superseded by specific exemptions stated in this section or in §307.8 of this title (relating to the Application of Standards), or by site-specific water quality standards for classified segments. Provisions of the general criteria remain in effect in mixing zones or below critical low-flow conditions unless specifically exempted in §307.8 of this title.

(b) Aesthetic parameters.

(1) Concentrations of taste and odor producing substances shall not interfere with the production of potable water by reasonable water treatment methods, impart unpalatable flavor to food fish including shellfish, result in offensive odors arising from the waters, or otherwise interfere with the reasonable use of the water in the state.

(2) Surface water shall be essentially free of floating debris and suspended solids that are conducive to producing adverse responses in aquatic organisms or putrescible sludge deposits or sediment layers which adversely affect benthic biota or any lawful uses.

(3) Surface waters shall be essentially free of settleable solids conducive to changes in flow characteristics of stream channels or the untimely filling of surface water in the state. This provision does not prohibit dredge and fill activities which are permitted in accordance with the Federal Clean Water Act.

(4) Surface waters shall be maintained in an aesthetically attractive condition.

(5) Waste discharges shall not cause substantial and persistent changes from ambient conditions of turbidity or color.

(6) There shall be no foaming or frothing of a persistent nature.

(7) Surface waters shall be maintained so that oil, grease, or related residue will not produce a visible film of oil or globules of grease on the surface or coat the banks or bottoms of the watercourse; or cause toxicity to man, aquatic life, or terrestrial life in accordance with subsection (d) of this section.

(c) Radiological substances. Radioactive materials shall not be discharged in excess of the amount regulated by Chapter 336 of this title (relating to Radioactive Substance Rules).

(d) Toxic substances. Surface waters will not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life. Additional requirements and criteria for toxic substances are specified in §307.6 of this title (relating to Toxic Materials). Criteria to protect aquatic life from acute toxicity apply to all surface waters in the state except as specified in §307.8(a)(2) of this title. Criteria to protect aquatic life from chronic toxicity apply to surface waters with a significant aquatic life use of limited, intermediate, high, or exceptional as designated in §307.10 of this title (relating to Appendices A - E) or as determined on a case-by-case basis in accordance with subsection (l) of this section. Toxic criteria to protect human health for consumption of fish apply to waters with a sustainable or incidental fishery, as described in §307.6(d) of this title. Additional criteria apply to water in the state with a public drinking water supply use, as described in §307.6(d) of this title. The general provisions of this subsection do not change specific provisions in §307.8 of this title for applying toxic criteria.

(e) Nutrients. Nutrients from permitted discharges or other controllable sources shall not cause excessive growth of aquatic vegetation which impairs an existing, attainable, or designated use. Site-specific nutrient criteria, nutrient permit limitations, and/or separate rules to control nutrients in individual watersheds will be established where appropriate after notice and opportunity for public participation and proper hearing.

(f) Temperature. Consistent with §307.1 of this title (relating to General Policy Statement) and in accordance with state water rights permits, temperature in industrial cooling lake impoundments and all other surface water in the state shall be maintained so as to not interfere with the reasonable use of such waters. Numerical temperature criteria have not been specifically established for industrial cooling lake impoundments, which in most areas of the state contribute to water conservation and water quality objectives. With the exception of industrial cooling impoundments, temperature elevations due to discharges of treated domestic (sanitary) effluent, and within designated mixing zones, the following temperature criteria, expressed as a maximum temperature differential (rise over ambient) are established: freshwater streams--5 degrees Fahrenheit; freshwater lakes and impoundments--3 degrees Fahrenheit; tidal river reaches, bay and gulf waters--4 degrees Fahrenheit in fall, winter, and spring, and 1.5 degrees Fahrenheit in summer (June, July, and August). Additional temperature criteria (expressed as maximum temperatures) for classified segments are specified in Appendix A of §307.10 of this title.

(g) Salinity.

(1) Concentrations and the relative ratios of dissolved minerals such as chlorides, sulfates, and total dissolved solids will be maintained such that existing, designated, and attainable uses will not be impaired.

(2) Criteria for chlorides, sulfates, and total dissolved solids for classified freshwater segments are specified in Appendix A of §307.10 of this title.

(3) Salinity gradients in estuaries will be maintained to support attainable estuarine dependent aquatic life uses. Numerical salinity criteria for Texas estuaries have not been established because of the high natural variability of salinity in estuarine systems, and because long-term studies by state agencies to assess estuarine salinities are still ongoing. Absence of numerical criteria shall not preclude evaluations and regulatory actions based on estuarine salinity, and careful consideration will be given to all activities which may detrimentally affect salinity gradients.

(h) Aquatic life uses and dissolved oxygen.

(1) Dissolved oxygen concentrations shall be sufficient to support existing, designated, and attainable aquatic life uses. Aquatic-

life use categories and corresponding dissolved oxygen criteria are described in §307.7(b)(3) of this title (relating to Site-specific Uses and Criteria).

(2) Aquatic life use categories and dissolved oxygen criteria for classified segments are specified in Appendix A of §307.10 of this title. Aquatic life use categories and dissolved oxygen criteria for other specific water bodies are specified in Appendix D of §307.10 of this title. Where justified by sufficient site-specific information, dissolved oxygen criteria which differ from §307.7(b)(3) of this title may be adopted for a particular water body in §307.10 of this title.

(3) Perennial streams, rivers, lakes, bays, estuaries, and other appropriate perennial waters which are not specifically listed in Appendix A or D of §307.10 of this title are presumed to have a high aquatic life use and corresponding dissolved oxygen criteria. In accordance with results from statewide ecoregion studies, unclassified perennial streams in southeast and northeast Texas are assigned dissolved oxygen criteria as indicated in §307.7(b)(3)(A)(ii) of this title. Higher uses will be protected where they are attainable.

(4) When water is present in the streambed of intermittent streams, a 24-hour dissolved oxygen mean of at least 2.0 mg/L and an absolute minimum dissolved oxygen concentration of 1.5 mg/L will be maintained. Intermittent streams which are not specifically listed in Appendix A or D of §307.10 of this title are considered to not have a significant aquatic life use except as indicated below in this subsection. For intermittent streams with seasonal aquatic life uses, dissolved oxygen concentrations commensurate with the aquatic life uses will be maintained during the seasons in which the aquatic life uses occur. Unclassified intermittent streams with significant aquatic life uses created by perennial pools are presumed to have a limited aquatic life use and corresponding dissolved oxygen criteria. Higher uses will be protected where they are attainable.

(i) Aquatic life uses and habitat. Vegetative and physical components of the aquatic environment will be maintained or mitigated to protect aquatic life uses. Procedures to protect habitat in permits for dredge and fill activities are specified in Federal Clean Water Act, §404 and in Chapter 279 of this title (relating to Water Quality Certification).

(j) Aquatic recreation. Existing, designated, and attainable uses of aquatic recreation will be maintained, as determined by criteria that indicate the potential presence of pathogens. Categories of recreation and applicable criteria are established in §307.7(b)(1) of this title. Contact recreation is presumed as a use for all water bodies except where listed otherwise for specific water bodies in Appendix A of §307.10 of this title.

(k) Antidegradation. Nothing in this section shall be construed or otherwise utilized to supersede the requirements of §307.5 of this title (relating to Antidegradation).

(l) Assessment of unclassified waters. Waters which are not specifically listed in Appendices A or D of §307.10 of this title are designated for the specific uses that are attainable or characteristic of those waters. Upon administrative or regulatory action by the executive director or commission which affects a particular unclassified water body, the characteristics of the affected water body will be reviewed by the agency to determine which aquatic life uses are appropriate. Additional uses so determined shall be indicated in public notices for discharge applications. Uses which are not applicable throughout the year in a particular unclassified water body will be assigned and protected for the seasons in which such uses are attainable. Initial determinations of use shall be considered preliminary, and in no way preclude redeterminations of use in public hearings conducted under the provisions of the Texas Water Code. For unclassified waters where the presumed minimum uses or criteria specified in this section are inappropriate, site-specific standards may be developed in accordance with §307.2(d) of this title (relating to Modification of Standards). Uses and criteria will be assigned in accordance with this section and with §307.7(b)(3) of this title. Procedures for assigning uses and criteria are described in the standards implementation procedures.

§307.5. Antidegradation.

(a) Application. The antidegradation policy and implementation procedures set forth in this section shall apply to actions regulated under state and federal authority which would increase pollution of the water in the state. Such actions include authorized wastewater discharges, TMDLs, waste load evaluations, and any other miscellaneous actions, such as those related to man-induced nonpoint sources of pollution, which may impact the water in the state.

(b) Antidegradation policy. In accordance with the Texas Water Code, §26.003, the following provisions establish the antidegradation policy of the agency.

(1) Tier 1. Existing uses and water quality sufficient to protect those existing uses will be maintained. Categories of existing uses are the same as for designated uses, as defined in §307.7 of this title (relating to Site-specific Uses and Criteria).

(2) Tier 2. No activities subject to regulatory action which would cause degradation of waters which exceed fishable/swimmable quality will be allowed unless it can be shown to the commission's satisfaction that the lowering of water quality is necessary for important economic or social development. Degradation is defined as a lowering of water quality by more than a de minimis extent, but not to the extent that an existing use is impaired. Water quality sufficient to protect existing uses will be maintained. Fishable/swimmable waters are defined as waters which have quality sufficient to support propagation of indigenous fish, shellfish, and wildlife and recreation in and on the water.

(3) Tier 3. Outstanding national resource waters are defined as high quality waters within or adjacent to national parks and wildlife refuges, state parks, wild and scenic rivers designated by law, and other designated areas of exceptional recreational or ecological significance. The quality of outstanding national resource waters will be maintained and protected.

(4) Discharges which cause pollution that are authorized by the Texas Water Code, the Federal Clean Water Act, or other applicable laws will not lower water quality to the extent that the Texas Surface Water Quality Standards are not attained.

(5) Anyone discharging wastewater which would constitute a new source of pollution or an increased source of pollution from any industrial, public, or private project or development will be required to provide a level of wastewater treatment consistent with the provisions of the Texas Water Code and the Clean Water Act (33 United States Code, §§1251 et seq.). As necessary, cost-effective and reasonable best management practices established through the Texas Water Quality Management Program shall be achieved for nonpoint sources of pollution.

(6) Application of antidegradation provisions shall not preclude the commission or executive director from establishing modified thermal discharge limitations consistent with the Clean Water Act, §316(a) (33 United States Code, §1326).

(c) Antidegradation implementation procedures.

(1) Implementation for specific regulatory activities.

(A) For TPDES permits for wastewater, the process for the antidegradation review and public coordination is described in the standards implementation procedures.

(B) For federal permits relating to the discharge of fill or dredged material under Federal Clean Water Act, §404, the antidegradation policy and public coordination is implemented through the evaluation of alternatives and mitigation under Federal Clean Water Act, §404(b)(1). State review of alternatives, mitigation, and requirements to protect water quality may also be conducted for federal permits which are subject to state certification, as authorized by Federal Clean Water Act, §401 and conducted in accordance with Chapter 279 of this title (relating to Water Quality Certification).

(C) Other state and federal permitting and regulatory activities which increase pollution of water in the state are also subject to the provisions of the antidegradation policy as established in §307.5(a) and (b) of this title (relating to Antidegradation).

(2) General provisions for implementing the antidegradation policy.

(A) Tier 1 reviews will ensure that water quality is sufficiently maintained so that existing uses are protected. All pollution which could cause an impairment of water quality is subject to Tier 1 reviews. If the existing uses and criteria of a potentially affected water body have not been previously determined, then the antidegradation review will include a preliminary determination of existing uses and criteria. Existing uses will be maintained and protected.

(B) Tier 2 reviews apply to all pollution which could cause degradation of water quality where water quality exceeds levels necessary to support propagation of fish, shellfish, wildlife, and recreation in and on the water (fishable/swimmable quality). Guidance for determining which water bodies exceed fishable/swimmable quality is contained in the standards implementation procedures. For dissolved oxygen, analyses of degradation under Tier 2 will utilize the same critical conditions as are used to protect instream criteria. For other parameters, appropriate conditions may vary. Conditions for determining degradation will be commensurate with conditions for determining existing uses. The highest water quality sustained since November 28, 1975 (in accordance with EPA Standards Regulation 40 CFR 131) defines baseline conditions for determinations of degradation.

(C) Tier 3 reviews apply to all pollution which could cause degradation of outstanding national resource waters. Outstanding national resource waters are those specifically designated in this chapter.

(D) When degradation of waters exceeding fishable/swimmable quality is anticipated, a statement that the antidegradation policy will be pertinent to the permit action will be included in the public notice for the permit application or amendment. If no degradation is anticipated, the public notice will so state.

(E) Evidence can be introduced in public hearings, or through the public comment process, concerning the determination of existing uses and criteria; the assessment of degradation under Tier 1, Tier 2, and Tier 3; the social and economic justification for lowering water quality; requirements and conditions necessary to preclude degradation; and any other issues which bear upon the implementation of the antidegradation policy.

(F) Interested parties will be given the opportunity to provide comments and additional information concerning the determination of existing uses, anticipated impacts of the discharge, baseline conditions, and the necessity of the discharge for important economic or social development if degradation of water quality is expected under Tier 2.

(G) The antidegradation policy and the general provisions for implementing the antidegradation policy apply to the determination of TMDLs and to waste load evaluations which allow an increase in loading. If the TMDL or waste load evaluation indicates that degradation of waters exceeding fishable/swimmable quality is expected, the public hearing notice will so state. Permits which are consistent with an approved TMDL or waste load evaluation under this antidegradation policy will not be subjected to separate antidegradation review for the specific parameters that are addressed by the TMDL or waste load evaluation.

§307.6. Toxic Materials.

(a) Application. Standards and procedures set forth in this section shall be applied in accordance with §307.8 of this title (relating to Application of Standards) and §307.9 of this title (relating to Determination of Standards Attainment).

(b) General provisions.

(1) Water in the state shall not be acutely toxic to aquatic life in accordance with §307.8 of this title.

(2) Water in the state with designated or existing aquatic life uses shall not be chronically toxic to aquatic life, in accordance with §307.8 of this title.

(3) Water in the state shall be maintained to preclude adverse toxic effects on human health resulting from contact recreation, consumption of aquatic organisms, consumption of drinking water or any combination of the three. Water in the state with sustainable fisheries and/or public drinking water supply uses will not exceed applicable human health toxic criteria, in accordance with subsection (d) of this section and §307.8 of this title.

(4) Water in the state shall be maintained to preclude adverse toxic effects on aquatic life, terrestrial wildlife, livestock, or domestic animals, resulting from contact, consumption of aquatic organisms, consumption of water, or any combination of the three.

(c) Specific numerical aquatic life criteria.

(1) Numerical criteria are established in Table 1 for those specific toxic substances for which adequate toxicity information is available, and which have the potential for exerting adverse impacts on water in the state.
Figure: 30 TAC §307.6(c)(1)

(2) Numerical criteria are based on ambient water quality criteria documents published by EPA. EPA guidance criteria have been appropriately recalculated to eliminate the effects of toxicity data for aquatic organisms which are not native to Texas, in accordance with procedures in the EPA guidance document entitled *Guidelines for Deriving Numerical Site-specific Water Quality Criteria* (EPA 600/3-84-099).

(3) Specific numerical acute aquatic life criteria are applied as 24-hour averages, and specific numerical chronic aquatic life criteria are applied as seven-day averages.

(4) Ammonia and chlorine toxicity will be addressed by total toxicity biomonitoring requirements in subsection (e) of this section.

(5) Specific numerical aquatic life criteria for metals and metalloids in Table 1 apply to dissolved concentrations where noted. Dissolved concentrations can be estimated by filtration of samples prior to analysis, or by converting from total recoverable measurements in accordance with procedures approved by the commission in the latest revision of the standards implementation procedures. Specific numerical aquatic life criteria for non-metallic substances in Table 1 apply to total recoverable concentrations unless otherwise noted.

(6) Specific numerical acute criteria for toxic substances are applicable to all water in the state except for small zones of initial dilution (ZIDs) at discharge points. Acute criteria may be exceeded

within a ZID and below extremely low streamflow conditions (one-fourth of critical low-flow conditions) in accordance with §307.8 of this title (relating to Application of Standards). There shall be no lethality to aquatic organisms which move through a ZID, and the sizes of ZIDs are limited in accordance with §307.8 of this title. Specific numerical chronic criteria are applicable to all water in the state with designated or existing aquatic life uses, except inside mixing zones and below critical low-flow conditions, in accordance with §307.8 of this title.

(7) For toxic materials for which specific numerical criteria are not listed in Table 1, the appropriate criteria for aquatic life protection may be derived in accordance with current EPA guidelines for deriving site-specific water quality criteria. When insufficient data are available to use EPA guidelines, the following provisions shall be applied in accordance with this section and §307.8 of this title:

(A) acute criteria will be calculated as 0.3 of the LC_{50} of the most sensitive aquatic species; LC_{50} x (0.3)= acute criteria;

(B) concentrations of non-persistent toxic materials shall not exceed concentrations which are chronically toxic (as determined from appropriate chronic toxicity data or calculated as 0.1 of acute LC_{50} values) to the most sensitive aquatic species; LC_{50} x (0.1) = chronic criteria;

(C) concentrations of persistent toxic materials that do not bioaccumulate shall not exceed concentrations which are chronically toxic (as determined from appropriate chronic toxicity data or calculated as 0.05 of LC_{50} values) to the most sensitive aquatic species; and

(D) concentrations of toxic materials that bioaccumulate shall not exceed concentrations that are chronically toxic (as determined from appropriate chronic toxicity data or calculated as 0.01 of LC_{50} values) to the most sensitive aquatic species.

(8) For toxic substances where the relationship of toxicity is defined as a function of pH or hardness, numerical criteria are presented as an equation based on this relationship. Appropriate pH or hardness values for such criteria are listed for each basin in Table 2. Site-specific values for pH and hardness, are used where available. Site-specific values for each segment are given in the standards implementation procedures.
Figure: 30 TAC §307.6(c)(8)

(9) Criteria for most metals are multiplied by a water-effects ratio in order to incorporate the effects of local water chemistry on toxicity. The water-effects ratio is assumed to be equal to one except where sufficient site-specific data are available to determine the water-effects ratio for a particular water body or portion of a water body. A water-effects ratio is only applicable to those portions of a water body which are adequately addressed by site-specific data. Water-effects ratios and resulting site-specific criteria which have been determined for particular water bodies are listed in Appendix E when standards are revised. A site-specific water-effects ratio which affects an effluent limitation in a wastewater discharge permit, and which has not been incorporated into Appendix E of §307.10 of this title (relating to Appendices A - E), will be noted in a public notice during the permit application process. An opportunity for public comment will be provided, and the water-effects ratio may be considered in any public hearing on the permit application.

(10) Additional site-specific factors may indicate that the numerical criteria listed in Table 1 are inappropriate for a particular water body. These factors are applied as a site-specific standards modification in accordance with §307.2(d) of this title (relating to Modification of Standards). The application of a site-specific standard must not impair an existing, attainable, or designated use. Factors which may justify a temporary variance or site-specific standards amendment include the following:

(A) background concentrations of specific toxics of concern in receiving waters, sediment, and/or indigenous biota;

(B) persistence and degradation rate of specific toxic materials;

(C) synergistic, additive, or antagonistic interactions of toxic substances with other toxic or nontoxic materials;

(D) measurements of total effluent toxicity;

(E) indigenous aquatic organisms, which may have different responses to particular toxic materials;

(F) technological or economic limits of treatability for specific toxic materials;

(G) bioavailability of specific toxic substances of concern, as determined by water-effect ratio tests or other analyses approved by the agency; and

(H) new information concerning the toxicity of a particular substance.

(d) Specific numerical human health criteria.

(1) Numerical human health criteria are established in Table 3.
Figure: 30 TAC §307.6(d)(1)

(2) Categories of human health criteria:

(A) concentration criteria in freshwaters to prevent contamination of drinking water, fish and other aquatic life to ensure that they are safe for human consumption. These criteria apply to freshwaters which are designated or used for public drinking water supplies. (Column A in Table 3);

(B) concentration criteria in freshwaters to prevent contamination of fish and other aquatic life to ensure that they are safe for human consumption. These criteria apply to freshwater which have sustainable fisheries, and which are not designated or used for public water supply (Column B in Table 3);

(C) concentration criteria in saltwaters to prevent contamination of fish and other aquatic life to ensure that they are safe for human consumption. These criteria apply to saltwaters which have a sustainable fishery (Column C in Table 3).

(3) Specific assumptions and procedures (except where noted in Table 3).

(A) Sources for the toxicity factors to derive criteria were derived from EPA's Integrated Risk Information System (IRIS); EPA Health Effects Assessment Summary Tables (HEAST); Assessment Tools for the Evaluation of Risk (ASTER); and the computer program, CLOGP3. Bioconcentration factors were converted to an average lipid concentration in fish tissue of 3%, except where noted.

(B) For known or suspected carcinogens (Types A, B, B_2, or C in IRIS), an incremental cancer risk level of 10^{-5} (1 in 100,000) was used to derive criteria. A RfD (reference dose) was determined for noncarcinogens and for carcinogens for which EPA has not derived cancer slope factors.

(C) Consumption rates of fish and shellfish were estimated as 10 grams per person per day for people living inland, and 15 grams per person per day for people living near the coast.

(D) Drinking water consumption rates were estimated as 2.0 liters per person per day.

(E) For carcinogens, a body-weight scaling factor of 3/4 power is used to convert data on laboratory test animals to human scale. Reported weights of laboratory test animals are used, and an average weight of 70 kg is assumed for humans.

(F) Numerical human health criteria were derived in accordance with the general procedures and calculations in the EPA guidance documents entitled *Technical Support Document for Water Quality-based Toxics Control* (EPA/505/2-90-001); and *Guidance Manual for Assessing Human Health Risks from Chemically Contaminated Fish and Shellfish* (EPA/503/8-89-002).

(G) If a calculated criterion to prevent contamination of drinking water and fish to ensure they are safe for human consumption (Column A in Table 3) was greater than the applicable maximum contaminant level (MCL) in Chapter 290 of this title (relating to Public Drinking Water), then the MCL was used as the criterion.

(H) If the concentration of a substance in fish tissue used for these calculations was greater than the applicable United States Food and Drug Administration Action Level for edible fish and shellfish tissue, then the acceptable concentration in fish tissue was lowered to the Action Level for calculation of criteria.

(4) Human health criteria for additional toxic materials will be adopted by the commission as appropriate.

(5) Specific human health concentration criteria for water are applicable to water in the state which has sustainable fisheries, and/or designation or use as a public drinking water supply, except within mixing zones and below harmonic mean stream flows, in accordance with §307.8 of this title. The following waters are considered to have sustainable fisheries:

(A) all designated segments listed in Appendix A of §307.10 of this title, unless specifically exempted;

(B) perennial streams and rivers with a stream order of three or greater, as defined in §307.3 of this title (relating to Definitions and Abbreviations);

(C) lakes and reservoirs greater than or equal to 150 acre feet and/or 50 surface acres;

(D) all bays, estuaries, and tidal rivers; and

(E) any other waters which potentially have sufficient fish production or fishing activity to create significant long-term human consumption of fish.

(6) Waters which are not considered to have a sustainable fishery, but which have an aquatic life use, will be considered to have an incidental fishery. Consumption rates assumed for incidental fishery waters are 1.0 gram per person per day for inland waters, and 1.5 grams per person per day for saltwaters. Numerical criteria applicable to incidental fishery waters are therefore ten times the criteria listed in Columns B and C of Table 3.

(7) Specific human health criteria are applied as long term average exposure criteria designed to protect populations over a life time (70 years). Attainment measures for human health are addressed in §307.9 of this title.

(8) For toxic materials of concern for which specific human health criteria are not listed in Table 3, the following provisions shall apply.

(A) For known or suspected carcinogens (Types A, B, B_2, or C in EPA databases), a cancer risk of 10^{-5} (1 in 100,000) shall be applied to the most recent numerical criteria adopted by EPA and published in the *Federal Register*. If an MCL or equivalent agency guideline for protection of drinking water sources is less than the resulting criterion, then the MCL shall apply to public drinking water supplies in accordance with paragraph (3)(G) of this subsection.

(B) For toxic materials not defined as carcinogens, the most recent numerical criteria adopted by EPA and published in the *Federal Register* shall be applicable. If an MCL or equivalent agency guideline for protection of drinking water sources is less than the resulting criterion, then the MCL shall apply to public drinking water supplies in accordance with paragraph (3)(G) of this subsection.

(C) In the absence of available criteria, numerical criteria may be derived from technically valid information and calculated in accordance with the provisions of paragraph (3) of this subsection.

(9) Numerical criteria for bioconcentratable pollutants will be derived in accordance with the general procedures in the EPA guidance document entitled, *Assessment and Control of Bioconcentratable Contaminants in Surface Waters* (March 1991). The commission may develop discharge permit limits in accordance with the provisions of this section.

(10) Numerical human health criteria are expressed as total recoverable concentrations for nonmetals, mercury, and selenium and as dissolved concentrations for other metals and metalloids.

(11) Additional site-specific factors may indicate that the numerical human health criteria listed in Table 3 are inappropriate for a particular water body. These factors are applied as a site-specific standards modification in accordance with §307.2(d) of this title (relating to Modification of Standards). The application of site-specific criteria shall not impair an existing, attainable, or designated use or affect human health. Factors which may justify a temporary variance or site-specific standards amendment include the following:

(A) background concentrations of specific toxics of concern in receiving waters, sediment, and/or indigenous biota;

(B) persistence and degradation rate of specific toxic materials;

(C) synergistic or antagonistic interactions of toxic substances with other toxic or nontoxic materials;

(D) technological or economic limits of treatability for specific toxic materials;

(E) bioavailability of specific toxic substances of concern;

(F) local water chemistry and other site-specific conditions which may alter the bioconcentration, bioaccumulation, or toxicity of specific toxic substances;

(G) site-specific differences in the bioaccumulation responses of indigenous, edible aquatic organisms to specific toxic materials;

(H) local differences in consumption patterns of fish and shellfish or drinking water, but only if any changes in assumed consumption rates will be protective of the local population that frequently consumes fish, shellfish, or drinking water from a particular water body; and

(I) new information concerning the toxicity of a particular substance.

(e) Total toxicity.

(1) Total (whole-effluent) toxicity of permitted discharges, as determined from biomonitoring of effluent samples at appropriate dilutions, will be sufficiently controlled to preclude acute total toxicity in all water in the state with the exception of small zones of initial dilution (ZIDs) at discharge points and at extremely low streamflow conditions (one-fourth of critical low-flow conditions) in accordance with §307.8 of this title. Acute total toxicity levels may be exceeded in a ZID, but there shall be no lethality to aquatic organisms which move through a ZID, and the sizes of ZIDs are limited in accordance with §307.8 of this title. Chronic total toxicity, as determined from biomonitoring of effluent samples, will be precluded in all water in the state with existing or designated aquatic life uses except in mixing zones and at flows less than critical low-flows, in accordance with §307.8 of this title.

(2) General provisions for controlling total toxicity.

(A) Dischargers whose effluent has a significant potential for exerting toxicity in receiving waters will be required to conduct whole effluent toxicity biomonitoring at appropriate dilutions.

(B) In addition to the other requirements of this section, the effluent of discharges to water in the state shall not be acutely toxic to sensitive species of aquatic life, as demonstrated by effluent toxicity tests. Toxicity testing for this purpose shall be conducted on samples of 100% effluent, and the criterion for acute toxicity shall be mortality of 50% or more of the test organisms after 24 hours of exposure. This provision does not apply to mortality that is a result of an excess, deficiency, or imbalance of dissolved inorganic salts (such as sodium, calcium, potassium, chloride, or carbonate) which are in the effluent and are not listed in Table 1 in subsection (c) of this section or which are in source waters.

(C) The latest revisions of the following EPA publications provide methods for appropriate biomonitoring procedures: *Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms*, *Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms*, *Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms*, and the *Technical Support Document for Water Quality-based Toxics Control*. The use of other procedures approved by the agency and EPA is also acceptable. Toxicity tests must be conducted using representative, sensitive aquatic organisms as approved by the agency, and any such testing must adequately determine if toxicity standards are being attained.

(D) If toxicity biomonitoring results indicate that a discharge is exceeding the restrictions on total toxicity in this section, then the permittee shall conduct a toxicity identification evaluation and toxicity reduction evaluation in accordance with permitting procedures of the commission. As a result of a toxicity reduction evaluation, additional conditions may be established in the permit. Such conditions may include total toxicity limits, chemical specific limits, and/or best management practices designed to reduce or eliminate toxicity. Where sufficient to attain and maintain applicable numeric and narrative state water quality standards, a chemical specific limit rather than a total toxicity limit may be established in the permit. Where conditions may be necessary to prevent or reduce effluent toxicity, permits shall include a reasonable schedule for achieving compliance with such additional conditions.

(E) If a permittee demonstrates, using the toxicity identification evaluation and toxicity reduction evaluation procedures, that diazinon is the primary cause of total toxicity, and that diazinon is ubiquitous within the wastewater system, the toxicity will be addressed in clauses (i) and (ii) of this subparagraph. If diazinon is not the primary cause of total toxicity, or if the permittee does not proceed with due diligence in controlling and investigating toxicity, or if diazinon is not ubiquitous within the wastewater system, the toxicity may be addressed in accordance with subparagraph (D) of this paragraph.

(i) the permittee will be required to implement a public education and awareness campaign designed to control the introduction of diazinon into the wastewater system, and the permittee will be required to conduct an investigation into the sources of diazinon; and

(ii) the permittee will be required to monitor for diazinon.

(F) Discharge permit limits based on total toxicity may be established in consideration of site-specific factors, but the application of such factors shall not result in impairment of an existing, attainable, or designated use. These factors are applied as a site-specific standards modification in accordance with §307.2(d) of this title. A demonstration that uses are protected may consist of additional effluent toxicity testing, instream monitoring requirements, and/or other necessary information as determined by the agency. Factors which may justify a temporary variance or site-specific standards amendment include the following:

(i) background toxicity of receiving waters;

(ii) persistence and degradation rate of principal toxic materials which are contributing to the total toxicity of the discharge;

(iii) site-specific variables which may alter the impact of toxicity in the discharge;

(iv) indigenous aquatic organisms, which may have different levels of sensitivity than the species used for total toxicity testing; and

(v) technological, economic, or legal limits of treatability or control for specific toxic materials.

§307.7. Site-specific Uses and Criteria.

(a) Uses and numerical criteria are established on a site-specific basis in Appendices A, D, amd E of §307.10 of this title (relating to Appendices A - E). Site-specific uses and numerical criteria may also be applied to unclassified waters in accordance with §307.4(h) of this title (relating to General Criteria) and §307.5(c) of this title (relating to Antidegradation). Site-specific criteria apply specifically to substances attributed to waste discharges or the activities of man. Site-specific criteria do not apply to those instances in which surface waters exceed criteria due to natural phenomena. The application of site-specific uses and criteria is described in §307.8 of this title (relating to the Application of Standards) and §307.9 of this title (relating to the Determination of Standards Attainment).

(b) Appropriate uses and criteria for site-specific standards are defined as follows.

(1) Recreation. Recreational use consists of two categories--contact recreation waters and noncontact recreation waters. Classified segments are designated for contact recreation unless elevated concentrations of indicator bacteria frequently occur due to sources of pollution which cannot be reasonably controlled by existing regulations or contact recreation is considered unsafe for other reasons such as ship or barge traffic. In a classified segment where contact recreation is considered unsafe for reasons unrelated to water quality, a designated use of noncontact recreation may be assigned criteria normally associated with contact recreation. A designation of contact recreation is not a guarantee that the water so designated is completely free of disease-causing organisms. Indicator bacteria, although not

generally pathogenic, are indicative of potential contamination by feces of warm blooded animals. The criteria for contact recreation are based on these indicator bacteria, rather than direct measurements of pathogens. Criteria are expressed as the number of "colony forming units" of bacteria per 100 milliliters (ml) of water. Even where the concentration of indicator bacteria is less than the criteria for contact recreation, there is still some risk of contracting waterborne diseases. Additional guidelines on minimum data requirements and procedures for evaluating standards attainment are specified in the latest approved version of the *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data*.

(A) Freshwater

(i) Contact recreation. The geometric mean of *E. coli* should not exceed 126 per 100 ml. In addition, single samples of *E. coli* should not exceed 394 per 100 ml. Contact recreation applies to all bodies of freshwater except where specifically designated otherwise in §307.10 of this title.

(ii) Noncontact recreation. The geometric mean of *E. coli* should not exceed 605 per 100 ml.

(B) Saltwater.

(i) Contact recreation. The geometric mean of Enterococci should not exceed 35 per 100 ml. In addition, single samples of Enterococci should not exceed 89 per 100 ml. Contact recreation applies to all bodies of saltwater, except where specifically designated otherwise in §307.10 of this title.

(ii) Noncontact recreation. The geometric mean of Enterococci should not exceed 168 per 100 ml.

(C) Fecal coliform bacteria. Fecal coliform bacteria can be used as an alternative instream indicator of recreational suitability until sufficient data are available for *E coli* or Enterococci. For segments designated as oyster waters in §307.10 of this title, fecal coliform can continue to be used as an indicator of recreational suitability because fecal coliform is used as the indicator for suitability of oyster water use as described in paragraph (3)(B) of this subsection. Fecal coliform can also continue to be used as a surrogate indicator in effluent limits for wastewater discharges. Fecal coliform criteria are the same for both freshwater and saltwater, as follows.

(i) Contact recreation. The geometric mean of fecal coliform should not exceed 200 per 100 ml. In addition, single samples of fecal coliform should not exceed 400 per 100 ml.

(ii) Noncontact recreation. Fecal coliform shall not exceed 2,000 per 100 ml as a geometric mean. In addition, single samples of fecal coliform should not exceed 4,000 per 100 ml.

(D) Swimming advisory programs. For areas where local jurisdictions or private property owners voluntarily provide public notice or closure based on water quality, the use of any single-sample or short-term indicators of recreational suitability are selected at the discretion of the local managers of aquatic recreation. Guidance for single-sample bacterial indicators is available in the EPA document entitled *Ambient Water Quality Criteria for Bacteria--1986.* Other short-term indicators to assess water quality suitability for recreation--such as measures of streamflow, turbidity, or rainfall--may also be appropriate.

(2) Domestic water supply.

(A) Use categories. Domestic water supply consists of two use subcategories--public water supply and aquifer protection.

(i) Public water supply. Segments designated for public water supply are those known to be used or exhibit characteristics that would allow them to be used as the supply source for public water systems, as defined by Chapter 290 of this title (relating to Water Hygiene).

(ii) Aquifer protection. Segments designated for aquifer protection are capable of recharging the Edwards Aquifer. The principal purpose of this use designation is to protect the quality of water infiltrating into and recharging the aquifer. The designation for aquifer protection applies only to those portions of the segments so designated that are on the recharge zone, transition zone, or contributing zone as defined in Chapter 213 of this title (relating to the Edwards Aquifer). Chapter 213 of this title establishes provisions for activities in the watersheds of segments which are designated for aquifer protection.

(B) Use criteria. The following use criteria apply to both domestic water supply use subcategories.

(i) Radioactivity associated with dissolved minerals in the freshwater portions of river basin and coastal basin waters should not exceed levels established by drinking water standards as specified in Chapter 290 of this title unless the conditions are of natural origin.

(ii) Surface waters utilized for domestic water supply shall not exceed toxic material concentrations that prevent them from being treated by conventional surface water treatment to meet drinking water standards as specified in Chapter 290 of this title.

(iii) Chemical and microbiological quality of surface waters used for domestic water supply should conform to drinking water standards as specified in Chapter 290 of this title.

(3) Aquatic life. The establishment of numerical criteria for aquatic life is highly dependent on desired use, sensitivities of usual aquatic communities, and local physical and chemical characteristics. Five subcategories of aquatic life use are established. They include limited, intermediate, high, and exceptional aquatic life and oyster waters. Aquatic life use subcategories designated for segments listed in Appendix A of §307.10 of this title recognize the natural variability of aquatic community requirements and local environmental conditions.

(A) Dissolved oxygen.

(i) The characteristics and associated dissolved oxygen criteria for limited, intermediate, high, and exceptional aquatic life use subcategories are indicated in Table 4.
Figure: 30 TAC §307.7(b)(3)(A)(i)

(ii) The dissolved oxygen criteria and associated critical low-flow values in Table 5 apply to streams which have significant aquatic life uses, and to streams which are specifically listed in Appendix A or D of §307.10 of this title. The criteria in Table 5 apply to streams in Texas which are east of a line defined by Interstate Highway 35 and 35W from the Red River to the community of Moore in Frio County, and by U.S. Highway 57 from the community of Moore to the Rio Grande. The critical low-flow values in Table 5 (at the appropriate stream bedslope) will be utilized as headwater flows when the flows are larger than applicable 7Q2 flows, in order to determine discharge effluent limits necessary to achieve dissolved oxygen criteria. For streams which have bedslopes less than the minimum bedslopes in Table 5, the flows listed for the minimum bedslope of 0.1 m/km will be applicable. For streams which have bedslopes greater than the maximum bedslope in Table 5, the flows listed for the maximum bedslope of 2.4 m/km will be applicable. The required effluent limits will be those necessary to achieve each level of dissolved oxygen (as defined in clause (i) of this subparagraph, Table 4) at or below an assigned, designated, or presumed aquatic life use.

Presumed aquatic life uses will be in accordance with those required by §307.4(h) of this title. The dissolved oxygen criteria in Table 5 do not apply to tidal streams.
Figure: 30 TAC §307.7(b)(3)(A)(ii)

(iii) The dissolved oxygen criteria in Table 5 are based upon data from the agency's least impacted stream study (Texas Aquatic Ecoregion Project). Results of this study indicate a strong dependent relationship for average summertime background dissolved oxygen concentrations and several hydrologic and physical stream characteristics--particularly bedslope (stream gradient) and stream flow. The dissolved oxygen criteria in Table 5 are derived from a multiple regression equation for the eastern portion of Texas as defined in clause (ii) of this subparagraph. Further explanation of the development of the regression equation and its application will be contained in the standards implementation procedures.

(iv) The critical low-flow values in Table 5 may be adjusted based on site-specific data relating dissolved oxygen concentrations to factors such as flow, temperature, or hydraulic conditions in accordance with the standards implementation procedures. Site-specific, critical low-flow values require approval by the agency. EPA will review any site-specific, critical low-flow values that could affect permits or other regulatory actions that are subject to approval by EPA. Critical low-flow values which have been determined for particular streams are listed in §307.10 of this title when standards are revised.

(B) Oyster waters.

(i) A 1,000 foot buffer zone, measured from the shoreline at ordinary high tide, is established for all bay and gulf waters, except those contained in river or coastal basins as defined in §307.2 of this title (relating to Description of Standards). Recreational criteria for indicator bacteria, as specified in §307.10(b)(1) of this title, are applicable within buffer zones.

(ii) Median fecal coliform concentration in bay and gulf waters, exclusive of buffer zones, shall not exceed 14 colonies per 100 ml, with not more than 10% of all samples exceeding 43 colonies per 100 ml.

(iii) Oyster waters should be maintained so that concentrations of toxic materials do not cause edible species of clams, oysters, and mussels to exceed accepted guidelines for the protection of public health. Guidelines are provided by U. S. Food and Drug Administration Action Levels for molluscan shellfish.

(4) Additional criteria.

(A) Chemical parameters. Site-specific criteria for chloride, sulfate, and total dissolved solids are established as averages over an annual period for either a single sampling point or multiple sampling points.

(B) pH. Site-specific numerical criteria for pH are established as absolute minima and maxima.

(C) Temperature. Site-specific temperature criteria are established as absolute maxima.

(D) Toxic materials. Criteria for toxic materials are established in §307.6 of this title (relating to Toxic Materials).

(5) Additional uses. Other basic uses, such as navigation, agricultural water supply, industrial water supply, seagrass propagation, and wetland water quality functions will be maintained and protected for all water in the state in which these uses can be achieved.

§307.8. Application of Standards.

(a) Low-flow conditions.

(1) The following standards do not apply below seven-day, two-year low-flows:

(A) site-specific criteria, as defined in §307.7 of this title (relating to Site-specific Criteria and Uses) and listed in Appendices A, D, and E of §307.10 of this title (relating to Appendices A - E);

(B) numerical chronic criteria for toxic materials as established in §307.6 of this title (relating to Toxic Materials);

(C) total chronic toxicity restrictions as established in §307.6 of this title;

(D) maximum temperature differentials as established in §307.4(f) of this title (relating to General Criteria);

(E) dissolved oxygen criteria for unclassified waters, as established in §307.4(h)(1) of this title; and

(F) aquatic recreation criteria for unclassified waters, as established in §307.4(j) of this title and in §307.7(b)(1) of this title.

(2) Numerical acute criteria for toxic materials and preclusion of total acute toxicity as established in §307.6 of this title are applicable at stream flows which are equal to or greater than one-fourth of seven-day, two-year low-flows (7Q2).

(3) Low-flow criteria in Appendix B of §307.10 of this title are solely for the purpose of defining the flow conditions under which water quality standards apply to a given water body. Low-flow criteria listed in Appendix B of §307.10 of this title are not for the purpose of regulating flows in water bodies in any manner or requiring that minimum flows be maintained in classified segments.

(4) Low-flow criteria defined in this section and listed in Appendix B of §307.10 of this title apply only to river basin and coastal basin waters. They do not apply to bay or gulf waters or reservoirs or estuaries.

(5) Seven-day, two-year low-flows (7Q2) and harmonic mean flows in Appendix B of §307.10 of this title were calculated from historical U.S. Geological Survey (USGS) daily streamflow records. The low-flow criterion was set at 0.1 of one cubic foot per second (ft^3/s) when the calculated 7Q2 was equal to or less than 0.1 of one ft^3/s.

(6) Flow values will be periodically recomputed to reflect alterations in the hydrologic characteristics of a segment, including reservoir construction, climatological trends, and other phenomena.

(7) The general criteria are applicable at all flow conditions except as specified in this section or in §307.4 of this title.

(8) Specific human health criteria for concentrations in water to prevent contamination of fish and shellfish so as to ensure safety for human consumption, as established in §307.6 of this title do not apply at stream flows below the harmonic mean flow.

(b) Mixing zones. A reasonable mixing zone will be allowed at the discharge point of permitted discharges into surface water in the state, in accordance with the following provisions.

(1) The following portions of the standards do not apply within mixing zones:

(A) site-specific criteria, as defined in §307.7 of this title and listed in Appendices A, D, and E of §307.10 of this title;

(B) numerical chronic aquatic life criteria for toxic materials as established in §307.6 of this title;

(C) total chronic toxicity restrictions as established in §307.6 of this title;

(D) maximum temperature differentials as established in §307.4(f) of this title;

(E) dissolved oxygen criteria for unclassified waters, as established in §307.4(h)(1) of this title;

(F) dissolved oxygen criteria for intermittent streams, as established in §307.4(h)(2) of this title;

(G) aquatic recreation criteria for unclassified waters, as established in §307.4(j) of this title and in §307.7(b)(1) of this title;

(H) specific human health criteria for concentrations in water to prevent contamination of drinking water, fish and shellfish so as to ensure safety for human consumption, as established in §307.6 of this title.

(2) Numerical acute aquatic life criteria for toxic materials and preclusion of total acute toxicity as established in §307.6 of this title are applicable in mixing zones. Acute criteria and acute total toxicity levels may be exceeded in small zones of initial dilution (ZIDs) at discharge points, but there shall be no lethality to aquatic organisms which move through a ZID. ZIDs shall not exceed the following sizes:

(A) 60 feet downstream and 20 feet upstream from a discharge point in a stream and river, and in addition, ZIDs in streams and rivers shall not encompass more than 25% of the volume of stream flow at or above seven-day, two-year low-flow conditions;

(B) a 25-foot radius in all directions (or equivalent volume or area for diffuser systems) from a discharge point in a lake or reservoir; and

(C) a 50-foot radius in all directions (or equivalent volume or area for diffuser systems) from a discharge point in a bay, tidal river, or estuary.

(3) Provisions of the general criteria in §307.4 of this title remain in effect in mixing zones unless specifically exempted in this section.

(4) Water quality standards do not apply to treated effluents at the immediate point of discharge--prior to any contact with either ambient waters or a dry streambed. However, effluent total toxicity requirements may be specified to preclude acute lethality near discharge points, or to preclude acute and chronic instream toxicity.

(5) Where a mixing zone is defined in a valid permit of the Texas Natural Resource Conservation Commission, the Railroad Commission of Texas, or the EPA, the mixing zone defined in the permit will apply.

(6) Mixing zones shall not preclude passage of free-swimming or drifting aquatic organisms to the extent that aquatic life use is significantly affected, in accordance with guidelines specified in the standards implementation procedures.

(7) Mixing zones will not overlap unless it can be demonstrated that no applicable standards will be violated in the area of overlap. Existing and designated uses will not be impaired by the combined impact of a series of contiguous mixing zones.

(8) Mixing zones will not encompass an intake for a domestic drinking water supply. Thermal mixing zones are excepted from this provision unless elevated temperatures adversely affect drinking water treatment.

(9) Mixing zones will be individually specified for all permitted domestic discharges with a permitted monthly average flow equal to or exceeding one million gallons per day and for all permitted industrial discharges to water in the state (excepting discharges which consist entirely of storm water runoff). For domestic discharges with permitted monthly average flows less than one million gallons per day, a small mixing zone will be assumed in accordance with guidelines for mixing zone sizes specified in the standards implementation procedures; and the executive director or commission may require specified mixing zones as appropriate.

(10) The size of mixing zones for human health criteria may vary from the size of mixing zones for aquatic life criteria.

(c) Minimum analytical levels. The specified definition of permit compliance for a specific toxic material will not be lower than established minimum analytical levels, unless that toxic material is of particular concern in the receiving waters, or unless an effluent specific method detection limit has been developed in accordance with 40 CFR 136. Minimum analytical levels are listed in the standards implementation procedures.

(d) Once-through cooling water discharges. When a discharge of once-through cooling water does not measurably alter intake concentrations of a pollutant, then water-quality based effluent limits for that pollutant are not required. For facilities which intake and discharge cooling-water into different water bodies, this provision only applies if water quality and applicable water quality standards in the receiving water are maintained and protected.

(e) Storm water discharges. Pollution in storm water shall not impair existing or designated uses. Controls on the quality of storm water discharges shall be based on best management practices, technology-based limits, or both in combination with instream monitoring to assess standards attainment and to determine if additional controls on storm water quality are needed. The implementation procedures describe how water quality standards will be applied to TPDES storm water discharges. The evaluation of instream monitoring data for standards attainment shall include the effects of storm water, as described in §307.9 of this title (relating to the Determination of Standards Attainment).

§307.9. Determination of Standards Attainment.

(a) General standards attainment sampling and assessment procedures. Unless otherwise stated in this chapter, additional details concerning sampling procedures for the measurement, collection, preservation and laboratory analysis of water quality samples are provided in the latest version of the *TNRCC Surface Water Quality Monitoring Procedures Manual*, the most recently published edition of the book entitled *Standard Methods for the Examination of Water and Wastewater*, 40 CFR 136, or other reliable sources acceptable to the executive director. Unless otherwise stated in this chapter, additional details concerning how sampling data are evaluated to assess standards compliance are provided in the latest approved version of the *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data*.

(b) Representative samples to determine standards attainment will be collected at locations approved by the agency. Samples collected at non-approved locations may be accepted at the discretion of the agency.

(c) Collection and preservation of water samples.

(1) To ensure that representative samples are collected and to minimize alterations prior to analysis, collection and preservation of attainment determination samples will be in accordance with procedures set forth in the most recently published edition of the book entitled *Standard Methods for the Examination of Water and Wastewater*, the latest version of the *TNRCC Surface Water Quality Monitoring Procedures Manual*, 40 CFR 36, or other reliable procedures acceptable to the agency.

(2) Bacterial and temperature determinations will be conducted on samples or measurements taken approximately one foot below the surface. Depth collection procedures for chloride, sulfate, total dissolved solids, dissolved oxygen, and pH to determine standards attainment may vary depending on the water body being sampled. Where standards apply to the mixed surface layer, the depth of this layer is determined in accordance with procedures in the latest approved version of the *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data*. Standards for chloride, sulfate, total dissolved solids, and pH are applicable to the mixed surface layer, but a single sample taken near the surface normally provides an adequate representation of these parameters.

(3) For dissolved oxygen, the following procedures are generally applicable:

(A) Non-tidal flowing streams. The dissolved oxygen criteria is applicable to the mixed surface layer, but a single sample taken near the surface normally provides an adequate representation of this parameter.

(B) Impoundments. Representative samples shall be collected from the entire water column in the absence of thermal stratification. Collection of representative samples shall be confined to the epilimnion when an impoundment is thermally stratified.

(C) Tidal waters. Representative samples shall be collected from the entire water column in the absence of density stratification. Under conditions of density stratification, a composite sample collected from the mixed surface layer shall be used to determine standards attainment.

(4) For toxic materials, numerical aquatic life criteria are applicable to water samples collected at any depth. Numerical human health criteria are applicable to the average concentration from the surface to the bottom. For the purposes of standards attainment for aquatic life protection and human health protection, samples which are collected at approximately one foot below the water surface will also be acceptable for comparison to numerical criteria.

(d) Sample analysis.

(1) Numerical criteria. Procedures for laboratory analysis will be in accordance with the most recently published edition of the book entitled *Standard Methods for the Examination of Water and Wastewater*, the latest version of the *Texas Surface Water Quality Monitoring Procedures Manual*, 40 CFR 136, or other reliable procedures acceptable to the agency.

(2) Radioactivity. Measurements will be made on filtered samples to determine radioactivity associated with dissolved minerals in accordance with current analytical methodology approved by the EPA.

(3) Toxicity. Bioassay techniques will be selected as testing situations dictate but will generally be conducted using representative sensitive organisms in accordance with §307.6 of this title (relating to Toxic Materials).

(e) Sampling periodicity and evaluation.

(1) Chloride, sulfate, total dissolved solids (TDS). Standards attainment determinations shall be based on the average of measurements taken over a period of at least one year. Results from all monitoring stations within the segment will be averaged to allow for reasonable parametric gradients. TDS determinations may be based on measurements of specific conductance.

(2) Radioactivity. The impact of radioactive discharges on the surface waters in Texas will be evaluated utilizing information developed by the Sanitary Engineering Research Laboratory at the University of Texas and presented in the June 30, 1960, report entitled, *Report on Radioactivity--Levels in Surface Waters--1958-1960*.

(3) Bacteria. Standards attainment will be based on a geometric mean of applicable samples and based on a single sample maximum, and data will be evaluated in accordance with the provisions of §307.7(b)(1) of this title (relating to Site-specific Uses and Criteria).

(4) Toxic materials. Specific numerical acute toxic criteria are applied as 24-hour averages, and specific numerical chronic toxic criteria are applied as seven-day averages. Human health criteria are applied as long-term average exposure criteria designed to protect populations over a life time of 70 years. Refer to the latest approved version of the *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data* for sampling periodicity and evaluation applicable to standards. Standards attainment for human health criteria will be based on the average of a minimum of four samples collected over at least a one year period.

(5) Temperature and pH. Standards attainment based on single measurements will be evaluated according to the latest approved version of the *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data*.

(6) Dissolved oxygen.

(A) Criteria for daily (24-hour) average concentrations will be compared to a time-weighted average of measurements taken over a 24-hour period.

(B) Criteria for minimum concentrations will be compared to individual measurements. When data are collected over a 24-hour period, any single measurement may be compared to the applicable minimum criterion.

(f) Biological integrity. Biological integrity, which is an essential component of the aquatic life categories defined in §307.7(b)(3) of this title, is assessed by sampling the aquatic community. Attainment of aquatic life use may be assessed by indices of biotic integrity which are described in publicly available documents such as in the latest version of the *TNRCC Receiving Water Assessment Procedures Manual*.

(g) Additional parameters. Assessment of narrative criteria parameters shall be performed in accordance with the latest approved version of the *TNRCC Guidance for Screening and Assessing Texas Surface and Finished Drinking Water Quality Data*.

§307.10. Appendices A - E.

The following appendices are integral components of this chapter of the Texas Surface Water Quality Standards.

(1) Appendix A--Site-specific Uses and Criteria for Classified Segments:
Figure: 30 TAC §307.10(1)

(2) Appendix B--Low Flow Criteria:
Figure: 30 TAC §307.10(2)

(3) Appendix C--Segment Descriptions:
Figure: 30 TAC §307.10(3)

(4) Appendix D--Site-specific Receiving Water Assessments:
Figure: 30 TAC §307.10(4)

(5) Appendix E--Site-specific Criteria:
Figure: 30 TAC §307.10(5)

This agency 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 July 28, 2000.

TRD-200005225
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 17, 2000
Proposal publication date: February 4, 2000
For further information, please call: (512) 239-0348

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CHAPTER 312. SLUDGE USE, DISPOSAL, AND TRANSPORTATION

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §312.9

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts an amendment to §312.9, concerning Sludge Fee Program. The amendment is adopted without changes to the proposed text as published in the May 19, 2000, issue of the *Texas Register* (25 TexReg 4482) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The purpose of the change to Chapter 312 is to incorporate recent changes required by House Bill (HB) 3288, 76th Legislature, 1999, which prohibit the TNRCC from charging disposal fees for sewage sludge that has been treated to the lowest pathogen density level provided by commission rules and that meets metal concentration limits, vector attraction reduction, and pathogen reduction requirements.

SECTION BY SECTION DISCUSSION

No sections were changed from the original proposal.

FINAL REGULATORY IMPACT ANALYSIS

Staff has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and has determined that the rulemaking does not meet the definition of a major environmental rule as defined by the Texas Government Code. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendment is administrative in that it would eliminate a fee for the disposal of sewage sludge that has been properly treated. The removal of this fee should benefit persons involved in the management of this material and therefore does not materially affect the economy in an adverse way. Elimination of the fee promotes proper treatment of sewage sludge and does not adversely affect the environment, or the public health and safety of the state or a sector of the state.

In addition, the adopted rules do not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement. The amendment implements the specific provisions of HB 3288, which removed the commission's authority to assess such a fee.

TAKINGS IMPACT ASSESSMENT

Staff has prepared a takings impact assessment for the rule under Texas Government Code, 2007.043. Promulgation and enforcement of the rule will not burden private real property because the action proposed removes fee requirements for disposal of certain sludges. This action does not constitute a taking of private property.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

Staff has reviewed this rulemaking proposal and found that it is subject to the Texas Coastal Management Program (CMP) and is consistent with all applicable goals and policies of the CMP. The rule conforms with §501.14(d) of the Coastal Coordination Act Implementation Rules by promoting the proper treatment of sewage sludge to reduce pathogens as required by the Texas Solid Waste Disposal Act, §361.022(c) through the elimination of a disposal fee on sewage sludge that has been properly treated. Additionally, this rule amendment implements administrative changes without significantly affecting the current substantive requirements which provide for the protection of the environment and public health and safety.

HEARING AND COMMENTERS

No hearing requests were received on the proposal.

ANALYSIS OF TESTIMONY

No written comments were received on the proposal.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides 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 to establish and approve all general policies of the commission; and the Texas Solid Waste Disposal Act, Health and Safety Code, §361.011, which provides the commission with the authority to manage municipal waste and §361.013, which provides the commission with the authority to adopt rules and establish fees for the transportation and disposal of solid waste. The proposed amendment implements HB 3288, 76th Legislature, 1999.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 28, 2000.

TRD-200005243
Margaret Hoffman
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Effective date: August 17, 2000
Proposal publication date: May 19, 2000
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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER P. MUNICIPAL SALES AND USE TAX

34 TAC §3.378

The Comptroller of Public Accounts adopts an amendment to §3.378 concerning natural gas and electricity, with changes to the proposed text as published in the February 25, 2000, issue of the *Texas Register* (25 TexReg 1564).

The amendment reflects changes to the Tax Code, §151.317, enacted by the 76th Legislature, 1999, making nonsubstantive revisions and codifying the agency's long-standing policy of using predominant use to determine the taxability of natural gas or electricity measured through a single meter when used for exempt or taxable purposes. References to the 1.0% local tax rate were deleted because since 1987, certain cities have imposed the 1/2% additional sales and use tax for property tax relief and others have imposed development corporation sales and use tax in 1/8% increments up to 1/2%. The procedures for cities to reimpose sales tax on residential use of natural gas and electricity are amended to clarify the statutory requirements a qualifying city had to fulfill before the city could continue taxation or reimpose the tax.

Changes were made to subsection (b)(2)(C) of the proposed rule. In that subparagraph, the verb "wishes" has been changed to past tense to indicate that the actions described are no longer available. Governing bodies of cities that wished to continue the taxation of residential use of natural gas and electricity had to take specific actions on specific dates in 1979. Any city that did not meet the requirements specified at that time cannot currently tax residential use of natural gas and electricity.

Changes were also made to subsection (b)(2)(F) of the proposed rule to remove obsolete language regarding the deadline for cities to adopt the option to tax residential use of natural gas and electricity. Cities adopting the local sales and use tax after October 1, 1979, cannot tax residential use of natural gas and electricity.

No comments were received regarding adoption of the amendment.

This amendment is adopted under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements the Tax Code, §151.317.

§3.378. Natural Gas and Electricity.

(a) Natural gas and electricity: imposition of the tax.

(1) The local tax applies to sales of natural gas and electricity for use in a city that has adopted the local tax and must be collected for the city in which delivery is made to the consumer.

(2) When a city adopts the local tax, the tax does not apply to sales of natural gas and electricity during a customer's regular monthly billing period that begins before the effective date of the adoption of the tax. The tax shall apply to each regular monthly billing period beginning on or after the effective date of the tax.

(b) Natural gas and electricity: exemptions from tax.

(1) Certain uses of natural gas and electricity are exempt from local tax. See §3.295 of this title (relating to Natural Gas and Electricity) for a discussion of definitions, specific exemptions relating to the sale or use of natural gas and electricity, and the circumstances under which the predominant use theory may be applied. Residential use of natural gas and electricity in a city is exempt unless the tax is imposed by a city as provided in paragraph (2) of this subsection.

(2) Residential use of natural gas and electricity.

(A) Effective October 1, 1979, the sale of natural gas and electricity for residential use is exempt from taxation under the Local Sales and Use Tax Act unless:

(i) the city voted for early abolition (see subparagraph (B) of this paragraph);

(ii) the city voted to continue taxation (see subparagraph (C) of this paragraph); or

(iii) the city voted to reimpose tax (see subparagraph (D) of this paragraph).

(B) Early abolition. At any time before October 1, 1979, by a majority vote of the membership of the governing body of a city, the governing body could exempt from the local tax the sale of natural gas and electricity for residential use. After the results of the vote were entered into the minutes of the city, the city secretary must have forwarded to the comptroller by registered or certified mail a certified copy of the ordinance. On receipt of notification, one whole calendar quarter must have elapsed prior to the exemption becoming effective (see §3.372(d)(1) of this title (relating to Adoption or Abolition City Tax) for an illustration of this procedure) unless notification was received by the comptroller by registered or certified mail postmarked no later than September 10, 1978; in which case, the exemption was effective on October 1, 1978.

(C) Continue taxation. If the governing body of a city wished to continue to impose the local tax on the sale of natural gas and electricity for residential use, the city secretary must have forwarded to the comptroller's office before May 1, 1979, by registered or certified mail a certified copy of the ordinance reflecting the majority vote of the membership exempting natural gas and electricity. If the ordinance was not received by the comptroller before May 1, 1979, the exemption from the local tax automatically became effective on October 1, 1979. To continue the taxation of residential use, the city secretary must have forwarded to the comptroller's office before June 30, 1979, by registered or certified mail, a certified copy of the ordinance reflecting the majority vote of the membership reimposing tax on natural gas and electricity.

(D) Reimposition of tax authorized. The local tax may be reimposed by a majority vote of the membership of the governing body of a city that exempted residential use of natural gas and electricity before May 1, 1979. If the majority of the governing body votes for the reimposition of the local tax, the results of the vote must be entered in the minutes of the city. Thereafter, the city secretary must forward to the comptroller by registered or certified mail a certified copy of the ordinance reimposing the tax. Upon receipt of notification by the comptroller, there shall elapse one whole calendar quarter prior to the reimposition becoming effective. The reimposition shall take effect beginning on the first day of the calendar quarter next succeeding the elapsed quarter.

(E) Effect of billing periods. The exemption or reimposition of the local tax does not apply to sales of natural gas and electricity for residential use made during a customer's regular monthly billing period which begins before the effective date of the exemption or reimposition. The exemption or reimposition shall apply to each regular monthly billing period beginning on or after the effective date of the exemption or reimposition.

(F) Cities adopting the Local Sales and Use Tax Act. Cities that first adopt the local sales and use tax after October 1, 1979, may not impose the tax on the residential use of natural gas and electricity.

(G) The sale of natural gas and electricity for residential use is automatically exempt from the additional city tax imposed under the Tax Code, §321.101(b) or the Development Corporation Act of 1979 (Texas Civil Statutes, Art. 5190.6), if the sale of natural gas and electricity is exempt from tax under §321.101(a). The sale of natural gas and electricity for residential use is automatically taxed under Tax Code, §321.101(b) if the tax under Tax Code, §321.101(a) is imposed on the sale of natural gas and electricity for residential use.

This agency 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 July 26, 2000.

TRD-200005186
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Effective date: August 15, 2000
Proposal publication date: February 25, 2000
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CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER A. PRACTICE AND PROCEDURE

34 TAC §9.17

The Comptroller of Public Accounts adopts an amendment to §9.17, concerning notice of public hearing on tax increase, without changes to the proposed text as published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5850).

This section is being amended to provide for changes to the model form for notice of public hearing on tax increase from House Bill 954, 76th Legislature, 1999, effective January 1, 2000, and to change the form number to conform with the comptroller form numbering system.

No comments were received regarding adoption of the amendment.

This amendment is adopted under the Tax Code, §26.06(g), which requires the comptroller to adopt rules prescribing the language and format to be used in the part of the notice required by Tax Code, §26.06(b)(2).

The amendment implements the Tax Code, §26.06.

This agency 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 July 25, 2000.

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Martin Cherry
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Comptroller of Public Accounts
Effective date: August 14, 2000
Proposal publication date: June 16, 2000
For further information, please call: (512) 463-3699

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34 TAC §9.18

The Comptroller of Public Accounts adopts a new §9.18, concerning adjustment for optional homestead exemption, without changes to the proposed text as published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5850).

This rule is being adopted to reflect statutory changes made by Senate Bill 4, 76th Legislature, 1999, effective September 1, 1999.

No comments were received regarding adoption of the new rule.

This new section is adopted under the Tax Code, §111.002 and §111.0022, which provides the comptroller the authority to adopt rules for the administration and enforcement of the Tax Code and programs or functions assigned to the comptroller by law.

The new section implements the Tax Code, §26.08, and the Education Code, §42.2522(e).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Effective date: August 14, 2000
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PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. INSURANCE PROGRAMS

SUBCHAPTER A. HEALTH CARE BENEFITS

34 TAC §41.12

The Teacher Retirement System of Texas (TRS) adopts amendments to §41.12 concerning certification of insurance coverage, without changes to the proposed text as published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3926).

These amendments make the rule conform to Education Code §22.004, which was revised by the 76th Legislature in Senate Bill 1128. The amendments change the deadlines, in accordance with the revised law, for school districts to file their reports relating to compliance with Education Code §22.004(c) to the TRS executive director. In addition, the amendments reflect the revised deadline for the TRS executive director to submit a status report to the legislature regarding the comparability of insurance coverage as described in Education Code §22.004

No comments were received regarding the proposal.

The amendments are adopted under the Education Code, §22.004, which requires the Board of Trustees of the TRS to adopt rules to determine whether a school district's group health coverage is comparable to the basic health coverage specified by that statute, and under Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of the TRS to adopt rules for the transaction of business of the Board.

This agency 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 July 24, 2000.

TRD-200005083
Charles L. Dunlap
Executive Director
Teacher Retirement System of Texas
Effective date: August 13, 2000
Proposal publication date: May 5, 2000
For further information, please call: (512) 391-2115

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SUBCHAPTER B. LONG-TERM CARE, DISABILITY AND LIFE INSURANCE

34 TAC §41.16

The Teacher Retirement System of Texas (TRS) adopts new rule §41.16 concerning insurance coverage under the Texas Public School Employees and Retirees Group Long-Term Care Insurance Program, without changes to the proposed text as published in the May 19, 2000, issue of the *Texas Register* (25 TexReg 4495).

The purpose of the new rule is to make clear that TRS may select or reject coverage options, including inflation protection and nonforfeiture benefits options, that may be offered under the long-term care insurance program.

No comments were received regarding the proposal.

The new rule is adopted under the Insurance Code art. 3.50-4A, which gives TRS authority to adopt rules as necessary to implement and administer the Texas Public School Employees Group Long-Term Care Insurance Program. In addition, the rule is adopted under Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for the transaction of business of the Board.

This agency 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 July 24, 2000.

TRD-200005084
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Executive Director
Teacher Retirement System of Texas
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Proposal publication date: May 19, 2000
For further information, please call: (512) 391-2115

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 93. YOUTH RIGHTS AND REMEDIES

37 TAC §93.33

The Texas Youth Commission (TYC) adopts an amendment to §93.33, concerning alleged mistreatment, without changes to the proposed text as published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3926).

The justification for amending the section is to ensure clear rules that will promote more efficient government.

The amendment will clarify the type of confidential information that will be deleted from an alleged mistreatment investigation report prior to providing the report to an employee against whom disciplinary action has been taken. Certain information can be provided on written request by the employee. Position titles no longer used are also being corrected.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, §61.045, which provides the Texas Youth Commission with the authority to develop programs for the welfare, custody and rehabilitation of youth in its jurisdiction.

The adopted rule implements the Human Resource Code, §61.034, regarding making rules appropriate to the accomplishments of the agency's functions.

This agency 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 July 27, 2000.

TRD-200005201
Steve Robinson
Executive Director
Texas Youth Commission
Effective date: August 16, 2000
Proposal publication date: May 5, 2000
For further information, please call: (512) 424-6301

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PART 12. TEXAS MILITARY FACILITIES COMMISSION

CHAPTER 379. ADMINISTRATIVE RULES

37 TAC §§379.17 - 379.39

The Texas Military Facilities Commission (Commission) adopts new Chapter 379, §§379.17 - 379.39, relating to procedures for the negotiation and mediation of certain breach of contract claims asserted by contractors against the State of Texas pursuant to §9 of House Bill 826, 76th. Legislature, Regular Session, Chapter 68 (1999)(codified at Government Code, Chapter

2260), without changes to the proposed text as published in the June 30, 2000, issue of the *Texas Register* (25 TexReg 6305).

Historically, the State of Texas has been immune from suit on a contract on the basis of sovereign immunity. Contractors seeking to assert and recover damages on a breach of contract claim had to obtain legislative consent to sue and a legislative appropriation to satisfy any resulting judgment. With the enactment of Chapter 2260, the legislature has established a new and exclusive administrative process by which a contractor who enters into a written contract with a unit of state government for goods, services or projects, may pursue a breach of contract claim for damages. Chapter 2260 requires a contractor who asserts a breach of contract claim and the Commission to attempt to resolve the contractor's claim and any counterclaim through negotiation, and authorizes, but does not require, the parties to mediate their dispute. If the contractor's claim is not resolved in its entirety within the statutory time frame, the contractor may request a contested case hearing before the State Office of Administrative Hearings ("SOAH"). Chapter 2260 authorizes the SOAH administrative law judge to render a non-appealable decision ordering the Commission to pay damages up to $250,000. If the contractor's claim exceeds $250,000, Chapter 2260 requires the administrative law judge to issue a written report of his or her findings to the legislature, recommending that the legislature either appropriate money to pay all or part of a valid claim or deny such appropriation and withhold consent to sue.

Section 2260.052(c) requires that the Commission adopt rules to establish negotiation and mediation provisions. An interagency dispute resolution working group, co-sponsored by the OAG and the Center for Public Policy Dispute Resolution at the University of Texas School of Law and consisting of representatives of state agencies, legislative offices, and institutions of higher education and representatives of contractors and vendors who do business with the state, assisted the OAG and SOAH with the development of both sets of rules.

The rules provide a process sufficiently flexible to permit the parties to structure a negotiation or mediation in a manner that is most appropriate for a particular dispute regardless of such variables as the size or organization of the Commission, or the contract's complexity, subject matter, dollar amount, or method and time of performance.

Section 379.17 defines terms as they relate to this chapter. Section 379.18 provides that the procedures are prerequisites to filing suit under Civil Practice & Remedies Code, Chapter 107 and Government Code, Chapter 2260. Section 379.19 advises that the state has not waived sovereign immunity to suit or to liability.

Section 379.20 sets out the requirements and procedures of the notice of claim of breach of contract that contractor must assert. Section 379.21 sets out the requirements and procedures of the counterclaim that the unit of state government must assert. Section 379.22 addresses the disclosure of additional information. Section 379.23 announces that the parties must negotiate to settle the dispute. Section 379.24 provides a timetable as it relates the negotiations between the contractor and the Commission. Section 379.25 describes how the parties may conduct the negotiation. Section 379.26 addresses the parties' settlement approval procedures. Section 379.27 announces the requirements of any resulting settlement agreement. Section 379.28 states how the costs of negotiations shall be handled by the parties. In the event, the breach of contract claim is not resolved in its entirety, Section 379.29 specifies the process by which a contractor may seek resolution of the dispute by SOAH. Section 379.30 set out the mediation timetable. Section 379.31 describes the conduct of the mediation. Section 379.32 discusses the qualifications, immunities, and duties of a mediator. Section 379.33 pertains to the confidentiality of a mediation and any resulting final settlement agreement. Section 379.34 states how the costs of mediation shall be handled by the parties. Section 379.35 addresses the parties settlement approval procedures. Section 379.36 details the handling of any resulting settlement agreement. Section 379.37 states that a final settlement agreement must comply with the provisions of §379.27 of this chapter. Section 379.38 provides that if mediation does not resolve the dispute the contractor may request that the claim be referred to SOAH in accordance with §379.29 of this chapter. Section 379.39 summaries the use of assisted negotiation processes.

No comments were received regarding adoption of the new sections.

The new sections are adopted under Government Code, Chapter 2260, Resolution of Certain Contract Claims against the State, §2260.052, which authorizes the Commission to adopt rules deemed necessary or advisable to effectuate Chapter 2260.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 31, 2000.

TRD-200005290
Jerry D. Malcolm
Executive Director
Texas Military Facilities Commission
Effective date: August 20, 2000
Proposal publication date: June 30, 2000
For further information, please call: (512) 406-6971

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 20. COST DETERMINATION PROCESS

40 TAC §20.101

The Texas Department of Human Services (DHS) adopts an amendment to §20.101 without changes to the proposed text published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5557).

Justification for the amendment is to establish payment rates for two years coincident with the state biennium. It will allow payment rates to be determined at the same time that the state legislature is establishing funding for these programs for the state's biennium. The amendment requires that payment rates for the Primary Home Care, Day Activity and Health Services, Emergency Response Services, and Residential Care programs be determined on a state fiscal year basis for a period of two years.

The Health and Human Services Commission adopts similar policy for Medicaid-funded services, codified at 1 TAC §355.101, in this issue of the *Texas Register*.

The department received no comments regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs; and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment implements the Human Resources Code, §§22.001- 22.030 and §§32.001-32.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 27, 2000.

TRD-200005202
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 438-3108

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PART 19. TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES

CHAPTER 701. COMMUNITY INITIATIVES SUBCHAPTER B. COMMUNITIES IN SCHOOLS

The Texas Department of Protective and Regulatory Services (TDPRS) adopts the repeal of §§701.201, 701.202, 701.211-701.214, 701.221, 701.241-701.243, and 701.251-701.255; and adopts new §§701.201, 701.203, 701.205, 701.207, 701.209, 701.211, 701.213, 701.215, 701.217, 701.219, 701.221, 701.223, 701.225, without changes to the proposed text published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5596).

Effective September 1, 1999, the Community In Schools (CIS) program rules were administratively transferred from the Texas Workforce Commission (TWC) to TDPRS. The justification for the sections is to repeal rules related to TWC administration of the CIS program and adopt new rules to guide the administration of the CIS program at TDPRS. The new rules better reflect the TDPRS philosophy for the CIS program, and ensure that CIS program administration is compatible with other TDPRS rules, policies, and administrative procedures. With the exception of two funding formula rules adopted effective January 1, 2000, TDPRS is repealing all existing CIS rules, and adopting new rules using a new numbering and organizational scheme.

The new sections will function by clearly informing the public about the mission and services provided by the CIS program in Texas, and the requirements to become a CIS provider.

No comments were received regarding adoption of the sections.

40 TAC §§701.201, 701.202, 701.211-701.214, 701.221, 701.241-701.243, 701.251-701.255

The repeals are adopted under the Human Resources Code (HRC), §40.029, which authorizes the department to adopt rules to facilitate implementation of departmental programs, and the Texas Family Code, Chapter 264, Subchapter I, which gives oversight of the Communities In Schools program to the Texas Department of Protective and Regulatory Services.

The repeals implement the Texas Family Code, Chapter 264, Subchapter I.

This agency 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 July 28, 2000.

TRD-200005233
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 438-3437

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40 TAC §§701.201, 701.203, 701.205, 701.207, 701.209, 701.211, 701.213, 701.215, 701.217, 701.219, 701.221, 701.223, 701.225

The new sections are adopted under the Human Resources Code (HRC), §40.029, which authorizes the department to adopt rules to facilitate implementation of departmental programs, and the Texas Family Code, Chapter 264, Subchapter I, which gives oversight of the Communities In Schools program to the Texas Department of Protective and Regulatory Services.

The new sections implement the Texas Family Code, Chapter 264, Subchapter I.

This agency 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 July 28, 2000.

TRD-200005232
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 438-3437

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PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 800. GENERAL ADMINISTRATION

The Texas Workforce Commission (Commission) adopts new §800.6 and the repeal of §§800.71-800.75 relating to Charges

for Copies of Public Records. Section 800.6 is adopted with changes to the proposed text as published in the June 2, 2000, issue of the *Texas Register* (25 TexReg 5298). Sections 800.71 - 800.75 are adopted without changes and will not be republished.

The purposes of the repeal and new rule were to: (1) set forth the provisions relating to requesting public records; (2) review the provisions consistent with the rule review plan to assess whether the need for the provisions still exists; (3) add a designated e-mail address as follows: open.records@twc.state.tx.us; (4) add a preferred physical address for requests for copies of public records as follows: Officer for Public Information, Texas Workforce Commission, 101 East 15th Street, Austin, Texas 78778-0001; and (5) move the provisions relating to charges for copies of public records (40 TAC §§800.71-800.75) out of Subchapter C, which is to be the location for the rules relating to Reallocations.

By setting forth the e-mail and preferred physical addresses, the Commission enhances the public's options for submitting open records (public) requests and expedites responses to open records (public) requests by ensuring that open records (public) requests sent by mail are delivered directly to the Officer for Public Information.

The General Services Commission rules currently adopted by reference may be viewed at the following link: http://info.sos.state.tx.us/pub/plsql/readtac$ext.viewtac

No comments were received from the public regarding the rules. Two non-substantive changes are made. One change at subsection (b) is to remove a specific room number from the address to avoid the need to revise the rule should the room number change in the future. The second change is to clarify that de minimis requests provisions apply to certain documents that are "maintained as paper documents." Specifically, subsection (f) is changed to apply to de minimis requests when the total records provided in response to all requests made by an individual or entity in any given 30-day period consist of fewer than 50 pages of readily available, standard-size pages "maintained as paper documents."

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §800.6

The new rule is adopted under Texas Labor Code §§301.061 and 302.002, which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

§800.6. Charges for Copies of Public Records.

(a) General Procedure. Except as otherwise specified in this chapter, the Texas Workforce Commission (Commission) hereby adopts by reference the definitions, methods, procedures, and charges for copies of public records set out in the General Services Commission Rules at 1 TAC §§111.61 - 111.71, as may be amended.

(b) Methods of Making Requests. Requests may be submitted in writing to the following mailing address: Officer for Public Information, Texas Workforce Commission, 101 East 15th Street, Austin, Texas 78778-0001. Requests made by electronic mail (e-mail) shall be submitted to open.records@twc.state.tx.us to be considered a valid request.

(c) Standard Fees. The Commission may establish a standard fee for the handling of certain types of repetitive requests when the costs of responding to such requests are substantially similar in most cases. The standard fee will be the average costs of handling that type of request. The average cost is calculated using the personnel, resource, and overhead charges set forth in the General Services Commission rules and will be based upon a survey of a representative sample of requests.

(d) Adjustments for Actual Cost. In the event that the actual costs of responding to a given request are significantly lower or higher than the standard fee charged for that type of request, actual costs will be charged in lieu of the standard fee.

(e) Program-Related Requests. No charge will be assessed to an individual or an employing unit for copies of records pertaining to that individual or employing unit when the provision of records is deemed by the Commission to be reasonably required for the proper administration of the Texas Unemployment Compensation Act, found at the Texas Labor Code, Title 4, Subtitle A.

(f) De Minimis Requests. No charge will be assessed to any individual or entity for providing copies of records in response to a request for Public Information under Texas Government Code, Chapter 552, when the total records provided in response to all requests made by that same individual or entity in any given 30-day period consist of fewer than 50 pages of readily available, standard-size pages maintained as paper documents.

(g) Requests by Other Governmental Entities. Notwithstanding any other provision in this section, provision of information to other governmental agencies for purposes other than the administration of the Texas Unemployment Compensation Act will be made only on a cost reimbursable basis, with all costs being calculated in accordance with OMB Circular A-87, as required by federal law at 20 Code of Federal Regulations §603 *et seq*. Charges to other governmental entities can only be waived when the request is of an isolated or infrequent nature and when the costs of responding to a particular request are negligible.

(h) Certified Records. In addition to the fees the Commission may charge for providing copies of records, the Commission shall charge a fee of $5.00 for preparation of a certification instrument which may be attached to one or more pages of records covered by the certification instrument.

This agency 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 July 31, 2000.

TRD-200005319
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Effective date: August 20, 2000
Proposal publication date: June 2, 2000
For further information, please call: (512) 463-8812

SUBCHAPTER C. CHARGES FOR COPIES OF PUBLIC RECORDS

40 TAC §§800.71 - 800.75

The repeal is adopted under Texas Labor Code §§301.061 and 302.002, which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200005318
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Effective date: August 20, 2000
Proposal publication date: June 2, 2000
For further information, please call: (512) 463-8812

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 15. TRANSPORTATION PLANNING AND PROGRAMMING

SUBCHAPTER E. FEDERAL, STATE, AND LOCAL PARTICIPATION

43 TAC §15.52

The Texas Department of Transportation adopts amendments to §15.52, concerning agreements for federal, state, and local participation. The amended section is adopted without changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5608) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §222.052 authorizes a local government to contribute funds to be spent by the Texas Transportation Commission in the development and construction of the public roads and the state highway system within the local government. Pursuant to this section, the department requires a local government to enter into a cost participation agreement with the department related to a highway improvement project.

Local governments have limited financial resources with which to meet their many financial obligations. Their cost participation in off system bridge program projects is often prohibitive which results in delaying necessary bridge improvements that are critical in nature. Local governments are also reluctant to commit their scarce resources to these projects due to the potential risk of cost escalation resulting in the local government owing the department more than the amount originally estimated.

To ensure the safety of the travelling public and to accelerate these needed bridge improvements, §15.52 is amended to change the required provisions of cost participation agreements that the department and local governments enter into when a local government is responsible for providing cost participation for a highway improvement project included in the off state highway system bridge program.

Due to the critical nature of these safety improvements and to help minimize the risk of cost escalation to the local government, amendments to §15.52(3) provide a new funding arrangement for off state highway system bridge projects. The local participation is based upon the department's estimate of the eligible work at the time of the agreement and would not be adjusted during construction except as needed to include any project cost item or portion of a cost item ineligible for state or federal participation. If it is found that the amount received is in excess of the local government's required funding share, the excess funds paid by the local government shall be returned. To maintain the intent of the federal bridge program, the local government is also responsible for any cost resulting from changes made at the request of the local government, either during preliminary engineering or construction.

To allow the local government time to budget for its cost participation, the amendments retain the provision for an initial payment for its portion of the estimated cost of preliminary engineering for the project upon execution of the agreement, and payment of the remainder due prior to the department's scheduled date for contract letting.

To allow for an efficient transition consistent with state law, the amendments apply to projects for which the construction contract has not been awarded. The department will not return any funds already received by the department under the terms of existing agreements.

COMMENTS

No comments were received on the proposed amendments.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

This agency 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 July 31, 2000.

TRD-200005266
Richard Monroe
General Counsel
Texas Department of Transportation
Effective date: August 20, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 463-8360

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43 TAC §15.55

The Texas Department of Transportation adopts amendments to §15.55, concerning construction cost participation, with changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5611).

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §222.053(b), authorizes the Texas Transportation Commission to require, request, or accept from a political subdivision matching or other local funds to make the most efficient use of its highway funding. Pursuant to this authority, the commission has previously adopted §§15.50-15.56, to specify the roles of federal, state, and local entities in the development of highway improvement projects.

Current §15.55 requires a local government to fund 10% of an off-state highway system bridge project. The amendments add

a new subsection (d) to §15.55. Subsection (d) authorizes the department to waive the local government's required 10% fund participation in an off state system bridge program project if the local government agrees to perform an equivalent dollar-amount of structural improvement work on another deficient bridge(s) or other mainlane cross-drainage structure(s) within the local government's jurisdiction.

Subsection (d)(1) defines the words and terms used in the new subsection. While a bridge on a participation-waived project typically must be a roadway-bearing structure of at least 20-foot length, a "bridge" on an equivalent-match project(s), as defined in this subsection, includes mainlane cross-drainage structures regardless of length along the roadway. This expansion of definition is needed to provide more assistance to the local governments, and additional flexibility in addressing their roadway structural needs. The term "deficient bridge" is defined as a bridge identified by the department as having a condition or load capacity that is inadequate. The definition is necessary in order to ensure that the equivalent-match program targets structurally inadequate bridges with a resulting increase in bridge safety for the traveling public. The definition of "participation-waived project" is limited to projects that are on the department's Unified Transportation Program and that satisfy minimum standards established by the department. These stipulations are required to remain consistent with the basic purpose of the bridge program, i.e., the remedy of deficient bridges.

Subsection (d)(2) authorizes the department's district engineer to approve a waiver. In order to receive consideration for a waiver, the local governmental body is required to commit by written resolution to spend an equivalent dollar-amount of funds for structural improvement work on another bridge(s) within its jurisdiction. An equivalent amount includes, but is not limited to, expenditures for direct or indirect costs for structural improvement work on bridge(s) in the equivalent-match project(s).

Subsection (d)(3) describes the eligibility requirements for a waiver. First, to assure that the integrity of the state's fund accounting and construction project letting systems is maintained, the construction contract for the participation-waived project may not have been awarded. Second, to ensure that the work is within the intent and the monetary limitations of the rules, work on the equivalent-match project may not have begun prior to approval of the waiver. Third, the local government must be in compliance with load posting and closure regulations as defined in the National Bridge Inspection Standards under 23 C.F.R. §650.303. This compliance is necessary to further support the basic purpose of the bridge program, which is to remedy deficient bridges and enhance bridge safety through bridge replacement and rehabilitation. Fourth, the bridge on the proposed equivalent-match project(s) must be classified as deficient, or a bridge that is weight restricted for school buses and is located on a school bus route. This requirement is necessary to properly discharge the basic purpose of the bridge program and to ensure that a maximum number of bridges are made safe for school bus loading. Finally, the structural improvement work on the equivalent-match project must increase the load capacity of the existing bridge or upgrade the bridge to its original capacity, with a minimum upgrade to safely carry school bus loading if located on a school bus route. This requirement is needed to ensure substantive improvement in the load carrying capacity of the deficient bridge.

Subsection (d)(4) describes the procedures a local government must follow to request a waiver. The local government is required to provide a written request to the department district engineer that includes the location(s), description of structural improvement work proposed, estimated cost for the equivalent-match project(s), and a copy of the resolution of the local governmental body. These requirements are needed to properly determine if the waiver complies with all the requirements of this subsection. The resolution from the local government must acknowledge assumption of all responsibilities for engineering and construction and complying with all applicable state and federal environmental regulation and permitting requirements for the bridge(s) on the equivalent-match project(s). Acknowledgement of these responsibilities is necessary since the bridges on the equivalent-match projects are not a part of the state highway system. Also, structural improvement work is being accomplished outside the department's purview. Therefore, in the interest of public safety and legal compliance, the department desires to inform the local government of its responsibilities.

Subsection (d)(5) specifies the criteria that will be considered by the district engineer when deciding whether to approve a waiver. The department is responsible for the administration of the off system bridge program, and desires to enhance the safety of the traveling public and ensure stewardship of public funds. The criteria described in this paragraph will ensure that a project is not undertaken by a local government without assurance that the public will be best served by the proposal. The district engineer will consider the type of work proposed for the equivalent-match project(s). Consideration of the type of work is needed to ensure that, to the greatest extent possible, the most deficient and unsafe off system bridges are being addressed. "Regional transportation needs" are required to be addressed to ensure that optimum movement and volume of traffic service are considered. The past performance of the local government in the participation-waived program must be considered in order to ensure overall efficiency and equitable administration of this program.

Subsection (d)(6) describes the procedures to be used by the district engineer when notifying a local government of the approval or disapproval of a waiver. After review of the request for waiver by the district engineer, a letter will be submitted to the requesting local government indicating approval or disapproval. If disapproved, the letter will state the reasons for disapproval. If the waiver is approved, the letter will state that the local government, for the equivalent-match project(s), will assume: all costs of the work; responsibility for complying with all applicable state and federal environmental regulations and permitting requirements; and responsibility for the engineering and construction necessary for completion of the work.

Subsection (d)(7) describes additional provisions and conditions related to the administration of this subsection. The local government will be allowed three years after the contract award of the participation-waived project to complete structural improvements on the equivalent-match project(s). The department believes this requirement will allow the local government time to marshal forces, accumulate materials, and otherwise carry out the agreed-to work. Within the specified three-year period for accomplishing the equivalent-match project(s), and no later than 30 days after completion of the equivalent-match project(s), documentation of completion of the equivalent-match project(s) requirement will be provided by letter to the district engineer. This notification is necessary in order for the department to verify compliance. If the local government fails to adequately complete the equivalent-match project(s), the local government will be excluded from future waivers under this subsection for a minimum of five years. This requirement is necessary to ensure program

efficiency and equitable administration for all participating local governments.

The local government is responsible for all of the direct cost of any participation-waived project cost item or portion of a cost item that is not eligible for federal participation under the Federal Highway Bridge Replacement and Rehabilitation Program (HBRRP) under 23 U.S.C. §144 and 23 C.F.R. §650 Subpart D. The local government is also responsible for any costs resulting from changes made at the request of the local government. Since participation-waived projects are HBRRP projects, all work involved is required to meet specified eligibility requirements.

A local government located in an economically disadvantaged county that receives an adjustment under subsection (b) of this section may participate in the provisions of subsection (d) in the amount of its reduced matching funds requirement. This requirement is needed for equitable administration of the equivalent-match program to all local governments. To ensure compliance with state law, the department will not reimburse funds already received by the department under the terms of existing agreements.

COMMENTS

No comments were received on the proposed amendments; however, to clarify the intent of subsection (d)(3)(D) the department is adopting with a non-substantive change.

Subsection (d)(3)(D) is revised by deleting the phrase "on a school bus route that is weight restricted for school buses;" and replacing it with the phrase "that is weight restricted for school buses and is located on a school bus route;". This change in wording is made to clarify intent.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

§15.55. Construction Cost Participation.

(a) Required cost participation. The commission may require, request, or accept from a local government matching or other funds, rights-of-way, utility adjustments, additional participation, planning, documents, or any other local incentives.

(b) Economically Disadvantaged Counties. In evaluating a proposal for a highway improvement project in a local government that consists of all or a portion of an economically disadvantaged county, the commission shall, for those projects in which the commission is authorized by law to provide state cost participation, adjust the minimum local matching funds requirement after evaluating a local government's effort and ability to meet the requirement.

(1) Request for adjustment. The city council, county commissioners court, district board, or similar governing body of a local government that consists of all or a portion of an economically disadvantaged county shall submit a request for adjustment to the local district office of the department. The request will include, at a minimum:

(A) the proposed project scope;

(B) the estimated total project cost;

(C) a breakdown of the anticipated total cost by category (e.g., right-of-way, utility adjustment, plan preparation, construction);

(D) the proposed participation rate;

(E) the nature of any in-kind resources to be provided by the local government;

(F) the rationale for adjusting the minimum local matching funds requirement; and

(G) any other information considered necessary to support a request.

(2) Evaluation. In evaluating a request for an adjustment to the local matching funds requirement, and a local government's effort and ability to meet the requirement, the commission will consider a local government's:

(A) population level;

(B) bonded indebtedness;

(C) tax base;

(D) tax rate;

(E) extent of in-kind resources available; and

(F) economic development sales tax.

(c) Participation ratios. The following Appendix A to this section establishes federal, state, and local cost participation ratios for highway improvement projects, subject to the availability of funds to the department.
Figure: 43 TAC §15.55(c) (No change.)

(d) Off state highway system bridge program.

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

(A) Bridge--For an equivalent-match project, a bridge or other mainlane cross-drainage structure.

(B) Deficient bridge--A bridge having a condition or load capacity that is inadequate.

(C) District engineer--The chief executive officer in each designated district office of the department.

(D) Equivalent-match project--A project in which the local government will structurally improve off state system bridges utilizing 100% local funds.

(E) Participation-waived project--An off-state system bridge project in which the state agrees to pay for local participation for eligible preliminary engineering, construction, and construction engineering costs as shown in subsection (c) of this section. This project must be on the department's approved Unified Transportation Program, satisfy minimum standards established by the department for off state system bridges, and meet the additional requirements of this subsection.

(2) Waiver. The district engineer may waive the requirement for a local government to provide the original 10% estimate of direct costs for preliminary engineering, construction engineering, and construction funds on the participation-waived project(s) if the local governmental body commits by written resolution, as described in paragraph (4) of this subsection, to spend an equivalent amount of funds for structural improvement work on another bridge or bridges on the equivalent-match project(s) within its jurisdiction. An equivalent amount includes, but is not limited to, expenditures for direct or indirect costs for structural improvement work on bridge(s) in the equivalent-match project(s).

(3) Eligibility. A local government is eligible for a waiver if:

(A) the construction contract for the participation-waived project has not been awarded;

(B) work on the equivalent-match project has not begun prior to approval of the waiver;

(C) the local government is in compliance with load posting and closure regulations as defined in the National Bridge Inspection Standards under 23 C.F.R. §650.303;

(D) the bridge on the proposed equivalent-match project(s) is a deficient bridge, or a bridge that is weight restricted for school buses and is located on a school bus route; and

(E) the equivalent-match project increases the load capacity of the existing bridge or upgrades the bridge to its original capacity, with a minimum upgrade to safely carry school bus loading if located on a school bus route.

(4) Request for waiver. To request a waiver, a local government must provide a written request to the district engineer that includes the location(s), description of structural improvement work proposed, estimated cost for the equivalent-match project(s), and a copy of the local governmental body's resolution. The resolution must acknowledge assumption of all responsibilities for engineering and construction and complying with all applicable state and federal environmental regulations and permitting requirements for the bridge(s) on the equivalent-match project(s).

(5) Considerations. In approving a request for waiver, the district engineer will consider:

(A) the type of work proposed for the equivalent-match project(s);

(B) regional transportation needs; and

(C) past performance under this subsection.

(6) Approval. The district engineer will submit a letter to the local government indicating the district engineer's approval or disapproval of the waiver. If disapproved, the letter will state the reasons for disapproval. If the waiver is approved, the letter will state that the local government, for the equivalent-match project(s) will assume:

(A) all costs of the work;

(B) responsibility for complying with all applicable state and federal environmental regulations and permitting requirements; and

(C) responsibility for the engineering and construction necessary for completion of the work.

(7) Agreement and conditions.

(A) If the district engineer approves the waiver, the local government and the department will enter into an agreement for the participation-waived project as specified in §15.52 of this subchapter.

(B) Local governments will be allowed three years after the contract award of the participation-waived project to complete structural improvements on the equivalent-match project(s). No later than 30 days after completion, documentation of completion of the equivalent-match project(s) requirement will be provided by letter to the district engineer. If the local government fails to adequately complete the equivalent-match project(s), it will be excluded from future waivers under this subsection for a minimum of five years.

(C) The local government is responsible for all of the direct cost of any participation-waived project cost item or portion of a cost item that is not eligible for federal participation under the Federal Highway Bridge Replacement and Rehabilitation Program under 23 U.S.C. §144 and 23 C.F.R. §650 Subpart D. The local government is also responsible for any costs resulting from changes made at the request of the local government.

(D) The local government will be responsible for 100% of right of way and utilities for the participation-waived project.

(E) A local government located in an economically disadvantaged county that receives an adjustment under subsection (b) of this section may participate in the provisions of this subsection in the amount of its reduced matching funds requirement.

(F) The department will not reimburse funds already received by the department under the terms of existing agreements.

This agency 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 July 31, 2000.

TRD-200005267
Richard Monroe
General Counsel
Texas Department of Transportation
Effective date: August 20, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 463-8630

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CHAPTER 17. VEHICLE TITLES AND REGISTRATION

SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §17.29

The Texas Department of Transportation adopts new §17.29, concerning vehicle registration renewal via the internet. The new section is adopted without changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5614) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTION

In accordance with the state's E-Government initiative, the department is developing a process for registered vehicle owners to renew their vehicle registrations via the internet. This process will be accomplished through communication and interaction between participating counties, a third-party vendor selected by the department to facilitate the program, and the customer. New §17.29 is added to provide the basic framework within which the new program will operate.

Subsection (a) establishes that the department will develop and maintain an internet registration renewal system. A third-party vendor will assist in this effort. This provision ensures uniformity and discourages each county from setting up its own system.

Subsection (b) is added to establish eligibility requirements for counties to participate in the program.

Subsection (b)(1) provides that the department may begin with a pilot program to ensure that the system is fully functional before it is implemented throughout the state. The pilot project will involve up to fifteen counties, which will be chosen based on whether a county is currently active in processing internet registration renewals, whether a county is adjacent to an active internet county,

and whether a county is willing and able implement the system. The goal is to ensure enough usage for a representative test, while also achieving a customer base with common work areas and media outlets.

Subsection (b)(2) addresses the later implementation of the system on a statewide basis. New counties will be added at their request and upon approval by the department. It is recognized that the system may not be implemented statewide at one time, but that a phased introduction may be necessitated by practical constraints. Moreover, participating counties may need to meet technical requirements, including hardware and an internet service provider.

Subsection (c) is added to establish the eligibility requirements that vehicle owners and their vehicles must meet to be able to renew vehicle registration via the internet. Specifically, the vehicle owner must be a resident of a county that is participating in the internet registration program, the vehicle must have current registration and be within 90 days prior to expiration (not including the 5-working-day grace period), and the vehicle record must meet all other requirements for registration renewal. These requirements will ensure that the vehicle owner is eligible for registration renewal and permit more efficient administration of the system.

Subsection (d) is added to establish the fees that must be paid by the registrant when renewing vehicle registration via the internet. The fee for mailing new registration insignia to the customer will be the same as if the registration were renewed by regular mail because the administrative burden on the counties is essentially the same. The fees for processing a registration renewal electronically and for processing a credit card payment are designed to cover the costs to the department of operating the internet registration renewal system. Remaining registration fees and local fees will be the same as with any other registration renewal. It is anticipated the $2.00 additional fee will almost recover costs of the system.

Subsection (e) is added to establish the information that a registrant must provide or verify to renew vehicle registration via the internet. In addition to information ordinarily provided in the course of vehicle registration renewal, more information is necessary to verify the registrant's identity and the identity of the vehicle, to ensure compliance with insurance requirements, and to permit electronic payment of registration fees.

Subsection (f) is added to establish the duties of participating counties in the processing of vehicle registration renewals via the internet. As in the case of all registration renewals, counties must ensure that all legal requirements have been met and must reject applications that fail to meet those requirements. These include items that are incorporated in the new section, such as insurance and address information, as well as items contained elsewhere in the rules and relevant statutes, such as emissions compliance and notations on the department's records for stolen vehicles, scofflaws, traffic warrants, and legal restraints. Internet registration renewal is intended to provide a system that will be more convenient for both customers and counties, not to permit the renewal of registrations that would not be renewed under the current system.

Subsection (f) also places some additional duties on the counties. Counties must be willing and able to accept electronic payments for the system to work, and they must promptly mail registration and validation stickers to customers. Counties must also be able to: process qualified renewals that are received from the third-party vendor; meet technical requirements for participation in the system, including hardware and an internet service provider and communicate with the third-party vendor and with customers in the manner specified by the department, which may involve the sending and receipt of email. Adherence to these standards will enable the system to function efficiently and ensure against inconsistency in the system's operation throughout the state.

COMMENTS

No comments were received on the proposed new section.

STATUTORY AUTHORITY

The new section is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation; under Transportation Code, §502.009, which directs the department to adopt rules to administer Chapter 502, relating to the registration of vehicles; under Transportation Code, §502.101, which authorizes the department to adopt rules governing the timely application for and issuance of registration receipts and insignia by mail or through an electronic off-premises location; and under Transportation Code, §502.180(e), which grants the department authority to adopt rules governing the issuance of registration insignia.

This agency 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 July 31, 2000.

TRD-200005268
Richard Monroe
General Counsel
Texas Department of Transportation
Effective date: August 20, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 463-8630

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Board of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the board adopts the proposal. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the Board of Insurance adopts the proposal. The Administrative Procedure Act, the Government Code, Chapters 2001 and 2002, does not apply to board action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104.)

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

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Proposed Action

The Commissioner of Insurance, at a public hearing under Docket No. 2455 scheduled for September 19, 2000, at 10:00 a.m., in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, will consider a proposal made in a staff petition. Staff's petition seeks amendment of the Texas Automobile Rules and Rating Manual (the Manual), to adopt new and/or adjusted 2000 and 2001 model Private Passenger Automobile Physical Damage Rating Symbols and revised identification information. Staff's petition (Ref. No. A-0700-18-I), was filed on July 28, 2000.

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data compiled on damageability, repairability, and other relevant loss factors for the listed 2000 and 2001 model vehicles.

A copy of the petition, including an exhibit with the full text of the proposed amendments to the Manual is available for review in the office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas. For further information or to request copies of the petition, please contact Sylvia Gutierrez at (512) 463-6327; refer to (Ref. No. A-0700-18-I).

Comments on the proposed changes must be submitted in writing within 30 days after publication of the proposal in the *Texas Register*, to the Office of the Chief Clerk, Texas Department of Insurance, P. O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of comments is to be submitted to Marilyn Hamilton, Deputy Commissioner, Personal and Commercial Lines Division, Texas Department of Insurance, P. O. Box 149104, MC 104-PC, Austin, Texas 78714-9104.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

TRD-200005364
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 1, 2000

Final Action

Adoption Of Amendments To The Texas Automobile Rules And Rating Manual To Allow Automobile Floor Plan Coverage To Be Written Optionally As Provided By Rule 125 Or As Inland Marine Insurance

The Commissioner of Insurance adopts an amendment to the Texas Automobile Rules and Rating Manual (Manual), section D of Rule 125, to allow automobile floor plan coverage to be written optionally as provided by section D of Rule 125 or as inland marine insurance. The amendment was proposed by Motors Insurance Company (MIC) in its Second Supplemental Petition filed on March 7, 2000, (Ref. No. A-0699-10). Notice of the proposal was published in the June 20, 2000, issue of the *Texas Register* (25 TexReg 6171). The amendment was considered at a public hearing on July 25, 2000, at 10:00 a.m., under Docket No. 2449 in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas.

The Commissioner adopts, without changes to the proposal as noticed in the Texas Register, an amendment to the Automobile Wholesale Floor Plan section of Rule 125 of the Manual to allow automobile floor plan coverage to be written either as provided by the provisions of Rule 125 or as inland marine insurance as allowed by 28 TAC §5.5002(5)(K).

The amendment to the Manual adds the following provision to section D of Rule 125: "A wholesale floor plan may also be written pursuant to 28 TAC §5.5002 entitled 'Texas Definition of Inland Marine Insurance' as provided in paragraph (5)(K)."

The Commissioner has jurisdiction of this matter pursuant to the Insurance Code, Articles 5.101, 5.96, and 5.98.

The Manual rule as adopted by the Commissioner of Insurance is on file in the Chief Clerk's Office of the Texas Department of Insurance under Reference No. A-0699-10 and is incorporated by reference in the Manual by Commissioner's Order No. 00-0886.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts action taken under Article 5.96 from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

Consistent with the Insurance Code, Article 5.96(h), prior to the effective date of this action, the Texas Department of Insurance will notify all insurers affected by this action.

TRD-200005360
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 1, 2000

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REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by the 75th Legislature, Regular Session, House Bill 1 (General Appropriations Act) Art. IX, Section 167. Included here are: (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the ***Texas Administrative Code*** on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the ***Texas Register*** office.

Agency Rule Review Plans

Texas Ethics Commission

Title 1, Part 2

Filed: July 28, 2000

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Texas Department of Transportation

Title 43, Part 1

Filed: July 31, 2000

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Agency Rule Review Plans - Revised

Texas Department of Agriculture

Title 4, Part 1

Filed: July 26, 2000

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Texas Department of Protective and Regulatory Services

Title 40, Part 19

Filed: July 28, 2000

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Texas Racing Commission

Title 16, Part 8

Filed: July 27, 2000

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Proposed Rule Reviews

Texas Natural Resource Conservation Commission

Title 30, Part 1

The Texas Natural Resource Conservation Commission (commission) notices the intention to review and propose the readoption of Chapter 292, River Authorities. The review of Chapter 292 is proposed in accordance with the requirements of Texas Government Code, §2001.039; and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999, which requires state agencies to review and consider for readoption each of their rules every four years. A review must include an assessment of whether the reasons for the rules continue to exist.

Chapter 292, River Authorities, defines the local governments to be known as River Authorities and imposes administrative, management, and reporting responsibilities. Each River Authority must adopt administrative policies consistent with certain provisions in the Texas Water Code, Local Government Code, Texas Government Code, and the Texas Constitution. Each River Authority must purchase an independent management audit or institute an independent internal audit function within the organization. Each River Authority must file with the commission status reports about these responsibilities and the commission may conduct a review to determine compliance.

The commission conducted a preliminary review of the rules under Chapter 292 and has determined that the reasons for adopting the rules continues to exist. The rules are needed to implement provisions of state law including Article III, §52, Texas Constitution and Texas Water Code, Chapter 12. The commission invites comments on whether the reasons for the rules in Chapter 292 continue to exist.

Comments may be submitted to Ms. Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-018-292-WT and must be submitted in **writing**. Comments must be received by **5:00 p.m., September 11, 2000**. For further information or questions concerning this proposal, please contact Mr. Michael Bame, Policy and Regulations Division, at telephone number (512) 239-5658. Texas Natural Resource Conservation Commission Page 2 Chapter 292 - River Authorities Rule Log No. 2000-018-292-WT

TRD-200005190

Margaret Hoffman

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Filed: July 27, 2000

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Texas Department of Protective and Regulatory Services

Title 40, Part 19

The Texas Department of Protective and Regulatory Services (TDPRS) proposes to review Title 40 Texas Administrative Code Chapter 700, Child Protective Services. Under the Texas Government Code, §2001.039, and the General Appropriations Act of 1997, Article IX, §167, state agencies must review their rules and readopt, readopt with amendments, or repeal rules as a result of the required rule review.

The objective of the rule review is to repeal or amend any rules necessary to ensure that all rules are consistent with current law and policy.

Comments on the review of 40 TAC Chapter 700, Child Protective Services, may be submitted to Jola Edwards (512) 438-4153, or TDPRS, Texas Register Liaison, Legal Services, P.O. Box 149030, Mail Code E-611, Austin, Texas 78714-9030, or faxed to (512) 438-3022. All comments must be received within 30 days of publication in the *Texas Register*.

TRD-200005227
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Filed: July 28, 2000

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The Texas Department of Protective and Regulatory Services (TDPRS) proposes to review Title 40 Texas Administrative Code Chapter 708, Medicaid Targeted Case Management Program. This review is pursuant to the Texas Government Code, §2001.039, and the General Appropriations Act of 1997, Article IX, §167.

As required by the Texas Government Code, §2001.039, and the General Appropriations Act of 1997, Article IX, §167, TDPRS will accept comments regarding whether the reason for adopting each of the rules in Chapter 708 continues to exist.

Comments on the review of 40 TAC Chapter 708, Medicaid Targeted Case Management Program, may be submitted to Clarice Cefai at (512) 438-5530, or TDPRS, Texas Register Liaison, Legal Services, P.O. Box 149030, Mail Code E-611, Austin, Texas 78714-9030, or faxed to (512) 438-3022. All comments must be received within 30 days of publication in the *Texas Register*.

TRD-200005229
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Filed: July 28,2000

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The Texas Department of Protective and Regulatory Services (TDPRS) proposes to review Title 40 Texas Administrative Code Chapter 734, Public Information This review is pursuant to the Texas Government Code, §2001.039, and the General Appropriations Act of 1997, Article IX, §167.

As required by the Texas Government Code, §2001.039, and the General Appropriations Act of 1997, Article IX, §167, TDPRS will accept comments regarding whether the reason for adopting each of the rules in Chapter 734 continues to exist.

Comments on the review of 40 TAC Chapter 734, Public Information, may be submitted to Phoebe Knauer at (512) 438-5916, or TDPRS, Texas Register Liaison, Legal Services, P.O. Box 149030, Mail Code E-611, Austin, Texas 78714-9030, or faxed to (512) 438-3022. All comments must be received within 30 days of publication in the *Texas Register*.

TRD-200005230
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Filed: July 28, 2000

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The Texas Department of Protective and Regulatory Services (TDPRS) proposes to review Title 40 Texas Administrative Code Chapter 736, Memoranda of Understanding with Other State Agencies. This review is pursuant to the Texas Government Code, §2001.039, and the General Appropriations Act of 1997, Article IX, §167.

As required by the Texas Government Code, §2001.039, and the General Appropriations Act of 1997, Article IX, §167, TDPRS will accept comments regarding whether the reason for adopting each of the rules in Chapter 736 continues to exist.

Comments on the review of 40 TAC Chapter 736, Memoranda of Understanding with Other State Agencies, may be submitted to Phoebe Knauer at (512) 438-5916, or TDPRS, Texas Register Liaison, Legal Services, P.O. Box 149030, Mail Code E-611, Austin, Texas 78714-9030, or faxed to (512) 438-3022. All comments must be received within 30 days of publication in the *Texas Register*.

TRD-200005231
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Filed: July 28,2000

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The Texas Department of Protective and Regulatory Services (TDPRS) proposes to review Title 40 Texas Administrative Code Chapter 740, Investigations. This review is pursuant to the Texas Government Code, §2001.039, and the General Appropriations Act of 1997, Article IX, §167.

TDPRS has found that the reason for adopting this chapter does not continue to exist and is repealing this chapter. The proposed repeals may be found in the Proposed Rules section of this issue of the *Texas Register*.

Comments on the review of 40 TAC Chapter 740, Investigations, may be submitted to Phoebe Knauer at (512) 438-5916, or TDPRS, Texas Register Liaison, Legal Services, P.O. Box 149030, Mail Code E-611, Austin, Texas 78714-9030, or faxed to (512) 438-3022. All comments must be received within 30 days of publication in the *Texas Register*.

TRD-200005236
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Filed: July 28, 2000

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Adopted Rule Reviews

Texas Department of Agriculture

Title 4, Part 1

The Texas Department of Agriculture (the department) adopts the review of Title 4, Texas Administrative Code, Part 1, Chapter 3, concerning Boll Weevil Eradication Program, Chapter 9, concerning Seed Quality, Chapter 10, concerning Seed Certification Standards , Chapter 13, concerning Grain Warehouse, and Chapter 16, concerning Aquaculture, pursuant to the Texas Government Code, §2001.039 and the

General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999 (Section 9-10.13), and readopts these chapter with the repeals proposed in its notice of intention to review. The proposed notice of intent to review was published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5949).

Section 9-10.13 and §2001.039 require state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the original justification for the rules continues to exist.

As part of the review process, the department proposed the repeal of Title 4, Part 1,§§3.200, 9.13, 10.31, 13.5, and 16.4. These proposals were also published in the June 16, 2000, issue of the *Texas Register*. No comments were received regarding the proposals or the department's notice of intention to review Chapters 3, 9, 10, 13 and 16. The repeals are adopted to eliminate unnecessary regulations. The adopted repeals may be found in the adopted rule section of this issue of the *Texas Register*.

The department has determined that in addition to adopting the repeal of §3.200, 9.13, 10.31, 13,5, and 16.4, the reason for adopting or readopting without changes all remaining sections in Title 4, Part 1, Chapters 3, 9, 10, 13, and 16 continues to exist.

TRD-200005207
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: July 27, 2000

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Texas Department of Agriculture-State Seed and Plant Board

Title 4, Part 5

The State Seed and Plant Board of the Texas Department of Agriculture (the department) adopts the review of Title 4, Texas Administrative Code, Part 5, Chapter 81, concerning Certification Procedures and Chapter 82, concerning Administrative Procedures, pursuant to the Texas Government Code, §2001.039 and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999 (Section 9- 10.13), and readopts these chapters without changes. The proposed notice of intention to review was published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5950).

Section 9-10.13 and §2001.039 require state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the original justification for the rules continues to exist.

No comments were received regarding the proposed notice. The State Seed and Plant Board and the department have determined that the reason for adopting or readopting without changes all sections in Title 4, Part 5, Chapters 81 and 82 continues to exist.

TRD-200005206
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture-State Seed and Plant Board
Filed: July 27, 2000

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General Services Commission

Title 1, Part 5

General Services Commission Notice of Adoption of Complete Review of Title 1, T.A.C., Chapter 123

The General Services Commission (the "Commission") has completed the review of Title 1, Texas Administrative Code, Part 5, Chapter 123 (relating to the Facilities Construction and Space Management Division as noticed in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5949).

The Commission received no comments on the requirements of the Texas Government Code, §2001.039 (relating to Agency Review of Existing Rules) as to whether the reasons for adopting the rules continue to exist. As part of this review process, the Commission proposed new rules to Chapter 123 and the repeal of old Chapter 123 which were published in the June 16, 2000 issue of the *Texas Register* (25 TexReg 5761). The Commission received no comments concerning the proposed repeal and new rules. The adoption of the repeal and new rules to Chapter 123 may be found in the Adoption Section of this *Texas Register*.

The Commission readopts Title 1, T.A.C., Chapter 123 pursuant to the Texas Government Code, §2001.039 and finds that the reason for adopting Chapter 123 continues to exist.

TRD-200005094
Ann Dillon
General Counsel
General Services Commission
Filed: July 24, 2000

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General Services Commission Notice of Adoption of Complete Review of Title 1, T.A.C., Chapter 125

The General Services Commission (the "Commission") has completed the second review of Title 1, Texas Administrative Code, Part 5, Chapter 125, Subchapter A - Travel Management Services, Subchapter B - State Vehicle Fleet Management, and Subchapter C - Texas Alternative Fuels Program as noticed in the May 26, 2000, issue of the *Texas Register* (25 TexReg 4883).

The Commission received no comments on the requirements of the Texas Government Code, §2001.039 (relating to Agency Review of Existing Rules) as to whether the reasons for adopting the rules continue to exist. As part of this review process, the Commission proposed amendments Chapter 125, Subchapter A, §§125.1 - 125.29 which were published in the May 26, 2000, issue of the *Texas Register* (25 TexReg 4674). The Commission received two comments concerning the proposed rule amendments. The adoption of the amendments to Chapter 125 may be found in the Adoption Section of this *Texas Register*.

The Commission readopts Title 1, T.A.C., Chapter 125 pursuant to the Texas Government Code, §2001.039 and finds that the reason for adopting Chapter 125 continues to exist.

TRD-200005141
Ann Dillon
General Counsel
General Services Commission
Filed: July 25, 2000

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Texas Natural Resource Conservation Commission

Title 30, Part 1

The Texas Natural Resource Conservation Commission (commission) adopts the review of and readopts with amendments 30 TAC Chapter 307, Surface Water Quality Standards. This review is in accordance with the requirements of Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature,

1999, which requires state agencies to review and consider for readoption each of their rules every four years. A review must include an assessment of whether the reasons for the rules continue to exist.

Chapter 307 contains the water quality standards and criteria which the commission uses to develop and authorize wastewater discharge permits. Section 307.1 contains the general standards policy of the commission and the purpose for the chapter which includes the maintaining of the quality of water in the state for public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and economic development of the state. Section 307.2 defines basin classification categories and describes justifications for standards modifications. Section 307.3 defines terms and abbreviations used in the standards. Section 307.4 lists the general criteria which are applicable to all surface water of the state unless specifically excepted in §307.8, Application of Standards, or §307.9, Determination of Standards Attainment. Section 307.5 describes the antidegredation policy and implementation procedures. Section 307.6 establishes criteria and control procedures for specific toxic substances and total toxicity. Section 307.7 defines appropriate water uses and supporting criteria for site-specific standards. Section 307.8 sets forth conditions under which portions of the standards do not apply. Section 307.9 describes sampling and analytical procedures to determine standards attainment. Section 307.10 lists site-specific standards and supporting information for each classified segment in Appendices A - C, partially classified water bodies in Appendix D, and site-specific criteria that may be derived from any waters in the state in Appendix E.

The commission has determined that the reason for the rules in Chapter 307 continues to exist. The rules in Chapter 307 are adopted under the Texas Water Code, §26.023, which provides the commission with the authority to develop rules setting water quality standards for all the water in the state. These rules are necessary to implement the provisions of Texas Water Code, §26.023, Water Quality Standards. The rules also implement the Federal Water Pollution Control Act (Clean Water Act), §303(d), which requires states to adopt water quality standards and to review and revise the standards from time to time, but at least once each three-year period. As part of its review, the commission has determined that revisions to the standards be made to incorporate new information on toxics and new data on waters in the state. The commission concurrently adopts amendments to Chapter 307 in the Adopted Rules section of this issue of the *Texas Register*.

A public hearing was held in conjunction with the hearing for the proposed revisions on March 21, 2000, and the comment period closed on March 31, 2000.

TRD-200005224
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: July 28, 2000

♦ ♦ ♦

Polygraph Examiners Board

Title 22, Part 19

The Polygraph Examiners Board adopts the review of the following sections from Chapter 391, concerning Polygraph Examiner Internship, pursuant to the Appropriations Act of 1997, HB 1, Article IX, §167:

§391.1. Authority

§391.2. Procedure and Qualifications

§391.3. Internship Training Schedule

§391.4. State Examinations for Polygraph Examiner License

§391.5. Intern Supervision

§391.6. Intern Sponsor Reporting

§391.7. Appearance Before the Board

§391.8. Applicant With Out-of-State License

§391.9. Intern Licensure Requirements for Preceptor Trainees

The proposed notice of review was published in the June 23, 2000, issue of the *Texas Register* (25 TexReg 6175).

The agency finds that the need for the rules contained in this chapter continues to exist.

No Comments were received regarding adoption of the review.

This concludes the review of Chapter 391, Polygraph Examiner Internship.

TRD-200005168
Frank DiTucci
Executive Officer
Polygraph Examiners Board
Filed: July 26, 2000

♦ ♦ ♦

The Polygraph Examiners Board adopts the review of the following sections from Chapter 401, concerning Grievance Review of Disciplinary Action, pursuant to the Appropriations Act of 1997, HB 1, Article IX, §167:

§401.1. Grievance Policy.

The proposed notice of review was published in the June 23, 2000, issue of the *Texas Register* (25 TexReg 6175).

The agency finds that the need for the rules contained in this chapter continues to exist.

No Comments were received regarding adoption of the review.

This concludes the review of Chapter 401, Grievance Review of Disciplinary Action.

The agency finds that the need for the rules contained in this chapter continues to exist.

Comments on the review of these proposed rules may be submitted to: Frank DiTucci, Executive Officer, Polygraph Examiners Board, P.O. Box 4087, Austin, Texas 78773-0001.

TRD-200005184
Frank DiTucci
Executive Officer
Polygraph Examiners Board
Filed: July 26, 2000

♦ ♦ ♦

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.

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.

Ark-Tex Council of Governments

Request for Proposal for Computer Equipment and Peripherals

The Ark-Tex Council of Governments (ATCOG), on behalf of the North East Texas Workforce Development Board (NETxWDB), is soliciting proposals for the procurement of computer equipment, and printers. The project is seeking; twenty (20) Intel Pentium III 866 Desktop workstations. Potential respondents may obtain a copy of the request for proposal by contacting Bill Moss or Malinda Walker, Ark-Tex Council of Governments, P.O. Box 5307, Texarkana, Texas 75505-5307, or call (903) 832-8636. The deadline for proposal submission is Thursday, August 24, 2000, at 5:00 p.m.

TRD-200005372
Brenda Davis
Director, Finance and Administration
Ark-Tex Council of Governments
Filed: August 2, 2000

♦ ♦ ♦

Office of the Attorney General

Notice of Settlement of CERCLA Cost Recovery Claim

Notice is hereby given by the State of Texas of the following proposed resolution of a claim for response costs under the Comprehensive Environmental Response, Compensation, and Liability Act and applicable state law. The State of Texas, on behalf of the Texas Natural Resource Conservation Commission, has reached an agreement with Bonny Corporation, Inc., Meridian Housing Company f/k/a Universal Chemical Company, Michael D. Smith, and H. Dean Smith (the "Settling Defendants") to resolve the Settling Defendants' liability to the State for natural resource damages and response costs incurred by the TNRCC arising from the release and threatened release of hazardous substances from the Hi-Yield Superfund Site, Commerce, Texas. The Attorney General will consider any written comments received on the settlement within 30 days of the date of publication of this notice.

Under the proposed Consent Decree, the Settling Defendants agree to pay $50,000 of the State's past response costs related to the Hi-Yield Superfund Site. The State was previously reimbursed $2,514,000 in past response costs by the Voluntary Purchasing Group ("VPG") Bankruptcy Estate. In addition, VPG agreed to spend up to $800,000 for the construction of a freshwater wetlands and riparian habitat to compensate for damages to natural resources at or near the Hi-Yield Superfund Site.

Public Comment: The Office of the Attorney General will receive comments relating to the proposed Consent Decree for 30 days following publication of this Notice. Comments should be addressed to Albert M. Bronson, Assistant Attorney General, Natural Resources Division, P.O. Box 12548, Austin, TX 78711-2548 and should refer to State of Texas v. Bonny Corporation, Inc., et al, Civil Action No. 3-00CV1180-D. The proposed Consent Decree may be examined at the Office of the Attorney General, 300 West 15th Street, 10th Floor, Austin, Texas by appointment A copy of the proposed Consent Decree may be obtained by mail from the Office of the Attorney General. In requesting a copy, please enclose a check for reproduction costs (at 25 cents per page) in the amount of $4.50 for the Decree, payable to the State of Texas.

TRD-200005379
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: August 2, 2000

♦ ♦ ♦

Coastal Coordination Council

Notice of 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 July 20, 2000, through July 27, 2000:

FEDERAL AGENCY ACTIONS:

Applicant: Texas Parks & Wildlife Department; Location: The project is located in Mad Island Wildlife Management Area adjacent to the Intracoastal Waterway, Matagorda County, Texas. Approximate UTM coordinates: Zone 14; Easting: 790000; Northing: 3176000. CCC

Project No.: 00-0254-F1; Description of Proposed Action: The applicant proposes to construct moist soil units. The project consists of the creation of 8 moist soil impoundments by constructing 16,145 feet of levee, which includes the discharge of 50,900 cubic yards of fill material into 14.24 acres of wetlands. Additionally, the applicant requests permission to backfill Rattlesnake Bayou with riprap and create an outlet ditch in the Rattlesnake Marsh on Mad Island Wildlife Management Area in Matagorda County. The project includes the construction of a rock weir (approximately 90 feet long by 4 feet deep by 40 feet wide) across Rattlesnake Bayou. The top of the weir will be approximately 6 inches below mean sea level. A channel approximately 320 feet long by 2.5 feet deep by 10 feet wide with 3:1 side slope will be constructed in the Rattlesnake Marsh to allow for the egress and ingress of marine organisms. The construction of the channel will include the discharge of 508 cubic yards of fill. Type of Application: U.S.A.C.E. permit application #22016 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: Byron Davis; Location: The project is located on the southern side of Dollar Bay, east of Moses Lake, on the northern side of Texas City, in Galveston County, Texas. Approximate UTM coordinates: Zone 15; Easting: 315000; Northing: 3255500. CCC Project No.: 00-0255-F1; Description of Proposed Action: The applicant proposes to connect his proposed western channel to the existing 16th Street Ditch to provide navigable access to the proposed residential development on the western side of the project site. This would include the excavation of a 430-foot by 45-foot connection between the channel and the 16th Street Ditch. In addition, the applicant proposes to maintenance dredge 1,400 feet of the 16th Street Ditch, removing approximately 7,000 cubic yards of material. To stabilize the levee area between the applicant's channel and an existing rainwater outfall channel on the south side of the project site, the applicant proposes to place 71 cubic yards of riprap along the new channel connection and place fill material in an area 500 feet long by 8 feet wide in the rainwater outfall channel. Finally, the applicant is requesting authorization to place two 80-foot wave attenuation structures at the mouth of the 16th Street Ditch and three 40-foot structures at the intersection between the proposed channel connection and the ditch. Type of Application: U.S.A.C.E. permit application #20852(03) under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Woodglen Section 3; Location: The project site is located on an approximately 24-acre tract of land at the east end of Sterlingshire Road, in Houston, Harris County, Texas. CCC Project No.: 00-0256-F1; Description of Proposed Action: The applicant proposes to fill approximately 4.65 acres of isolated wetlands to construct the third phase, to be known as Woodglen Section 3, of a Habitat for Humanity Development. The project site is approximately 24 acres in size. The applicant proposes several off-site alternatives to compensate for the proposed wetland impacts. The off-site locations are all within 15 to 20 miles of the project site. The applicant's second mitigation proposal is the Lake Houston Forested Mitigation Area. The creation and/or enhancement of 8 acres of wetlands is proposed. Type of Application: U.S.A.C.E. permit application #22056 under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: David Petroleum; Location: The project site is located in State Tract 252 in Galveston Bay, Chambers County, Texas. Approximate UTM coordinates: Zone 15; Easting: 312000; Northing: 327280. CCC Project No.: 00-0257-F1; Description of Proposed Action: The applicant proposes to install a 4.5-inch diameter pipeline in State Tract 252 in Galveston Bay under Blanket Permit No. 21364(01). The proposed pipeline will be 678 feet long, originating at Davis' proposed Well No. 1 location and terminating at a sub-sea tie-in on Vantage Petroleum's existing 8-inch pipeline, all in State Tract 252. No oyster reefs are present within 500 feet of the affected area. Type of Application: U.S.A.C.E. permit application #21364(01)/007 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: CRESCO Development Corporation; Location: The project site is located in the 10,000 Block of Blackhawk Boulevard in Houston, Harris County, Texas. Approximate UTM coordinates: Zone 15; Easting: 282000; Northing: 327550. CCC Project No.: 00-0258-F1; Description of Proposed Action: The applicant is requesting an extension of time until December 31, 2005, to perform activities authorized under Department of the Army Permit 20881. The proposed extension is needed in order to complete the mitigation. As mitigation, the applicant will create 14.7 acres of wetlands and will preserve and enhance 3.7 acres within the planned development. Type of Application: U.S.A.C.E. permit application #20881(01) under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387). Applicant: TransTexas Gas Corporation; Location: The proposed project is located in State Tract 331, Galveston Bay, Galveston County, Texas. Approximate UTM coordinates: Zone 15; Easting: 314602; Northing: 3261313. CCC Project No.: 00-0259-F1; Description of Proposed Action: The applicant proposes an extension of time to conduct work under Permit 20643(03) and to request authorization to drill a well. In addition, the applicant proposes to drill Well #6, 20643(04)/017, in State Tract 331 and install an 8-inch gathering line. The gathering line will run from Well #6 to an existing production platform for a total length of 1,474 feet and will maintain the required 500-foot distance from any present oyster reefs. Type of Application: U.S.A.C.E. permit application #20643(04) and 20643(04)/017 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).

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-200005367
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: August 1, 2000

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 08/07/00 - 08/13/00 is 18% for Consumer [1]/Agricultural/Commercial [2]/credit thru $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 08/07/00 - 08/13/00 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005 [3] for the period of 08/01/00 - 08/31/00 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The monthly ceiling as prescribed by §303.005 for the period of 08/01/00 - 08/31/00 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-200005347
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: August 1, 2000

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Texas Education Agency

Request for Proposals Concerning Texas Permanent School Fund Investment Management Services: Domestic Small/Mid Cap Broad Style

Eligible Proposers. The Texas Education Agency (TEA) is requesting proposals under Request for Proposals (RFP) #701-00-042 from qualified investment management companies to provide domestic small/mid cap broad style investment management services to the Texas Permanent School Fund (PSF).

Description. The purpose of this RFP is to solicit information that will aid the State Board of Education (SBOE) in selecting one or more independent investment management companies to provide domestic small/mid cap broad style investment management services for portions of the PSF.

Dates of Project. Proposers should plan for a starting date of no earlier than November 3, 2000, or such time as the SBOE approves a contract. Ending dates of contracts will be subject to 30-day cancellation clauses.

Project Amount. The total amount of the contract is subject to a negotiated bid.

Selection Criteria. A contract will be awarded based on an evaluation of the proposer's ability to provide the requested services; the demonstrated competence and qualifications of the proposer; and the reasonableness of the proposed fee. The TEA is not obligated to execute a contract, provide funds, or endorse any proposal that is submitted in response to this RFP. This RFP does not commit the TEA to pay any costs incurred before a contract is executed. The issuance of this RFP does not obligate the TEA or the SBOE to award a contract or pay any costs incurred in preparing a response.

Requesting the Proposal. A complete copy of RFP #701-00-042 may be obtained by writing the: Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tmail.tea.state.tx.us. Please refer to the RFP number in your request.

Further Information. For clarifying information about the RFP, contact Paul Ballard, Texas Permanent School Fund, Texas Education Agency, (512) 463-9l69.

Deadline for Receipt of Proposals. Proposals must be received in the Document Control Center of the Texas Education Agency by 5:00 p.m. (Central Time), Friday, September 8, 2000, to be considered.

TRD-200005388
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: August 2, 2000

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Request for Proposals Concerning Texas Permanent School Fund Investment Management Services: Domestic Small/Mid Cap Growth Style

Eligible Proposers. The Texas Education Agency (TEA) is requesting proposals under Request for Proposals (RFP) #701-00-043 from qualified investment management companies to provide domestic small/mid cap growth style investment management services to the Texas Permanent School Fund (PSF).

Description. The purpose of this RFP is to solicit information that will aid the State Board of Education (SBOE) in selecting one or more independent investment management companies to provide domestic small/mid cap growth style investment management services for portions of the PSF.

Dates of Project. Proposers should plan for a starting date of no earlier than November 3, 2000, or such time as the SBOE approves a contract. Ending dates of contracts will be subject to 30-day cancellation clauses.

Project Amount. The total amount of the contract is subject to a negotiated bid.

Selection Criteria. A contract will be awarded based on an evaluation of the proposer's ability to provide the requested services; the demonstrated competence and qualifications of the proposer; and the reasonableness of the proposed fee. The TEA is not obligated to execute a contract, provide funds, or endorse any proposal that is submitted in response to this RFP. This RFP does not commit the TEA to pay any costs incurred before a contract is executed. The issuance of this RFP does not obligate the TEA or the SBOE to award a contract or pay any costs incurred in preparing a response.

Requesting the Proposal. A complete copy of RFP #701-00-043 may be obtained by writing the: Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tmail.tea.state.tx.us. Please refer to the RFP number in your request.

Further Information. For clarifying information about the RFP, contact Paul Ballard, Texas Permanent School Fund, Texas Education Agency, (512) 463-9l69.

Deadline for Receipt of Proposals. Proposals must be received in the Document Control Center of the Texas Education Agency by 5:00 p.m. (Central Time), Friday, September 8, 2000, to be considered.

TRD-200005389
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: August 2, 2000

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Request for Proposals Concerning Texas Permanent School Fund Investment Management Services: Domestic Small/Mid Cap Value Style

Eligible Proposers. The Texas Education Agency (TEA) is requesting proposals under Request for Proposals (RFP) #701-00-044 from qualified investment management companies to provide domestic small/mid cap value style investment management services to the Texas Permanent School Fund (PSF).

Description. The purpose of this RFP is to solicit information that will aid the State Board of Education (SBOE) in selecting one or more independent investment management companies to provide domestic small/mid cap value style investment management services for portions of the PSF.

Dates of Project. Proposers should plan for a starting date of no earlier than November 3, 2000, or such time as the SBOE approves a contract. Ending dates of contracts will be subject to 30-day cancellation clauses.

Project Amount. The total amount of the contract is subject to a negotiated bid.

Selection Criteria. A contract will be awarded based on an evaluation of the proposer's ability to provide the requested services; the demonstrated competence and qualifications of the proposer; and the reasonableness of the proposed fee. The TEA is not obligated to execute a contract, provide funds, or endorse any proposal that is submitted in response to this RFP. This RFP does not commit the TEA to pay any costs incurred before a contract is executed. The issuance of this RFP does not obligate the TEA or the SBOE to award a contract or pay any costs incurred in preparing a response.

Requesting the Proposal. A complete copy of RFP #701-00-044 may be obtained by writing the: Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tmail.tea.state.tx.us. Please refer to the RFP number in your request.

Further Information. For clarifying information about the RFP, contact Paul Ballard, Texas Permanent School Fund, Texas Education Agency, (512) 463-9l69.

Deadline for Receipt of Proposals. Proposals must be received in the Document Control Center of the Texas Education Agency by 5:00 p.m. (Central Time), Friday, September 8, 2000, to be considered.

TRD-200005390
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: August 2, 2000

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Commission on State Emergency Communications

Correction of Error

The Commission on State Emergency Communications proposed to review 1 TAC §251.9. The notice appeared in the August 4, 2000, *Texas Register* (25 TexReg 7359).

Due to an error by the Commission, this notice was submitted for publication erroneously. The Commission plans to reconsider the review of this rule when it meets on August 10, 2000.

TRD-200005504

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Employees Retirement System of Texas

Request for Qualifications-Texas Employees Uniform Group Insurance Program for Class 946-20

In accordance with §4 of Article 3.50-2, Texas Insurance Code, as amended, the Employees Retirement System of Texas (ERS) is issuing a Request for Qualifications (RFQ) for Class 946-20 to conduct an audit of the benefit plans provided to participants of the Texas Employees Uniform Group Insurance Program (UGIP). The audit will cover Fiscal Years 2000, 2001, and 2002 and will begin following the ERS Board of Trustees award and acceptance of offer from the qualified provider of auditing services (Offeror) and upon ERS' execution of the parties' contract and continuing through August 31, 2003. This includes an option for up to three, one (1) year renewals of the parties' contract at the election of the ERS and consent of the Offeror. Responses will be accepted for the service areas identified in the RFQ packet located on the ERS' Web site.

The RFQ will be available on or after September 7, 2000, from the ERS' Web site, (www.ers.state.tx.us). To access the RFQ from the Web site, interested vendors must either fax their request on their company letterhead to the attention of Kim Johnson at (512) 867-7380, or send their request via email to kjohnson@ers.state.tx.us to receive their access code. An email request must include the name of the vendor, street address, phone number, fax number, and email address. Three copies of the completed RFQ and the executed contract (with original signatures and applicable exhibits) are due to the ERS by 12:00 p.m. (Noon) C. S. T. on October 9, 2000. The ERS Board of Trustees will select the qualified Offeror(s) at its December 2000 Board meeting. Questions concerning the RFQ should be sent to ivendorquestions on the ERS' Web site.

The ERS is the administrator for the UGIP as provided in Article 3.50-2 of the Texas Insurance Code. The UGIP covers over 523,000 state agency and higher education employees, retirees, and dependents. The ERS is responsible for contracting with health, dental, life, and disability carriers, and third party administrators to provide coverage for UGIP participants or administer such coverage throughout Texas. The services requested and described in the RFQ include auditing claims administration, contract compliance, gross and net costs and administrative costs of the providers and administrators specified in the RFQ.

The ERS will base its evaluation and selection of an award on the basis of demonstrated competence and qualifications to perform the services for a fair and reasonable price. The professional fees under any contract must be consistent with and not higher than the recommended practices and fees published by the applicable professional associations and may not exceed any maximum provided by law. Further, the Offeror will be evaluated on factors including, but not limited to the following, which are not necessarily listed in order of priority: compliance with the RFQ, operating requirements (the vendor must have been in business and providing claims administrative auditing services for at least five (5) years by September 1, 2000), appropriate auditing credentials, training and education for Offeror's personnel, general and specific experience with auditing insurance benefits, including managed care, the fairness and reasonableness of proposed fees, prior experience contracting with the ERS, and the plan for performing the required services. Notice of the RFQ will be posted in the *Texas Register* and on the Texas Marketplace Web site. The ERS reserves the right to select none, one, or more than one Offeror when it is determined that such action would be in the best interest of the UGIP.

TRD-200005392

Sheila W. Beckett
Executive Director
Employees Retirement System of Texas
Filed: August 2, 2000

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Texas Department of Health

Notice of Bloodborne Pathogens Exposure Control Plan - Health and Safety Code, Chapter 81, Subchapter H

MINIMUM STANDARD

This exposure control plan (plan) is adopted as the minimum standard to implement the Bloodborne Pathogens Exposure Control Plan required in Health and Safety Code, §81.304.

APPLICABILITY

These minimum standards apply to a governmental unit that employs employees who: provide services in a public or private facility providing health care related services, including a home health care organization; or otherwise have a risk of exposure to blood or other material potentially containing bloodborne pathogens in connection with exposure to sharps. The Texas Department of Health (department) may, in accordance with rules adopted by the Texas Board of Health, waive the application of Health and Safety Code, Chapter 81, Subchapter H, to a rural county if the department finds that the application of the subchapter to the county would be burdensome. A waiver granted under this §96.501 expires December 31, 2001. "Rural County" is a county that: (1) has a population of 50,000 or less; or (2) has a population of more than 50,000 but: (A) does not have located within the county a general or special hospital licensed under Health and Safety Code, Chapter 241, with more than 100 beds; and (B) was not, based on the 1990 federal census, completely included within an area designated as urbanized by the Bureau of the Census of the United States Department of Commerce.

GUIDANCE

This plan is provided by the department to be analogous with Title 29 Code of Federal Regulation §1910.1030, Occupational Safety and Health Administration (OSHA), Bloodborne Pathogens Standard as specified in Health and Safety Code, §81.304. Employers should review the plan for particular requirements as applicable to their specific situation. Governmental units may modify the plan appropriately to their respective practice settings. Employers will need to include provisions relevant to their particular facility or organization in order to develop an effective, comprehensive exposure control plan.

REVIEW

Employers review annually the exposure control plan, update when necessary, and document when accomplished.

INSTRUCTIONS

When parentheses are noted, specific details for modification are present in instruction form.

BLOODBORNE PATHOGENS EXPOSURE CONTROL PLAN

Facility Name: _____

Date of Preparation: _____

In accordance with Health and Safety Code, Chapter 81, Subchapter H, and analogous to OSHA Bloodborne Pathogens Standard, the following exposure control plan exists:

1. EXPOSURE DETERMINATION

The Texas Department of Health (department) Bloodborne Pathogens Exposure Control Plan (plan) requires employers to perform an exposure determination for employees who have occupational exposure to blood or other potentially infectious materials. The exposure determination is made without regard to the use of personal protective equipment. This exposure determination is required to list all job classifications in which employees have occupational exposure, regardless of frequency. The following job classifications apply:

(List the job titles appropriate to this facility or organization; for example, nurse, fireman, etc.)

(a)

(b)

(c)

(d)

(e)

(f)

(g)

The job descriptions for the above employees encompass the potential occupational exposure risks to bloodborne pathogens.

2. IMPLEMENTATION SCHEDULE AND METHODOLOGY

The department's plan outlines a schedule and method of implementation for the various elements of the exposure control plan.

Compliance Methods

Universal precautions are observed to prevent contact with blood or other potentially infectious materials. All blood or other potentially infectious material are considered infectious regardless of the perceived status of the source individual.

Engineering and work practice controls are used to eliminate or minimize exposure to employees. Where occupational exposure remains after institution of these controls, personal protective equipment is used. Examples include safety design devices, sharps containers, needleless systems, sharps with engineered sharps injury protection for employees, passing instruments in a neutral zone, etc.

Supervisors and workers examine and maintain engineering and work practice controls within the work center on a regular schedule.

Handwashing facilities are also available to the employees who incur exposure to blood or other potentially infectious materials. The department's plan requires that these facilities be readily accessible after incurring exposure.

If handwashing facilities are not feasible, the employer is required to provide either an antiseptic cleanser in conjunction with a clean cloth/paper towels, antiseptic towelettes or waterless disinfectant. If these alternatives are used, then the hands are to be washed with soap and running water as soon as feasible.

After removal of personal protective gloves, employees wash hands and any other potentially contaminated skin area immediately or as soon as feasible with soap and water. If employees incur exposure to their skin or mucous membranes, then those areas are washed with soap and water or flushed with water as appropriate as soon as feasible following contact.

Needles

Contaminated needles and other contaminated sharps are not bent, recapped, removed, sheared, or purposely broken. The department's plan allows an exception to this if no alternative is feasible and the action

is required by a specific medical procedure. If such action is required, then the recapping or removal of the needle must be done by the use of a device or a one-handed technique.

Contaminated Sharps Discarding and Containment

Contaminated sharps are discarded immediately or as soon as feasible in containers that are closable, puncture resistant, leakproof on sides and bottom, and biohazard labeled or color-coded.

During use, containers for contaminated sharps are easily accessible to personnel; located as close as is feasible to the immediate area where sharps are being used or can be reasonably anticipated to be found (e.g., laundries); maintained upright throughout use; are not allowed to overfill; and replaced routinely.

Work Area Restrictions

In work areas where there is a reasonable likelihood of exposure to blood or other potentially infectious materials, employees are not to eat, drink, apply cosmetics or lip balm, smoke, or handle contact lenses. Food and beverages are not to be kept in refrigerators, freezers, shelves, cabinets, or on counter/bench tops where blood or other potentially infectious materials are present.

Mouth pipetting/suctioning of blood or other potentially infectious materials is prohibited.

All procedures are conducted in a manner to minimize splashing, spraying, splattering, and generation of droplets of blood or other potentially infectious materials.

Collection of Specimens

Specimens of blood or other potentially infectious materials are placed in a container, which prevents leakage during the collection, handling, processing, storage, transport, or shipping of the specimens. The container used for this purpose is labeled with a biohazard label or color-coded unless universal precautions are used throughout the procedure and the specimens and containers remain in the facility. Specimens of blood and other potentially infectious body substances or fluids are usually collected within a hospital, doctor's office, clinic, or laboratory setting. Labeling of these specimens should be done according to the agency's specimen collection procedure. This procedure should address placing the specimen in a container, which prevents leakage during the collection, handling, processing, storage, transport, or shipping of the specimens. In facilities where specimen containers are sent to other facilities and/or universal precautions are not used throughout the procedure, a biohazard or color-coded label should be affixed to the outside of the container.

If outside contamination of the primary container occurs, the primary container is placed within a secondary container, which prevents leakage during the handling, processing, storage, transport, or shipping of the specimen. The secondary container is labeled with a biohazard label or color-coded.

Any specimen, which could puncture a primary container, is placed within a secondary container, which is puncture proof.

Contaminated Equipment

Equipment which may become contaminated with blood or other potentially infectious materials is examined prior to servicing or shipping and decontaminated as necessary unless the decontamination of the equipment is not feasible. Employers place a biohazard label on all portions of contaminated equipment that remain to inform employees, service representatives, and/or the manufacturer, as appropriate.

Personal Protective Equipment

All personal protective equipment used is provided without cost to employees. Personal protective equipment is chosen based on the anticipated exposure to blood or other potentially infectious materials. The protective equipment is considered appropriate only if it does not permit blood or other potentially infectious materials to pass through or reach the employee's clothing, skin, eyes, mouth, or other mucous membranes under normal conditions of use and for the duration of the time which the protective equipment is used. Examples of personal protective equipment include gloves, eyewear with side shields, gowns, lab coats, aprons, shoe covers, face shields, and masks. All personal protective equipment is fluid resistant.

All personal protective equipment is cleaned, laundered, and disposed of by the employer at no cost to employees. All repairs and replacements are made by the employer at no cost to employees.

All garments which are penetrated by blood are removed immediately or as soon as feasible and placed in the appropriate container. All personal protective equipment is removed prior to leaving the work area and placed in the designated receptacle.

Gloves are worn where it is reasonably anticipated that employees will have hand contact with blood, other potentially infectious materials, non-intact skin, and mucous membranes. Latex sensitive employees are provided with suitable alternative personal protective equipment.

Disposable gloves are not to be washed or decontaminated for re-use and are to be replaced as soon as practical when they become contaminated or as soon as feasible if they are torn, punctured, or when their ability to function as a barrier is compromised.

Utility gloves may be decontaminated for re-use provided that the integrity of the glove is not compromised. Utility gloves are discarded if they are cracked, peeling, torn, punctured, exhibit other signs of deterioration, or when their ability to function as a barrier is compromised.

Masks in combination with eye protection devices, such as goggles, glasses with solid side shield, or chin length face shields, are required to be worn whenever splashes, spray, splatter, or droplets of blood or other potentially infectious materials may be generated and eye, nose, or mouth contamination can reasonably be anticipated.

Surgical caps or hoods and/or fluid resistant shoe covers or boots are worn in instances when gross contamination can reasonably be anticipated.

Housekeeping

Employers shall ensure that the worksite is maintained in a clean and sanitary condition. The employer shall determine and implement an appropriate written schedule for cleaning and method of decontamination based upon the location within the facility, the type of surface to be cleaned, type of soil present, and tasks or procedures being performed in the area.

All contaminated work surfaces are decontaminated after completion of procedures, immediately or as soon as feasible after any spill of blood or other potentially infectious materials, and at the end of the work shift.

Protective coverings (e.g., plastic wrap, aluminum foil, etc.) used to cover equipment and environmental surfaces are removed and replaced as soon as feasible when they become contaminated or at the end of the work shift.

All bins, pails, cans, and similar receptacles are inspected and decontaminated on a regularly scheduled basis.

Any broken glassware which may be contaminated is not picked up directly with the hands.

Regulated Waste Disposal

All contaminated sharps are discarded as soon as feasible in sharps containers located as close to the point of use as feasible in each work area.

Regulated waste other than sharps is placed in appropriate containers that are closable, leak resistant, labeled with a biohazard label or color-coded, and closed prior to removal. If outside contamination of the regulated waste container occurs, it is placed in a second container that is also closable, leak proof, labeled with a biohazard label or color-coded, and closed prior to removal.

All regulated waste is properly disposed of in accordance with federal, state, county, and local requirements.

Laundry Procedures

Although soiled linen may be contaminated with pathogenic microorganisms, the risk of disease transmission is negligible if it is handled, transported, and laundered in a manner that avoids transfer of microorganisms to patients, personnel, and environments. Rather than rigid rules and regulations, hygienic and commonsense storage and processing of clean and soiled linen is recommended. The methods for handling, transporting, and laundering of soiled linen are determined by the agencies written policy and any applicable regulations.

Laundry is cleaned at: (designate onsite or name offsite facility.)

Hepatitis B Vaccine

All employees who have been identified as having occupational exposure to blood or other potentially infectious materials are offered the hepatitis B vaccine, at no cost to the employee, under the supervision of a licensed physician or licensed healthcare professional. The vaccine is offered after bloodborne pathogens training and within 10 working days of their initial assignment to work unless the employee has previously received the complete hepatitis B vaccination series, antibody testing has revealed that the employee is immune, or that the vaccine is contraindicated for medical reasons. Employees receive the vaccine at (state location, such as Employee Health Services, Immunization Clinic, etc.)

Employees who decline the Hepatitis B vaccine sign a declination statement (See appendix A of this exposure control plan).

Employees who initially decline the vaccine but who later elect to receive it may then have the vaccine provided at no cost.

Post Exposure Evaluation and Follow up

When the employee incurs an exposure incident, the employee reports to (state location, as Employee Health Services, or designated person as Employee Health Nurse). All employees who incur an exposure incident are offered a confidential medical evaluation and follow up as follows:

*Documentation of the route(s) of exposure and the circumstances related to the incident.

* Identification and documentation of the source individual, unless the employer can establish that identification is infeasible or prohibited by state or local law. After obtaining consent, unless law allows testing without consent, the blood of the source individual should be tested for HIV/HBV infectivity, unless the employer can establish that testing of the source is infeasible or prohibited by state or local law.

*The results of testing of the source individual are made available to the exposed employee with the employee informed about the applicable laws and regulations concerning disclosure of the identity and infectivity of the source individual.

*The employee is offered the option of having his/her blood collected for testing of the employee's HIV/HBV serological status. The blood sample is preserved for at least 90 days to allow the employee to decide if the blood should be tested for HIV serological status. If the employee decides prior to that time that the testing will be conducted, then testing is done as soon as feasible.

*The employee is offered post exposure prophylaxis in accordance with the current recommendations of the U.S. Public Health Service.

*The employee is given appropriate counseling concerning infection status, results and interpretations of tests, and precautions to take during the period after the exposure incident. The employee is informed about what potential illnesses can develop and to seek early medical evaluation and subsequent treatment.

*The following person(s) _____ is (are) designated to assure that the policy outlined here is effectively carried out and maintains records related to this policy.

Interaction with Healthcare Professionals

A written opinion is obtained from the healthcare professional who evaluates employees of this facility or organization after an exposure incident. In order for the healthcare professional to adequately evaluate the employee, the healthcare professional is provided with:

(1) a copy of the (facility's or organization's) exposure control plan;

(2) a description of the exposed employee's duties as they relate to the exposure incident;

(3) documentation of the route(s) of exposure and circumstances under which the exposure occurred;

(4) results of the source individual's blood tests (if available); and,

(5) medical records relevant to the appropriate treatment of the employee.

Written opinions are obtained from the healthcare professional in the following instances:

(1) when the employee is sent to obtain the Hepatitis B vaccine, or

(2) whenever the employee is sent to a healthcare professional following an exposure incident.

Healthcare professionals are instructed to limit their written opinions to:

(1) whether the Hepatitis B vaccine is indicated;

(2) whether the employee has received the vaccine;

(3) the evaluation following an exposure incident;

(4) whether the employee has been informed of the results of the evaluation;

(5) whether the employee has been told about any medical conditions resulting from exposure to blood or other potentially infectious materials which require further evaluation or treatment (all other findings or diagnosis shall remain confidential and shall not be included in the written report); and,

(6) whether the healthcare professional's written opinion is provided to the employee within 15 days of completion of the evaluation.

Use of Biohazard Labels

Agencies should have a procedure that determines when biohazard-warning labels are to be affixed to containers or placed in color-coded bags. The procedure should include the types of materials that should be labeled as biohazard material. These materials may include but are

not limited to, regulated waste, refrigerators and freezers containing blood or other potentially infectious materials, and other containers used to store, transport, or ship blood or other potentially infectious materials.

Training

Training for all employees is conducted prior to initial assignment to tasks where occupational exposure may occur. All employees also receive annual refresher training. This training is to be conducted within one year of the employee's previous training.

Training for employees is conducted by a person knowledgeable in the subject matter and includes an explanation of the following:

(1) Chapter 96. Bloodborne Pathogen Control

(2) OSHA Bloodborne Pathogen Final Rule;

(3) epidemiology and symptomatology of bloodborne diseases;

(4) modes of transmission of bloodborne pathogens;

(5) (this facility's or organization's) exposure control plan (i.e., points of the plan, lines of responsibility, how the plan will be implemented, where to access plan, etc.);

(6) procedures which might cause exposure to blood or other potentially infectious materials at this facility;

(7) control methods which are used at the facility to control exposure to blood or other potentially infectious materials;

(8) personal protective equipment available at this facility (types, use, location, etc.);

(9) hepatitis B vaccine program at the facility;

(10) procedures to follow in an emergency involving blood or other potentially infectious materials;

(11) procedures to follow if an exposure incident occurs, to include U.S. Public Health Service Post Exposure Prophylaxis Guidelines;

(12) post exposure evaluation and follow up;

(13) signs and labels used at the facility; and,

(14) an opportunity to ask questions with the individual conducting the training.

Recordkeeping

According to OSHA's Bloodborne Pathogens Standard, medical records are maintained by: (list name or department responsible for maintaining medical records).

According to OSHA's Bloodborne Pathogens Standard, training records are maintained by: (list name or department responsible for maintaining training records).

ANNUAL REVIEW

Signature _____ Date _____

Signature _____ Date _____

Signature _____ Date _____

Signature _____ Date _____

Signature _____ Date _____

Signature _____ Date _____

Signature _____ Date _____

Signature _____ Date _____

Signature _____ Date _____

APPENDIX A

HEPATITIS B VACCINE DECLINATION STATEMENT

I understand that due to my occupational exposure to blood or other potentially infectious materials I may be at risk of acquiring hepatitis B virus (HBV) infection. I have been given the opportunity to be vaccinated with hepatitis B vaccine, at no charge to myself. However, I decline hepatitis B vaccination at this time. I understand that by declining this vaccine, I continue to be at risk of acquiring hepatitis B, a serious disease. If, in the future, I continue to have occupational exposure to blood or other potentially infectious materials and I want to be vaccinated with hepatitis B vaccine, I can receive the vaccination series at no charge to myself.

Signature _____ Date _____

APPENDIX B
ASSESSMENT TOOL

		Yes	No
1.	The exposure control plan is located in each work center		
2.	Employees at occupational risk for bloodborne pathogens exposure are identified		
3.	Employees comply with universal precautions when performing duties		
4.	Employees appropriately use engineering controls in the work center		
5.	Employees employ safe work practices in performance of duties		
6.	Handwashing facilities are readily accessible in the work centers		
7.	Employees regularly wash their hands, especially after glove removal		
8.	Employees deposit contaminated sharps in biohazard containers immediately after use		
9.	Employees change filled biohazard containers when full		
10.	Employees do not eat, drink, apply cosmetics or lip balm, smoke, or handle contact lenses in the work area		
11.	Food and beverages are not kept in close proximity to blood or bodily fluids		
12.	Employees do not mouth pipette/suction blood or bodily fluids		
13.	Employees place specimens in leak resistant containers after collection		
14.	Employees place specimens in biohazard leakproof containers for shipment		
15.	Employees properly decontaminate equipment before servicing or shipping for repairs or place a biohazard label to inform others the equipment remains contaminated		
16.	Employees wear the designated fluid resistant personal protective equipment/attire appropriate for the task at hand		
17.	Employees place the contaminated personal protective equipment in the appropriate receptacles		
18.	Employees maintain a clean environment at all times		
19.	Employees use an EPA approved germicide properly to decontaminate and clean the facility and equipment		
20.	Employees know the safe procedure for contaminated, broken glass clean up		

21. Employees demonstrate knowledge of the agency's policies regarding disposal and transport of regulated waste by placing regular waste, special waste, and/or biohazard waste in appropriate containers and transporting the waste according to policy

22. Employees place wet laundry in leak resistant bags or containers and transport used laundry in biohazard leakproof containers

23. Each employee knows his documented hepatitis B vaccine status

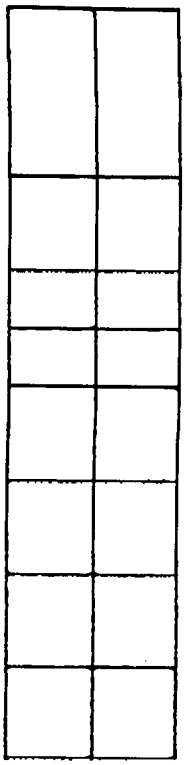
24. Employees know where and to whom to report exposure incidents

25. An employee occupational exposure protocol is practiced in accordance with U.S. Public Health Service

26. Employees are oriented and receive annual training to the exposure control plan

27. Recording and reporting occupational exposures are conducted in accordance with OSHA's Bloodborne Pathogens Standard

28. Medical and training records are maintained in accordance with OSHA's Bloodborne Pathogens Standard



TRD-200005205
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: July 27, 2000

♦ ♦ ♦

Notice of Intent to Revoke Certificates of Registration

Pursuant to 25 Texas Administrative Code §289.205, the Bureau of Radiation Control (bureau), Texas Department of Health (department), filed complaints against the following registrants: Pick Chiropractic Center, Onalaska, R03286; Barry Brooks, D.D.S., Jacksonville, R06642; Westwood Animal Clinic, Houston, R20280; Family Health Clinic, Cleveland, R23214; Magnolia Imaging Center, Houston, R24790; Telxon Corporation, Houston, R23628.

The complaints allege that these registrants have failed to pay required annual fees. The department intends to revoke the certificates of registration; order the registrants to cease and desist use of radiation machine(s); order the registrants to divest themselves of such equipment; and order the registrants to present evidence satisfactory to the bureau that they have complied with the orders and the provisions of the Texas Health and Safety Code, Chapter 401. If the fee is paid within 30 days of the date of each complaint, the department will not issue an order.

This notice affords the opportunity to the registrants for a hearing to show cause why the certificates of registration should not be revoked. A written request for a hearing must be received by the bureau within 30 days from the date of service of the complaint to be valid. Such written request must be filed with Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), 1100 West 49th Street, Austin, Texas 78756-3189. Should no request for a public hearing be timely filed or if the fee is not paid, the certificates of registration will be revoked at the end of the 30-day period of notice.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200005370
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 2, 2000

♦ ♦ ♦

Notice of Intent to Revoke Radioactive Material Licenses

Pursuant to 25 Texas Administrative Code §289.205, the Bureau of Radiation Control (bureau), Texas Department of Health (department), filed complaints against the following licensees: Universal Toxicology Laboratories, Midland, G02047; Littleton Inspection Services, DeSoto, L04835.

The complaints allege that these licensees have failed to pay required annual fees. The department intends to revoke the radioactive material licenses; order the licensees to cease and desist use of such radioactive materials; order the licensees to divest themselves of the radioactive material; and order the licensees to present evidence satisfactory to the bureau that they have complied with the orders and the provisions of the Texas Health and Safety Code, Chapter 401. If the fee is paid within 30 days of the date of each complaint, the department will not issue an order.

This notice affords the opportunity to the licensees for a hearing to show cause why the radioactive material licenses should not be revoked. A written request for a hearing must be received by the bureau within 30

days from the date of service of the complaint to be valid. Such written request must be filed with Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), 1100 West 49th Street, Austin, Texas 78756-3189. Should no request for a public hearing be timely filed or if the fee is not paid, the radioactive material licenses will be revoked at the end of the 30-day period of notice.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200005371
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 2, 2000

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Notice of Request for Proposals for School-Based Health Center Establishment

INTRODUCTION

The Texas Department of Health (department) requests proposals to support establishment and operation of school-based health centers for the project period January 1, 2001, through August 31, 2001. Project proposals will be reviewed and awarded on a competitive basis.

PURPOSE

The purpose of this program is to assist school districts with the costs of establishing and operating school-based health centers in order to: promote community-based collaboration and solutions, and to assist children and families in obtaining primary and preventive health care in accessible settings.

ELIGIBLE APPLICANTS

Eligible entities include school districts located within the state of Texas. 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. Applicants must provide historical evidence of fiscal and administrative responsibility as outlined in the grant instructions.

AVAILABLE FUNDS

Award of these funds is contingent upon annual federal grant awards to the department from the U.S. Department of Health and Human Services Title V Maternal and Child Health Services Block Grant. This announcement is made prior to the award of these funds to allow applicants sufficient time to respond by the application due date. Award of these funds is contingent upon satisfactory completion of the grant application and the negotiation process. The projected amount available is approximately $500,000. The department expects to fund four projects.

DEADLINE

The original and three copies of the application must be received by the School Health Program, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, on or before 5:00 p.m., Central Daylight Saving Time, on October 11, 2000. No facsimiles will be accepted.

REVIEW AND AWARD CRITERIA

Each application will be screened for minimum eligibility, completeness, and satisfactory fiscal and administrative history. Applications which arrive after the deadline for submission will not be reviewed. Applications will be reviewed by a panel of reviewers and scored according to the quality of the application. Target populations and interventions must be planned in compliance with Texas Education Code, §§38.0095, 38.011 and 38.012 and 25 Texas Administrative Code§§37.501 - 37.508. A copy of the adopted rules can be downloaded or requested along with the Request for Proposals (RFP) from the department's school health website outlined in the "for information" section of this notice. The department reserves the right to make funding decisions based on the need to provide prevention services across geographic areas and to allocate resources based on an analysis of current resources already available in a particular community in order to avoid the duplication of services. Priority will be given to those districts located in rural areas or that have low property wealth per student.

FOR INFORMATION

For a copy of the RFP, and other information, contact Ms. Michelle McComb, R.N., School Health Program, Child Wellness Division, (512) 458-7111 ext. 3307 or by email:michelle.mccomb@tdh.state.tx.us, or by accessing the school health web site at: www.tdh.state.tx.us/schoolhealth. No copies of the RFP will be released prior to July 28, 2000.

TRD-200005369
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 2, 2000

♦ ♦ ♦

Notice of Request for Proposals for the Texas Diabetes Prevention and Control Initiative

INTRODUCTION

The Texas Department of Health (department) requests proposals for the Texas Diabetes Prevention and Control Initiative for the project period October 1, 2000, through August 31, 2001. The department is seeking to select providers of services to target high priority populations as described in the project. Proposals will be reviewed and awarded on a competitive basis.

PURPOSE

The Texas Diabetes Prevention and Control Initiative's mission is to improve the health status of Texans who have, or who are at high-risk for developing Type 2 Diabetes. This will be accomplished by educating health care providers about Diabetes and its newest treatment options, educating and screening Diabetes high-risk populations and assisting them with obtaining quality health care in their communities, and increasing the general awareness of Diabetes in Texas through a Diabetes media campaign.

ELIGIBLE APPLICANTS

Eligible applicants include local health departments, community health centers, public or private universities, not-for-profit and for-profit organizations. Individuals are not eligible to apply.

Eligible applicants will be geographically restricted to those proposing to serve one of two counties: (1) El Paso County; and (2) Harris County.

AVAILABLE FUNDS

Approximately $400,000 is expected to be available to fund at least two projects with a 11-month budget. The specific dollar amount to be awarded to each applicant will depend upon the merit and scope of the proposed project.

Funding recipients are required to contribute a percentage of their total project budget as Match, In-Kind contributions, or a combination of the

two. The amount contributed will be applicant determined, and will be a criterion used when judging proposals.

DEADLINE

The original and six copies of the application must be received by Luby Garza, Nutrition Consultant, Texas Diabetes Program/Council, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, on or before 5:00 p.m., Central Daylight Saving Time, on August 28, 2000. No facsimiles will be accepted.

REVIEW AND AWARD CRITERIA

Each application will be screened for minimum eligibility, completeness, and satisfactory fiscal and administrative history. Applications which are deemed ineligible or incomplete will not be reviewed. Applications which arrive after the deadline for submission will not be reviewed. Eligible, complete applications will be reviewed by a panel of reviewers and scored according to the quality of the application. Target populations and interventions must be planned in compliance with Texas Diabetes Prevention and Control Initiative outline. The department reserves the right to make funding decisions based on the need to provide Diabetes prevention services across geographic areas and to allocate resources based on an analysis of current resources already available in a particular community in order to avoid the duplication of services.

FOR INFORMATION

For a copy of the RFP, and other information, contact Ms. Luby Garza, Texas Diabetes Program/Council, at (512) 458-7490 or at E-mail: luby.garza@tdh.state.tx.us. No copies of the RFP will be released prior to August 11, 2000.

TRD-200005380
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 2, 2000

♦ ♦ ♦

Withdrawal of the Notice of Request for Proposals for Human Immunodeficiency Virus Prevention in Dallas, Texas

The Texas Department of Health (department) filed a Notice of Request for Proposals for Human Immunodeficiency Virus Prevention in Dallas, Texas, and was published in the August 4, 2000, issue of the *Texas Register*, TRD No. 200005142. The HIV/STD Health Resources Division has withdrawn the Request for Proposals.

For further information, please contact Laura Ramos, HIV/STD Health Resources Division, 1100 West 49th Street, Austin, Texas, 78756-3199, at (512) 490-2525 or E-mail laura.ramos@tdh.state.tx.us.

TRD-200005383
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 2, 2000

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Texas Health and Human Services Commission

Joint Public Hearing-Proposed Payment Rates for Medicaid Programs Operated by Texas Department Services (Bienvivir Waiver and Deaf-Blind Multiple Disabilities)

The Texas Health and Human Services Commission (HHSC) and the Texas Department of Human Services (TDHS) will conduct a joint public hearing to receive public comments on proposed payment rates for the following Medicaid programs and services operated by TDHS: Bienvivir Waiver and Deaf-Blind Multiple Disabilities Waiver. The joint hearing will be held in compliance with Title 1 of the Texas Administrative Code, §355.105(g), which requires public hearings on proposed payment rates for medical assistance programs. The public hearing will be held on August 28, 2000, at 9:30 am, in the west side of the Public Hearing Room (west side of Room 125E) of the John H. Winters Human Services Building at 701 West 51st Street, Austin, Texas (First floor, East Tower). Written comments regarding payment rates set by the HHSC may be submitted in lieu of testimony until 5:00 pm the day of the hearing. Written comments may be sent by U.S. mail to the attention of Nancy Kimble, TDHS, MC W-425, P.O. Box 149030, Austin, Texas 78714-9030. Express mail can be sent to Ms. Kimble at TDHS, MC W-425, 701 West 51st Street, Austin, Texas 78751-2312. Hand deliveries addressed to Ms. Kimble will be accepted by the receptionist in the lobby of the John H. Winters Human Services Building at 701 West 51st Street, Austin, Texas. Alternatively, written comments may be sent via facsimile to Ms. Kimble at (512) 438-3014. Interested parties may request to have mailed to them or may pick up a briefing package concerning the proposed payment rates by contacting Ms. Kimble, TDHS, MC W-425, P.O. Box 149030, Austin, Texas 78714-9030, (512) 438-4051.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Ms. Kimble, TDHS, MC W-425, P.O. Box 149030, Austin, Texas 78714-9030, telephone number (512) 438-4051, by August 21, 2000, so that appropriate arrangements can be made.

TRD-200005183
Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: July 26, 2000

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Texas Department of Housing and Community Affairs

Notice of Administrative Hearing (MHD1999000141UR)

Manufactured Housing Division

Wednesday, August 16, 2000, 1:00 p.m.

State Office of Administrative Hearing, Stephen F. Austin Building, 1700 N Congress, 11th Floor, Suite 1100

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. William N. Blackwood dba Blackwood Mobile Home Service to hear alleged violations of Sections 4(d)(f), 7(d) and 8(b)(d) of the Act and Sections 80.51 and 80.125(e) of the Rules regarding selling of a used manufactured home and failing to provide the consumer with a written warranty that the manufactured home is habitable; selling an unhabitable used manufactured home; installation of a manufactured home without obtaining, maintaining or possessing a valid installer's license and not properly installing the manufactured home; and selling of a used manufactured home without the appropriate, timely transfer

of a good and marketable title. SOAH 332-00-1837. Department MHD1999000141UR.

Contact: Jerry Schroeder, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589.

TRD-200005386
Daisy Stiner
Executive Director
Texas Department of Housing and Community Affairs
Filed: August 2, 2000

♦ ♦ ♦

Houston-Galveston Area Council

Open House

On **Wednesday, August 30, 2000,**the Houston-Galveston Area Council (H-GAC) will host an Open House on the proposed Air Quality Conformity Determination for the 2022 Metropolitan Transportation Plan (MTP) and the 2000-2002 Transportation Improvement Program (TIP). During this meeting, the public will be given the opportunity to meet with the staff and make their comments on H-GAC's proposed finding of compliance with emissions reduction targets for on-road mobile sources.

Please join us by attending this important meeting held at H-GAC, 3555 Timmons Lane 2nd Floor, Conference Room A beginning at 5:00 p.m. To obtain a copy of the proposed air quality conformity finding, offer comment or ask questions, please contact Ms. Lily Wells, Chief Air Quality Planner at (713) 627-3200 or via e-mail at lwells@hgac.cog.tx.us. Comments are welcome beginning **July 31, 2000 through August 31, 2000.** Faxed comments can be sent to (713) 993-4508.

In compliance with the Americans with Disabilities Act (ADA), H-GAC will provide for reasonable accommodations for persons attending H-GAC functions. Requests should be received by H-GAC 24 hours prior to the function.

TRD-200005218
Alan Clark
MPO Director
Houston-Galveston Area Council
Filed: July 28, 2000

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Texas Department of Human Services

Announcement of Available Funds and Request for Proposals for Outreach and Referral Services and Citizenship and Naturalization Preparation

The Texas Department of Human Services (DHS) is pleased to announce the availability of funding for outreach and referral services and citizenship and naturalization preparation under Refugee Social Service funds from the federal Office of Refugee Resettlement (ORR) in the Department of Health and Human Services. The code of Federal Regulations (CFR) 45, parts 400 and 401, give the State the authority to contract with public and private agencies for the provision of Refugee Social Services. In Texas, the DHS is the single state agency responsible for the administration of the Refugee Social Services program. Within DHS, the office of Immigration and Refugee Affairs is the entity responsible for the direct management of the Refugee Social Services program.

The refugee program provides service through local contracts in areas of the State with the largest number of refugee arrivals: Amarillo, Austin, Dallas, Fort Worth, Houston and San Antonio. Funds under this announcement are available in the amount of $400,000 for outreach and referral services and $263,000 for citizenship services.

Funds will be awarded on a competitive basis to public and private agencies that can demonstrate the greatest aptitude for effectively serving the target population: persons admitted to the United States as refugees under §207 of the Immigration and Nationality Act (INA) or granted asylum under §208 of the INA. Eligibility also includes Cubans and Haitians under §501 of the Refugee Education Assistance Act of 1980 (P.L. 96-422); certain Amerasians from Vietnam who were admitted to the U.S. as immigrants under §584 of the foreign Operations Export Financing and Related Programs Appropriations Act of 1998 and Kurdish asylees. Eligible persons must possess original Immigration and Naturalization services (INS) documents which verify admission status under one of the above laws including persons admitted to the United States by the Immigration and Naturalization Services under §207 and §208 of the Immigration and Nationality Act, Amerasians from Vietnam and Cuban and Haitian Entrants.

APPLICATION DEADLINE: Five copies of the proposal(s) must be mailed or delivered, not faxed or electronically mailed, to: Gracie Serrato, TDHS, 701 W. 51st Street, P.O. Box 149030, Austin, Texas 78714-9030. Proposals must be received no later than 5:00 p.m. CDT on September 18, 2000. Proposals received after this date/time, faxed or electronically mailed, will not be considered.

PROPOSAL EVALUATION AND FUNDING AWARD: The final selection of contractors shall be made by representatives of the Office of Immigration and Refugee Affairs, in accordance with applicable state and federal laws. The evaluation criteria and scores for each are contained on the Request for Proposal (RFP) document. A copy of the RFP will be sent to you upon written request submitted to Gracie Serrato at the address listed above.

TRD-200005242
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Filed: July 28, 2000

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Public Forum/Vendor Conference for Phase 1 of the TIERS Project

The Texas Department of Human Services (DHS) will conduct a public forum/vendor conference on August 10, 2000, from 9:00 am to 12:00 noon local time in Austin, Texas at the DHS state office facility in the Public Hearing Room (Room 125, East Tower). The DHS facility is located at 701 West 51st Street, in Austin, Texas.

The forum relates to DHS's intent to contract with experienced systems engineering and implementation, help desk, and training services vendors to assist the Texas Integrated Eligibility Redesign System (TIERS) project team through Phase 1 of the TIERS project.

TRD-200005241
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Filed: July 28, 2000

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Texas Department of Insurance

Insurer Services

The following applications have been filed with the Texas Department of Insurance and are under consideration:

Application to change the name of REPUBLIC SERVICE LIFE INSURANCE COMPANY to AMERICAN CENTURY LIFE INSURANCE COMPANY OF TEXAS, a domestic life company. The home office is in Fort Worth, Texas.

Application to change the name of UNISTAR INSURANCE COMPANY to WORTH CASUALTY COMPANY, a domestic fire and casualty company. The home office is in Fort Worth, Texas.

Application for admission to the State of Texas by RESPONSE INSURANCE COMPANY OF AMERICA, a foreign fire and casualty company. The home office is in Washington, D.C.

Application for admission to the State of Texas by RESPONSE INDEMNITY COMPANY OF DELAWARE, a foreign fire and casualty company. The home office is in Wilmington, Delaware.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200005382
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: August 2, 2000

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Name Applications

Application to change the name of CHARTWELL REINSURANCE COMPANY to CHARTWELL INSURANCE COMPANY, a foreign fire and casualty insurance company. The home office is in Stamford, Connecticut.

Application to change the name of SUN LIFE OF CANADA REINSURANCE COMPANY (U.S.) to CLARICA LIFE REINSURANCE COMPANY, a foreign life insurance company. The home office is in Lansing, Michigan.

Application to do business in the State of Texas by XL CAPITAL ASSURANCE, INC., a foreign fire and casualty company. The home office is in New York, New York.

Application to do business in the State of Texas by SENIOR AMERICAN LIFE INSURANCE COMPANY, a foreign life insurance company. The home office is in Warrington, Pennsylvania.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701. Charles W. Dow February 3, 2000 Page 2

TRD-200005191
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: July 27, 2000

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Notice of Applications by Small Employer Carriers to be Risk-Assuming Carriers

Notice is given to the public of the application of the listed small employer carrier to be a risk-assuming carrier under Texas Insurance Code Article 26.52. A small employer carrier is defined by Chapter 26 of the Texas Insurance Code as a health insurance carrier that offers, delivers or issues for delivery, or renews small employer health benefit plans subject to the chapter. A risk-assuming carrier is defined by Chapter 26 of the Texas Insurance Code as a small employer carrier that elects not to participate in the Texas Health Reinsurance System. The following small employer carrier has applied to be a risk-assuming carrier:

Southwest Life & Health Insurance Company

The application is subject to public inspection at the offices of the Texas Department of Insurance, Financial Monitoring Unit, 333 Guadalupe, Hobby Tower 3, 3rd Floor, Austin, Texas.

If you wish to comment on this application to be a risk-assuming carrier, you must submit your written comments within 60 days after publication of this notice in the Texas Register to Lynda H. Nesenholtz, Chief Clerk, Mail Code 113-1C, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-91204. An additional copy of the comments must be submitted to Mike Boerner, Managing Actuary, Actuarial Division of the Financial Program, Mail Code 304-3A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. Upon consideration of the application, if the Commissioner is satisfied that all requirements of law have been met, the Commissioner or his designee may take action to approve the application to be a risk-assuming carrier.

TRD-200005387
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: August 2, 2000

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Notice of Public Hearing

The Commissioner of Insurance, at a public hearing under Docket No. 2455 scheduled for September 19, 2000, at 10:00 a.m., in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, will consider a proposal made in a staff petition. Staff's petition seeks amendment of the Texas Automobile Rules and Rating Manual (the Manual), to adopt new and/or adjusted 2000 and 2001 model Private Passenger Automobile Physical Damage Rating Symbols and revised identification information. Staff's petition (Ref. No. A-0700-18-I), was filed on July 28, 2000.

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data compiled on damageability, repairability, and other relevant loss factors for the listed 2000 and 2001 model vehicles.

A copy of the petition, including an exhibit with the full text of the proposed amendments to the Manual is available for review in the office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas. For further information or to request copies of the petition, please contact Sylvia Gutierrez at (512) 463-6327; refer to (Ref. No. A-0700-18-I).

Comments on the proposed changes must be submitted in writing within 30 days after publication of the proposal in the *Texas Register*, to the Office of the Chief Clerk, Texas Department of Insurance, P. O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of comments is to be submitted to Marilyn Hamilton, Deputy Commissioner, Personal and Commercial Lines Division, Texas Department of Insurance, P. O. Box 149104, MC 104-PC, Austin, Texas 78714-9104.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

TRD-200005363
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: August 1, 2000

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of Maxorplus, LTD., a domestic third party administrator. The home office is Amarillo, Texas.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

TRD-200005361
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: August 1, 2000

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of Member Protection Insurance Plans, Inc., a foreign third party administrator. The home office is Wallingford, Connecticut.

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-200005393
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: August 2, 2000

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Texas Department of Mental Health and Mental Retardation

Public Notice Announcing Pre-application Orientation for Waiver Program Provider Enrollment

The Texas Department of Mental Health and Mental Retardation (TDMHMR), pursuant to 25 TAC §419.704, will hold a Pre-application Orientation (PAO) for persons seeking to participate as a program provider in the Home and Community-based Services (HCS), Home and Community-based Services-OBRA (HCS-O), or Mental Retardation Local Authority (MRLA) programs.

The PAO will be held at 8:30 a.m., Monday, November 13, 2000, in Austin, Texas. Persons wanting to attend the PAO must request a registration form by letter or by fax. Requests should be addressed to Bill Fordyce, Enrollment/Sanctions Manager, Medicaid Administration, TDMHMR, PO Box 12668, Austin, Texas 78711-2668. The fax number is (512) 206-5725.

Upon receipt of a written request, TDMHMR will provide the applicant with information regarding the provider application enrollment processes and a registration form. Completed registration forms must be returned to TDMHMR no later than 5:00 p.m., Friday, October 13, 2000. Written requests for a registration form received after October 6, 2000, may not be timely enough to meet the October 13, 2000, registration form return date. If the registration form is not returned to TDMHMR by October 13, 2000, the form is invalid and the applicant will be required to reapply when the next PAO is announced.

Persons requiring an interpreter for the deaf or hearing impaired or other accommodation should contact Helen Rayner by calling (512) 206-5249 or the TTY phone number of *Texas Relay*, which is 1-800-735-2988, at least 72 hours prior to the PAO. You may also contact Helen Rayner for additional information concerning the PAO.

TRD-200005365
Charles Cooper
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Filed: August 1, 2000

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Texas Natural Resource Conservation Commission

Enforcement Orders

An agreed order was entered regarding PETRO-MEX, INC., Docket No. 1999-0216- PST-E; PST ID No. 34084 on July 17, 2000, assessing $8,000 in administrative penalties with $5,919 deferred.

Information concerning any aspect of this order may be obtained by contacting Mary Risner, Staff Attorney at (512) 239-6224 or Sushil Modak, Enforcement Coordinator at (512) 239-2142, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DIAMOND MINI-MART, Docket No. 1999- 0655-PWS-E; PWS No. 2350041on July 17, 2000, assessing $2,475 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sandy Van Cleave, Enforcement Coordinator at (512) 239-0667 or Scott McDonald, Staff Attorney at (512) 239-6055, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TRUTH YEARWOOD AND YEARWOOD DISTRIBUTING CO., INC., Docket No. 1998-0968-MLM-E; Facility ID No. 38628 on July 17, 2000, assessing $13,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Mead, Enforcement Coordinator at (512) 239-6010 or Camille Morris, Staff Attorney at (512) 239-3915, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding JOBE CONCRETE PRODUCTS, INC., Docket No. 1999-1414-AIR-E; Account No. EE-0034-D on July 17, 2000, assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Karen Santiesteban, Enforcement Coordinator at (512)239-

4467, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LEON HEIJLIGERS DBA CENTER POINT DAIRY, Docket No. 1999-0801-AGR-E; Permit No. 03872 on July 17, 2000, assessing $8,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Eric Reese, Enforcement Coordinator at (512) 239-2611 or Scott McDonald, Staff Attorney at (512) 239-6005, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CHISHOLM TRAIL SPECIAL UTILITY DISTRICT DBA CARRIAGE OAKS WATER SYSTEM, Docket No. 1999-1213-PWS-E; PWS No. 2460121on July 17, 2000, assessing $938 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Eric Reese, Enforcement Coordinator at (512) 239-2611, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DUKE AND LONG DISTRIBUTING COMPANY, INC. DBA EVERYDAY FOOD STORE NO. 5209, Docket No. 2000-0060- PWS-E; PWS No. 2270215 on July 17, 2000, assessing $1,250 in administrative penalties with $250 deferred.

Information concerning any aspect of this order may be obtained by contacting Kimberly McGuire, Enforcement Coordinator at (512) 239-4761, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HARRIS CREEK WATER COMPANY, Docket No. 1999-1592-PWS-E; PWS Facility ID No. 1550076 on July 17, 2000, assessing $1,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Brian Lehmkuhle, Enforcement Coordinator at (512) 239-4482, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BELIEVERS WORLD OUTREACH CHURCH INC DBA BURCHFIELD MINISTRIES COUNTRY CAMP, Docket No. 1999-1498-PWS-E; PWS No. 0450031 on July 17, 2000, assessing $1,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sandy Van Cleave, Enforcement Coordinator at (512) 239-0667, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kaufman and Broad Lone Star LP, Docket No. 2000-0253-EAQ-E; Edwards Aquifer Protection Program No. 1379 on July 17, 2000, assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Lopez, Enforcement Coordinator at (512) 239-1896, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BILL SMALLING DBA SMALLING INTERESTS, Docket No. 1999-1255-EAQ-E; Edwards Aquifer Program No. 99072701 on July 17, 2000, assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Eric Reese, Enforcement Coordinator at (512) 239-2611, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RAEFORD HARRINGTON DBA HARRINGTON ENVIRONMENTAL SERVICES, Docket No. 1998-1136-SLG-E; Registration No. 20579 on July 17, 2000, assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting I-Jung Chiang, Staff Attorney at (512) 239-0600 or Laura Eaves, Enforcement Coordinator at (512) 239-4495, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MERCURY FORWARDING AGENCY INC, Docket No. 1999-0986-MLM-E ; Account No. MI-0037-O on July 17, 2000, assessing $3,300 in administrative penalties with $660 deferred.

Information concerning any aspect of this order may be obtained by contacting Karen Santiesteban, Enforcement Coordinator at (512) 239-4467, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding RANDY RISINGER, Docket No. 1999-0729- IRR-E; Enforcement ID No. 13720; No TNRCC License on July 17, 2000, assessing $500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Joseph Daley, Enforcement Coordinator at (512) 239-3308 or Mary Risner, Staff Attorney at (512) 239-6224, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BUDGET RENT A CAR, Docket No. 2000- 0098-AIR-E; Account No. EE-0885-P on July 17, 2000, assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Corey Burke, Enforcement Coordinator at (512) 239-5259, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding KOCH MIDSTREAM PROCESSING COMPANY, Docket No. 2000-0163-AIR-E; Account No. CZ-0012-K on July 17, 2000, assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting David Van Soest, Enforcement Coordinator at (512) 239-0468, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding KOCH MIDSTREAM SERVICES COMPANY, Docket No. 1999-1478-AIR-E; Air Account Nos. PE-0046-G, PE-0164-W and WC-0025-W on July 17, 2000, assessing $7,500 in administrative penalties with $1,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Gayle Stewart, Enforcement Coordinator at (512) 239-1136, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ODELL GEER CONSTRUCTION CO INC, Docket No. 1999-0092-AIR-E; Account No. BF-0057-Ion July 17, 2000, assessing $4,725 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134 or Robin Houston, Staff Attorney at (512) 239-0682, Texas

Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ODELL GEER CONSTRUCTION CO INC, Docket No. 1999-0093-AIR-E; Account No.90-6084-C on July 17, 2000, assessing $3,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134 or Robin Houston, Staff Attorney at (512) 239-0682, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LARRY TROTTER DBA PREFERRED AUTO SALES, Docket No. 2000-0042-AIR-E; Account No. DB-5093-C on July 17, 2000, assessing $900 in administrative penalties with $180 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Gerberding, Enforcement Coordinator at (512) 239-4490, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GARDNER GLASS PRODUCTS, Docket No. 1999-0764-AIR-E; Account No. WA-0041-A on July 17, 2000, assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Carl Schnitz, Enforcement Coordinator at (512) 239-1892, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding OASIS PIPE LINE COMPANY TEXAS LP, Docket No. 2000-0076-AIR-E; Account Nos. CZ-0026-W and KG-0007-K on July 17, 2000, assessing $7,500 in administrative penalties with $1,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Gerberding, Enforcement Coordinator at (512) 239-4490, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HOUSTON STEEL EQUIPMENT COMPANY, Docket No. 2000-0016-AIR-E; Account No. HX-1861-C on July 17, 2000, assessing $3,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sheila Smith, Enforcement Coordinator at (512) 239-1670, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TOSCO MARKETING COMPANY, INC., Docket No. 1999-1567-AIR-E; Account No. EE-0799-J on July 17, 2000, assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Corey Burke, Enforcement Coordinator at (512) 239-5259, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ULTRA FUEL AND OIL LLC, Docket No. 1999-1589-AIR-E; Account Nos. EE-2063-F and EE-0866-T on July 17, 2000, assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting Corey Burke, Enforcement Coordinator at (512) 239-5259, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding UNION PACIFIC RAILROAD, Docket No. 1999-1565-AIR-E; Account No. EE-1354-V on July 17, 2000, assessing $1,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Corey Burke, Enforcement Coordinator at (512) 239-5259, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CHEMICAL LIME NEW BRAUNFELS, LTD, Docket No. 2000-0108-AIR-E; Account No. CS-0020-O on July 17, 2000, assessing $3,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Susan Johnson, Enforcement Coordinator at (512) 239-2555, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding AGRO-TRANSFER INC., Docket No. 1999- 0663-AIR-E; Account No. HN-0320-P; Permit No. 24286 on July 17, 2000, assessing $3,500 in administrative penalties with $700 deferred.

Information concerning any aspect of this order may be obtained by contacting Tim Haase, Enforcement Coordinator at (512) 239-6007, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding KOCH PIPELINE COMPANY LP, Docket No. 1999-0876-AIR-E; Account Nos. KH-0011-IG, C-0069-S, SG-0138-T, HJ-0037-L, SP-0005- O, GJ-0355-L, RL-0172-J, BR-0153-W, FJ-0039-S, KA-0069-I, RI-0025-F, BE-0021-R, LK- 0045-P, RG-0080-T, NE-0065-N, JG-0086-F, WE-0245-H, MC-0063-K, SK-0519-K, CV- 0133-S, GJ-0354-N, UB-0159-W, AB-0429-I, AB-0430-A, DC-0129-H, VC-0122-R, WM- 0191-O, BC-0031-N, VC-0121-T, FC-0186-H, SM-0072-J, DK-0062-A, WE-0240-R, SD- 0047-K, BR-0085-O, CV-0122-A, CZ-0181-J, SP-0040-M, 0029842A, and 0033431U on July 17, 2000, assessing $214,463 in administrative penalties with $42893 deferred.

Information concerning any aspect of this order may be obtained by contacting Stacey Young, Enforcement Coordinator at (512) 239-1899, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding SAUL DORIA DBA PICKERING AUTOMOTIVE, Docket No. 1998-1543-AIR-E; Account No. HX-1907-D on July 17, 2000, assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tel Croston, Enforcement Coordinator at (512) 239-5717 or John Wright, Staff Attorney at (512) 239-2269, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding EQUISTAR CHEMICALS LP, Docket No. 1999-1480-IHW-E; Permit No. 50117; Registration No. 30030 on July 17, 2000, assessing $9,000 in administrative penalties with $1,800 deferred.

Information concerning any aspect of this order may be obtained by contacting Thomas Greimel, Enforcement Coordinator at (512) 239-5690, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MORRIS ROSENSTEIN AND SAN-TEX LUMBER CO., INC., Docket No. 1996-1615-IHW-E; TNRCC ID No. 84635; EPA ID No. TXP490268024 on July 17, 2000, assessing $85,503 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tim Haase, Enforcement Coordinator at (512) 239-6007 or Nathan Block, Staff Attorney at (512) 239-4706, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SIGNTECH USA LTD., Docket No. 1999- 1546-IHW-E; SWR No. 39225 on July 17, 2000, assessing $36,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sherry Smith, Enforcement Coordinator at (512) 239-0572, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SNEED SHIPBUILDING INC, Docket No. 1999-1578-IHW-E; IHW ID No. 86273 on July 17, 2000, assessing $11,000 in administrative penalties with $2,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Eric Reese, Enforcement Coordinator at (512) 239-2611, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PENRECO, Docket No. 1999-0815-IWD-E; WQ Permit No. 00377; NPDES Permit No. TX0003727 on July 17, 2000, assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Michael Meyer, Enforcement Coordinator at (512) 239-4492, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HIDALGO COUNTY, Docket No. 1999-0695- MSW-E; MSW Permit No. 1593A on July 17, 2000, assessing $11,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Michael De La Cruz, Enforcement Coordinator at (512) 239-0259 or Toni Tolliver, Staff Attorney at (512) 239-2941, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF LYTLE, Docket No. 1999-1468- MWD-E; WQ Permit No. 10096-001; NPDES Permit No. TX0057509 on July 17, 2000, assessing $4,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Eric Reese, Enforcement Coordinator at (512) 239-2611, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NORTH TEXAS MUNICIPAL WATER DISTRICT, Docket No. 1999-1505-MWD-E; WQ Permit No. 10384-001; NPDES TX0025950 on July 17, 2000, assessing $3,125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sherry Smith, Enforcement Coordinator at (512) 239-0572, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF ITALY, Docket No. 1999-0450- MWD-E; WQ Expired Permit No. WQ10516-001; NPDES Permit No.TX0024805 on July 17, 2000, assessing $6,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Michael Meyer, Enforcement Coordinator at (512) 239-4492, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding B HARI INTERNATIONAL DBA KWIK SERVE #3, Docket No. 1999-1458-PST-E; PST Facility ID No. 0067479 on July 17, 2000, assessing $7,000 in administrative penalties with $1,400 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael De La Cruz, Enforcement Coordinator at (512) 239-0259, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DOYLE FOSTER DBA WEIR COUNTRY STORE, Docket No. 1999-1403-PST-E; PST Facility ID No. 0022117 on July 17, 2000, assessing $8,250 in administrative penalties with $1,650 deferred.

Information concerning any aspect of this order may be obtained by contacting Susan Johnson, Enforcement Coordinator at (512) 239-2555, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SWATI ENTERPRISES INC, Docket No. 1998- 0939-PST-E; PST Facility ID No. 29907 on July 17, 2000, assessing $5,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Randy Norwood, Enforcement Coordinator at (512) 239-1879 or John Sumner, Staff Attorney at (512) 239-0497, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ANDREWS TRANSPORT INC, Docket No. 2000-0004-PST-E; PST Facility ID No. 0040091on July 17, 2000, assessing $5,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kent Heath, Enforcement Coordinator at (512) 239-4575, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CARMEL INDUSTRIES INC DBA HIGHWAY 290 TRUCK STOP (SHELL), Docket No. 1999-1377-PST-E; PST Facility ID No. 0035658 on July 17, 2000, assessing $7,000 in administrative penalties with $1,400 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael De La Cruz, Enforcement Coordinator at (512) 239-0259, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding JAWEED VIRANI DBA STAR MART, Docket No. 1999-1449-PST-E; Facility ID No. 0034474 on July 17, 2000, assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Erika Fair, Enforcement Coordinator at (512) 239-6673, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding AHMED INC DBA TOTE-A-BAG, Docket No. 1998-0652-PST-E; TNRCC ID No. 39407 on July 17, 2000, assessing $23,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gayle Stewart, Enforcement Coordinator at (512) 239-1136

or Joshua Olszewski, Staff Attorney at (512) 239-3645, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF STREETMAN, Docket No. 1999- 1538-MWD-E; TPDES Permit No. 10471-001 on July 17, 2000, assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Kristi Jones, Enforcement Coordinator at (512) 239-1258, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200005373
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Consevation Commission
Filed: August 2, 2000

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Notice of Application

APPLICATION. CITY OF DUMAS, P.O. Box 438, Dumas, Texas 79029, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a permit which will authorize a Type I municipal solid waste management facility. The site will receive an estimated average 62 tons of waste per day. The total disposal capacity of the landfill is approximately 8,281,438 in-place cubic yards. The applicant would be authorized to dispose of municipal solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities; municipal solid waste resulting from construction or demolition projects, Class 2 and Class 3 industrial solid waste, and special wastes that are properly identified. The operating hours for receipt of waste at this municipal solid waste facility shall be any time between the hours of 6:00 a.m. to 9:00 p.m., Monday through Sunday. The waste management facility is located on a 160 acre site approximately 13 miles east of the City of Dumas and 1 1/2 miles north of State Highway 152 on Keith Road in Moore County, Texas (latitude 35°52'17" north, longitude 101°44'21" west). CONTESTED CASE HEARING. The TNRCC may approve the application unless a written hearing request is filed within 30 days after newspaper publication of this 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 applicant's name and the 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) location and distance of your property relative to the proposed facility. You may also submit your proposed adjustments to the application/permit which would satisfy your concerns. Requests for hearing on this application must be submitted in writing during the 30-day notice period to the Office of the Chief Clerk at the address included in the information section below. If a hearing request is filed, the Executive Director will not issue the permit and will forward the application and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. INFORMATION. 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, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address as above. 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-200005375
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: August 2, 2000

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Default Orders. The TNRCC staff proposes 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 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 **September 11, 2000**. 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 a proposed Default Order is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's jurisdiction, or the TNRCC's orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed Default Order is not required to be published if those changes are made in response to written comments.

A copy of each of the proposed Default Orders is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. 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 September 11, 2000**. 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: Conny Whitehorn dba Coronado Water Company; DOCKET NUMBER: 1998-1308-PWS-E; TNRCC IDENTIFICATION (ID) NUMBER: 0590009; LOCATION: west side of Highway 385, five miles south of Hereford, Deaf Smith County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: §290.46(f)(1)(A), by failing to maintain the chlorinator and chlorine residual of 0.2 milligrams per liter (mg/L) in the far reaches of the distribution system at all times; §290.43(c)(9), (d)(2), by using tanks previously used for a non-potable purpose to store potable water and by failing to provide pressure relief devices on all pressure tanks; §290.45(b)(1)(C)(ii) and (iii), by failing to provide a total storage capacity of 200 gallons per connection and failed to provide two or more service pumps with a total rated capacity of 2.0 gallons per minute per connection; §290.41(c)(1)(C), by failing to locate well Number 1 more than 500 feet away from a livestock pen; §290.41(c)(1)(F), (3)(N),

by failing to provide flow meters for wells and by failing to obtain a sanitary easement covering all property within 150 feet of wells; §290.113(c), by failing to annually notify customers of a fluoride secondary maximum concentration level 2.6 mg/L; and §290.51 and Texas Health and Safety Code (THSC), §341.041, by failing to pay water regulatory assessments and public health service fees for fiscal years 1994-1998; PENALTY: $1,813; STAFF ATTORNEY: John Sumner, Litigation Division, MC 175, (512) 239-0497; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(2) COMPANY: Gulshan Enterprises, Incorporated; DOCKET NUMBER: 1998-0107-PST-E; TNRCC ID NUMBER: 39647 and 39714; LOCATION: Handi Stop Number 3, 12948 Beaumont Highway and Handi Stop Number 69 19202 Clay Road, Houston, Harris County, Texas; TYPE OF FACILITY: UST; RULES VIOLATED: §115.241 and THSC, §382.085(b), by failing to install an approved Stage II vapor recovery system; §334.22(a), by failing to pay the required outstanding annual UST facility fees for fiscal year 1997-1998; §115.245(1) and (2) and THSC, §382.085(b), by failing to conduct annual pressure decay testing for the Stage II vapor recovery system in accordance with test procedures; §115.248(1) and THSC, §382.085(b), by failing to ensure that every current employee is aware of the purposes and correct operating procedures of the Stage II system by the trained facility representative; and §334.7(d)(3), by failing to amend, update, or change the facility's UST registration information; PENALTY: $16,250; STAFF ATTORNEY: Scott McDonald, Litigation Division, MC 175, (512) 239-6005; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Nazir Ahmad Zahra; DOCKET NUMBER: 1999-1360-PST-E; TNRCC ID NUMBER: 17087; LOCATION: 1202 North Ben Wilson, Victoria, Victoria County, Texas; TYPE OF FACILITY: UST; RULES VIOLATED: §334.48(c), by failing to conduct inventory control procedures; and §334.93, by failing to demonstrate the required financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases from USTs; PENALTY: $6,600; STAFF ATTORNEY: Ali Abazari, Litigation Division, MC 175, (512) 239-5915; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5336, (361) 825-3100.

TRD-200005359
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: August 1, 2000

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (the Code), §7.075, which requires that the TNRCC may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 11, 2000**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable Regional Office listed as follows. Written comments about these AOs should be sent to the enforcement coordinator designated for each AO at the TNRCC's Central Office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on September 11, 2000**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The TNRCC enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing**.

(1) COMPANY: James M. Barton; DOCKET NUMBER: 2000-0166-OSI-E; IDENTIFIER: On- Site Sewage Facilities (OSSF) Installer Identification Number OS456; LOCATION: Mansfield, Johnson County, Texas; TYPE OF FACILITY: OSSF; RULE VIOLATED: 30 TAC §285.5(1) and the THSC, §366.051(c), by failing to verify proof of a permit before beginning the installation of an OSSF; and 30 TAC §285.58(a)(3) and the THSC, §366.054, by failing to notify the authorized agent and obtain authorization to construct; PENALTY: $400; ENFORCEMENT COORDINATOR: Sherry Smith, (512) 239-0572; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(2) COMPANY: Boral Bricks, Incorporated; DOCKET NUMBER: 2000-0455-AIR-E; IDENTIFIER: Air Account Number HH-0018-J; LOCATION: Marshall, Harrison County, Texas; TYPE OF FACILITY: brick manufacturing; RULE VIOLATED: 30 TAC §122.121, §122.130(b)(1), and the Act, §382.054 and §382.085(b), by failing to submit a federal operating permit application; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(3) COMPANY: Boral Bricks, Incorporated; DOCKET NUMBER: 2000-0362-AIR-E; IDENTIFIER: Air Account Number RL-0010-N; LOCATION: Henderson, Rusk County, Texas; TYPE OF FACILITY: brick manufacturing; RULE VIOLATED: 30 TAC §122.121, §122.130(b)(1), and the Act, §382.054 and §382.085(b), by failing to submit a federal operating permit application; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(4) COMPANY: Borger Energy Associates, L.P.; DOCKET NUMBER: 2000-0359-AIR-E; IDENTIFIER: Air Account Number HW-0081-I; LOCATION: Borger, Hutchinson County, Texas; TYPE OF FACILITY: electrical power generating plant; RULE VIOLATED: 30 TAC §116.115(c), Permit Number 32096, and the Act, §382.085(b), by failing to achieve required nitrogen oxide concentration; PENALTY: $11,000; ENFORCEMENT COORDINATOR: Shawn Hess, (806) 353-9251; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(5) COMPANY: Circle Bar Auto/Truck Plaza, L.L.C.; DOCKET NUMBER: 2000-0190-PST-E; IDENTIFIER: Petroleum Storage Tank Facility (PST) Identification Number 64553; LOCATION: Ozona, Crockett County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.74, by failing to conduct release investigation and confirmation steps; 30 TAC §334.72, by failing to report a suspected release from an underground storage tank (UST); and 30 TAC §334.75(b), by

failing as the operator of an UST system to contain and immediately clean up a spill or overfill; PENALTY: $8,000; ENFORCEMENT COORDINATOR: Mark Newman, (915) 655-9479; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(6) COMPANY: Thurmond W. Gentry dba Capitol Electroplating, Inc.; DOCKET NUMBER: 2000-0340-AIR-E; IDENTIFIER: Air Account Number HX-1400-T; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: chromium plating; RULE VIOLATED: 30 TAC §113.190, 40 Code of Federal Regulations (CFR) §§63.342(f)(3), 63.343(a)(ii) and (c)(3), 63.342(c)(1)(i), 63.346, 63.347(c)(1) and (h)(1), and the Act, §382.085(b), by failing to timely develop and implement an operation and maintenance plan, demonstrate chromium emission limits and establish the pressure drop value, maintain inspection and monitoring data records, submit initial notification report within 180 calendar days, and submit annual compliance status report; and 30 TAC §116.110(a)(1) and (4), §106.452(1)(A), and the Act, §382.085(b), by failing to obtain a permit for three hard chrome tanks and meet the condition of a permit exemption for dry abrasive cleaning; PENALTY: $8,750; ENFORCEMENT COORDINATOR: Mac Vilas, (512) 239-2557; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: KMCO, Inc.; DOCKET NUMBER: 2000-0514-MWD-E; IDENTIFIER: Texas Pollutant Discharge Elimination System (TPDES) Permit Number 02712-000 (Formerly Water Quality Permit Number 02712-000); LOCATION: Crosby, Harris County, Texas; TYPE OF FACILITY: industrial organic chemical; RULE VIOLATED: TPDES (Formerly Water Quality) Permit Number 02712-000, the Code, §26.121, and 30 TAC §305.125(1), by failing to meet the permitted effluent limits for total suspended solids, ammonia-nitrogen, and zinc; PENALTY: $2,700; ENFORCEMENT COORDINATOR: Michelle Harris, (512) 239-0492; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: LaPorte Methanol Company, L.P.; DOCKET NUMBER: 2000-0287-AIR-E; IDENTIFIER: Air Account Number HX-2302-N; LOCATION: LaPorte, Harris County, Texas; TYPE OF FACILITY: marine barge loading; RULE VIOLATED: 30 TAC §113.300, 40 CFR §63.560(e)(i), and the Act, §382.085(b), by failing to have proper emission controls; PENALTY: $3,000; ENFORCEMENT COORDINATOR: Ro Bali, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(9) COMPANY: The City of Marlin; DOCKET NUMBER: 2000-0121-MWD-E; IDENTIFIER: Water Quality Permit Number 10110-002; LOCATION: Marlin, Falls County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: Water Quality Permit Number 10110-002 and the Code, §26.121, by failing to comply with the permitted limits for biochemical oxygen demand; and 30 TAC §290.51(a)(3) and the Code, §341.041, by failing to pay public health service fees; PENALTY: $15,000; ENFORCEMENT COORDINATOR: Karen Berryman, (512) 239-2172; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(10) COMPANY: Mitchell Gas Services, L.P.; DOCKET NUMBER: 2000-0263-AIR-E; IDENTIFIER: Air Account Number CN-1101-D; LOCATION: Bronte, Coke County, Texas; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §122.146(2) and the Act, §382.085(b), by failing to submit Title V compliance certifications; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Mark Newman, (915) 655-9479; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(11) COMPANY: Mitchell Gas Services, L.P.; DOCKET NUMBER: 2000-0387-AIR-E; IDENTIFIER: Air Account Number ND-0063-F; LOCATION: Colorado City, Nolan County, Texas; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §122.146(1) and the Act, §382.085(b), by failing to certify compliance with the Title V Permit O-00729; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Kara Dudash, (915) 698-9674; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(12) COMPANY: Natural Gas Pipeline Co. of America; DOCKET NUMBER: 2000-0338-AIR- E; IDENTIFIER: Air Account Number JE-0157-G; LOCATION: Sabine Pass, Jefferson County, Texas; TYPE OF FACILITY: natural gas pipeline transportation; RULE VIOLATED: 30 TAC §122.146(1) and (2), Air Permit Number O-009061, and the Act, §382.085(b), by failing to provide an annual certificate of compliance; 30 TAC §122.503(c)(2), Air Permit Number O- 009061, and the Act, §382.085(b), by failing to submit an updated application prior to construction and by operating a vapor recovery unit and condensate tank; and 30 TAC §335.323 and the Act, §382.085(b), by failing to pay hazardous waste generator fees; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Susan Kelly, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(13) COMPANY: The City of Nome; DOCKET NUMBER: 2000-0195-PWS-E; IDENTIFIER: Public Water Supply (PWS) Number 1230039; LOCATION: Nome, Jefferson County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.120(h)(3), by failing to submit a properly completed corrosion control study; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Jaime Garza, (512) 239-1406; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(14) COMPANY: The Outpost, Inc. and B&L, L.L.C. dba Nannie's Biscuit and Bakery; DOCKET NUMBER: 2000-0357-PWS-E; IDENTIFIER: PWS Number 0750035; LOCATION: Schulenberg, Fayette County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.105, by exceeding the maximum contaminant level for total coliform bacteria; and 30 TAC §290.106(b) and (e), by failing to take the required number of repeat bacteriological samples and provide public notice for failure to take the required number of repeat bacteriological samples; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Jaime Garza, (512) 239-1406; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(15) COMPANY: Porter Municipal Utility District; DOCKET NUMBER: 2000-0121-MWD-E; IDENTIFIER: TPDES Permit Number 12242-001; LOCATION: near Porter, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TPDES Permit Number 12242-001 and the Code, §26.121, by failing to comply with ammonia nitrogen 30-day average concentration permit limits of three milligrams per liter (mgl); PENALTY: $2,625; ENFORCEMENT COORDINATOR: Julia McMasters, (512) 239-5839; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: The City of Roaring Springs; DOCKET NUMBER: 1999-0653-MWD-E; IDENTIFIER: Water Quality Permit Number 10260-001; LOCATION: Roaring Springs, Motley County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.126, by failing to meet the requirements of the 75/90 rule; and Water Quality Permit Number 10260-001 and the Code, §26.121, by failing to meet the permitted flow limits, adequately monitor effluent flow, and meet the permitted effluent quality limits;

PENALTY: $1,875; ENFORCEMENT COORDINATOR: Brian Lehmkuhle, (512) 239-4482; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(17) COMPANY: Rudolph's, Inc.; DOCKET NUMBER: 2000-0139-PST-E; IDENTIFIER: PST Facility Identification Numbers 30432, 30433, 30444, and 30436; LOCATION: Cuero, De Witt County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.7(d)(3), by failing to provide an amended registration for any change; 30 TAC §334.10(b)(1)(B), by failing to maintain copies of all required records pertaining to an UST system; 30 TAC §334.50(a)(1)(A) and (b)(2)(A)(i)(III), and the Code, §26.3475, by failing to provide a release detection method capable of detecting a release from the UST and test a line leak detector; 30 TAC §334.105(b), by failing to maintain an updated copy of certification of financial responsibility; and 30 TAC §334.128(a) and §334.21, by failing to pay the above-ground storage tank fees; PENALTY: $13,040; ENFORCEMENT COORDINATOR: Audra Baumgartner, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(18) COMPANY: South Road Water Supply Corporation; DOCKET NUMBER: 2000-0214- PWS-E; IDENTIFIER: PWS Number 0270028; LOCATION: Marble Falls, Burnet County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.41(e)(1)(B), §290.42(h), and the Code, §26.121, by failing to properly dispose of filter back wash and sludge from the clarifiers; and 30 TAC §291.93(3)(A) and (B), by failing to submit a planning report within 90 days after being notified that the utility had reached or exceeded 85% of its overall rated capacity; PENALTY: $563; ENFORCEMENT COORDINATOR: John Mead, (512) 239-6010; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(19) COMPANY: Sterling Chemicals Inc.; DOCKET NUMBER: 2000-0479-IHW-E; IDENTIFIER: Solid Waste Registration Number 30285; LOCATION: Texas City, Galveston County, Texas; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §335.221(a)(13) and 40 CFR §266.103(g)(1), by failing to operate the hazardous waste feed to boiler UB9 at or above the minimum combustion chamber temperature of 563 degrees Fahrenheit; PENALTY: $15,000; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: Stolthaven Houston, Inc.; DOCKET NUMBER: 2000-0358-IWD-E; IDENTIFIER: TPDES Permit Number 03129; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: chemical product storage; RULE VIOLATED: TPDES Permit Number 03129 and the Code, §26.121, by failing to comply with the chemical oxygen demand daily maximum effluent concentration limit of 150 mgl; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023- 1486, (713) 767-3500.

(21) COMPANY: City of Trenton; DOCKET NUMBER: 1999-1517-MWD-E; IDENTIFIER: National Pollutant Discharge Elimination System (NPDES) Permit Number TX0026794 and Water Quality Permit Number 10704-001; LOCATION: Trenton, Fannin County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: NPDES Permit Number TX0026794 and 30 TAC §305.125(1) and (17), by failing to submit the discharge monitoring reports; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Joseph Daley, (512) 239-3308; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(22) COMPANY: Trinity Industries, Incorporated; DOCKET NUMBER: 2000-0224-AIR-E; IDENTIFIER: Air Account Number TA-0496-G; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: railcar manufacturing; RULE VIOLATED: 30 TAC §122.121, §122.130(c)(2), and the Act, §382.054 and §382.085(b), by failing to submit a Title V abbreviated permit application; and 30 TAC §§370.008, 335.331(b), and 335.323, by failing to pay non-hazardous waste generator fees; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Wendy Penland, (817) 469-6750; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(23) COMPANY: Texas Crude Energy, Inc.; DOCKET NUMBER: 2000-0431-AIR-E; IDENTIFIER: Air Account Number NE-0062-T; LOCATION: Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: natural gas compression station; RULE VIOLATED: 30 TAC §122.121 and the Act, §382.054 and §382.085(b), by failing to obtain a Title V federal operating permit; and 30 TAC §122.130(a)(2) and the Act, §382.054 and §382.085(b), by failing to submit a federal operating permit; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Gary McDonald, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(24) COMPANY: U.S. Liquids of Texas, Inc.; DOCKET NUMBER: 2000-0326-SLG-E; IDENTIFIER: Sludge Transporter Registration Number 22718; LOCATION: Waskom, Harrison County, Texas; TYPE OF FACILITY: waste transportation; RULE VIOLATED: the Code, §26.121, by discharging grease trap waste into a drainage ditch; and 30 TAC §312.143, by failing to deliver a shipment of grease trap waste to an authorized disposal site; PENALTY: $2,000; ENFORCEMENT COORDINATOR: David Van Soest, (512) 239-0468; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(25) COMPANY: West Harris County MUD No. 17; DOCKET NUMBER: 2000-0342-MWD- E; IDENTIFIER: Water Quality Permit Number 12247-001 and TPDES Permit Number 12247-001; LOCATION: Katy, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: Water Quality Permit Number 12247-001, TPDES Permit Number 12247-001, and the Code, §26.121, by failing to meet the total suspended solids (TSS) daily average permit limit of 15 mgl, TSS individual grab permit limit of 60 mgl, ammonia-nitrogen seasonal daily average permit limit of two and three mgl, ammonia-nitrogen daily average permit limit of 6.9 pounds per day, carbonaceous biochemical oxygen demand daily average permit limit of ten mgl, and the dissolved oxygen minimum permit limit of six mgl; PENALTY: $3,000; ENFORCEMENT COORDINATOR: Michelle Harris, (512) 239-0492; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200005348
Paul Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: August 1, 2000

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (the Code), §7.075. 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* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 11, 2000**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withdraw or withhold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the 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. 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 September 11, 2000**. 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: Paul Keefer, Jr.; DOCKET NUMBER: 1999-0530-MSW-E; TNRCC IDENTIFICATION (ID) NUMBER: 455040097; LOCATION: 0.6 miles southeast of the intersection of Campbell Road and Farm-to-Market (FM) Road 157 and 0.7 miles northeast of FM Road 157, Maypearl, Ellis County, Texas and 107 South Highway 67, Venus, Ellis County, Texas; TYPE OF FACILITY: unauthorized municipal solid waste disposal site and underground storage tanks (UST); RULES VIOLATED: §330.4 and §330.5(a) and the Code, §26.121, by causing or allowing the disposal of municipal solid waste without authorization; and §334.21, by failing to pay the required UST fees for fiscal years 1992-1999; PENALTY: $15,000; STAFF ATTORNEY: John Sumner, Litigation Division, MC 175, (512) 239-0497; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(2) COMPANY: Ortega Construction Company, Incorporated; DOCKET NUMBER: 1999-0887-AIR-E; TNRCC ID NUMBER: EE-1854-T; LOCATION: 1708 First Street, El Paso, El Paso County, Texas; TYPE OF FACILITY: construction; RULES VIOLATED: §111.145(1), §101.4 and Texas Health and Safety Code (THSC), §382.085(a) and (b), by failing to utilize water, oil, or chemicals to control dust emissions during demolition and/or construction operations and by discharging dust emissions in such concentration and of such duration as are or may tend to interfere with the normal use and enjoyment of property; PENALTY: $3,125; STAFF ATTORNEY: Ali Abazari, Litigation Division, MC 175, (512) 239-5915; REGIONAL OFFICE: 401 East Franklin, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(3) COMPANY: R B Wicker Tire and Rubber Company; DOCKET NUMBER: 1999-1466-AIR-E; TNRCC ID NUMBER: EE-1224-M; LOCATION: 701 West Paisano Drive, El Paso, El Paso County, Texas; TYPE OF FACILITY: tire service store; RULES VIOLATED: §115.252(2) and THSC, §382.085(b), by allowing the transfer from a storage vessel of gasoline with a reid vapor pressure greater than 7.0 pounds per square inch absolute to a pump when the gasoline may ultimately be used in a motor vehicle; PENALTY: $1,250; STAFF ATTORNEY: Robin Houston, Litigation Division, MC 175, (512) 239-0682; REGIONAL OFFICE: 40l East Franklin, Suite 560, El Paso, Texas 7990l-1206, (915) 835-4949.

TRD-200005358
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: August 1, 2000

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Notice of Public Hearing (Chapter 39)

The Texas Natural Resource Conservation Commission (TNRCC or commission) will conduct a public hearing to receive testimony concerning amendments to 30 TAC Chapter 39, Public Notice. This notice is given under the requirements of Texas Government Code, Subchapter B, Chapter 2001.

The proposed rules would change the requirement for notice to mineral rights owners from those within the cone of influence to those underlying the proposed or existing injection well facility and underlying the tracts of land adjacent to the well facility. The proposed rules will change not only the mailed notice requirements but also the published notice requirements for Class I underground injection wells. The proposed amendments do not apply to mailed or published notice requirements for Class III injection wells or for permitted Class V injection wells.

A public hearing on this proposal will be held in Austin on September 6, 2000, at 10:00 a.m. in Building F, Room 3202A at the Texas Natural Resource Conservation Commission complex, located at 12100 Park 35 Circle. Individuals may present oral statements when called upon in the order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., September 11, 2000, and should reference Rule Log Number 1999-071- 039-WS. For further information, please contact Michelle Lingo, Policy and Regulations Division, (512) 239-6757.

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-200005280
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: July 31, 2000

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Notice of Water Rights Application

UNITED STATES DEPARTMENT OF ENERGY, 900 E. Commerce Road, New Orleans, Louisiana 70123, applicant, seeks an amendment to Certificate of Adjudication No. 12-5332, as amended, pursuant to §11.122, Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC §§295.1, et seq. Certificate of Adjudication No. 12-5332 authorized the owner to divert and use 215,000 acre-feet of water, limited to 52,000 acre-feet of water per annum, at a maximum diversion rate of 72 cfs from a specific point on the Brazos River, Brazos River Basin for mining purposes (leaching phase) at the

Bryan Mound Salt Dome Project in Brazoria County. Owner was also authorized to divert and use not to exceed 152,000 acre-feet of water, limited to 52,000 acre-feet in any one year, for mining purpose during the displacement phase of the Bryan Mound Project. Owner is also authorized to divert and use 88 acre-feet of water, limited to 3.5 acre-feet in any one year, for municipal purposes and 135 acre-feet of water per annum for industrial (fire protection) purposes. The time priority for the first 204,400 acre-feet of water authorized for diversion for mining purposes and the 135 acre-feet of water authorized for diversion for industrial (fire protection) purposes is June 25, 1979. The time priority for the remaining 162,600 acre-feet of water authorized for mining purpose and the 88 acre-feet of water authorized for municipal purposes is April 27, 1981. The certificate also contained a Special Condition stating that the certificate would become null and void when the total of 367,088 acre-feet of water had been diverted unless the certificate owner applied for and received an extension prior to diversion of the total amount of water authorized under the certificate. The certificate, as amended once, authorized an increase in the maximum diversion rate from 72 cfs to 91 cfs with a time priority of March 8, 1989. The applicant seeks to amend the certificate by increasing the maximum diversion rate from 91 cfs to 130 cfs, deleting the Special Condition limiting the total amount of water diverted under the certificate, as amended, to 367,088 acre-feet of water and allowing the applicant to continue to divert not to exceed 52,000 acre-feet of water per annum until completion of the Bryan Mound Project.

Notice is given that RANDOLPH A. RUEDRICH, 1210 East Sixteenth Street, Apartment 21, Anchorage, Alaska 99501, applicant, seeks a water use 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 a dam and reservoir on an unnamed tributary of Santa Clara Creek, tributary of Cibolo Creek, tributary of the San Antonio River, San Antonio River Basin and impound therein not to exceed 3 acre-feet at the normal operating level. The reservoir will be approximately 1.2 acres with a capacity of 3 acre-feet of water at normal operating level. Station 1 on the centerline of the dam will be at Latitude 29.56° N, Longitude 98.15° W, also bearing N 45° E, 5500 feet from the SW corner of Claiborne Rector Survey No. 83, Abstract No. 270, Guadalupe County, Texas. Applicant also seeks to divert and use not to exceed 150 acre-feet of water per annum from the perimeter of the reservoir at a maximum rate of 1400 gpm (3.12 cfs) to irrigate 70 acres of land out of a 120-acre tract in the aforesaid survey, approximately 12 miles west of Seguin, Texas and 0.3 mile SW of Marion, Texas. Ownership of the land to be irrigated by applicant is evidenced by a Warranty Deed recorded in Volume 999, pages 955-956 of the Official Records of Guadalupe County, Texas. The proposed reservoir will be immediately downstream of the City of Marion's wastewater treatment plant discharge point which will provide the majority of the water requested by the applicant.

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 proposed conditions to the requested extension of time which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not grant the application and will forward it 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, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-200005376
Ladonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: August 2, 2000

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Proposal for Decision

The State Office Administrative Hearing issued a Proposal for Decision and Order to the Texas Natural Resource Conservation Commission on July 21, 2000. Petition of the Executive Director Against Winnett Oil Company, Gerald Winnett and Francille Winnett; SOAH Docket No. 582-99-2088; TNRCC Docket No. 1997-1094-PST-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, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105 TNRCC PO Box 13087, Austin Texas 78711-3087. If you have any questions or need assistance, please contact Doug Kitts, Chief Clerk's Office, (512) 239-3317.

TRD-200005377
Douglas A. Kitts
Agenda Coordinator
Texas Natural Resource Conservation Commission
Filed: August 2, 2000

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Texas Department of Public Safety

Local Emergency Planning Committee Hazardous Materials Emergency Preparedness Grants Request for Proposals

INTRODUCTION: The Governor's Division of Emergency Management (DEM), acting for the State Emergency Response Commission (SERC), is requesting proposals for Local Emergency Planning Committee (LEPC) Hazardous Materials Emergency Preparedness (HMEP) grants to be awarded to Cities/Counties representing LEPCs to further their work in hazardous materials transportation emergency planning.

DESCRIPTION OF ACTIVITIES: LEPCs are mandated by the federal Emergency Planning and Community Right-to-Know Act (EPCRA) to

provide planning and information for communities relating to chemicals, in their use, storage or transit. The U.S. Department of Transportation has made grant money available to enhance communities' readiness for responding to hazardous materials transportation incidents. A grant may be used by an LEPC in various ways, depending on a community's needs.

ELIGIBLE APPLICANTS: Each proposal must be developed by an LEPC, the membership of which is recognized by the SERC, in cooperation with county and/or city governments. The proposal must be approved by a vote of the LEPC. Each LEPC shall arrange for a city or county to serve as its fiscal agent for management of any and all money awarded under this grant.

CERTIFICATION: The fiscal agent must provide certification to commit funds for this project. The certification must be in the form of an enabling resolution from the county or authorization to commit funds from the city as appropriate.

BUDGET LIMITATIONS: Total funding for these grants is dependent on the amount granted to the state from the U.S. Department of Transportation. No less then seventy-five percent of the money granted to the state for planning will be awarded to LEPCs. This is the fifth of a series of annual grant awards, which will be issued through FY 2001. Grants will be awarded based upon population, Hazardous Materials risk, need, and cost-effectiveness as judged by DEM. DEM will fund eighty percent of the total project cost. Twenty percent of the project cost must be borne by the grantee. Approved in-kind contributions may be used to satisfy this contribution. LEPCs must maintain the same level of spending for planning as an average of the past two years, in addition to the grant.

EXAMPLES OF PROPOSALS: Development, improvement, and implementation of the emergency plans required under the Emergency Planning and Community Right-to-Know Act (EPCRA), as well as exercises, which test the emergency plan. Improvement of emergency plans may include hazard analysis as well as response procedures for emergencies involving transportation of hazardous materials including radioactive materials. An assessment to determine flow patterns of hazardous materials within a State, between a State and another State or Indian Country, and development and maintenance of a system to keep such information current. An assessment of the need for regional hazardous materials emergency response teams. An assessment of local response capabilities. Conducting emergency response drills and exercises associated with emergency response plans. Technical staff to support the planning effort. (staff funding under planning grants cannot be diverted to support other requirements of EPCRA.) Public outreach about hazardous materials training issues such as community protection, chemical emergency preparedness, or response. Any other planning project related to the transportation of hazardous materials approved by DEM.

CONTRACT PERIOD: Grant contracts begin as early as December 15, 2000, and end August 12, 2001.

FINAL SELECTION: The DEM shall review the proposals. SERC Subcommittee on Planning will make the final selection. The State is under no obligation to award grants to all applicants.

APPLICATION FORMS AND DEADLINE: The "Request for Proposals and Application Package" should be sent via certified/registered mail or other private mail delivery service, requiring a signature to the Texas Department of Public Safety, Division of Emergency Management, P.O. Box 4087, Austin, Texas 78773-0225. An application may be requested by calling DEM at (512) 424-5985. The original and four copies of the completed application must be received at above address by 5:00 P.M. on October 31, 2000. For more information, please call (512) 424-5985.

TRD-200005219
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Filed: July 28, 2000

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Public Utility Commission of Texas

Notice of Application for Amendment to Certificate of Operating Authority

On July 26, 2000, Birch Telecom of Texas Ltd., L.L.P. filed an application with the Public Utility Commission of Texas (commission) to amend its certificate of operating authority (COA) granted in COA Certificate Number 50023. Applicant intends to relinquish its COA in favor of a Service Provider Certificate of Operating Authority, and expand its geographic area to include the entire state of Texas.

The Application: Application of Birch Telecom of Texas Ltd., L.L.P. for an Amendment to its Certificate of Operating Authority, Docket Number 22829.

Persons with questions about this docket, or who wish to intervene or otherwise participate in these proceedings should make appropriate filings or comments to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 no later than August 16, 2000. You may contact the commission's Office of Customer Protection at (512) 936-7120. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 22829.

TRD-200005283
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 31, 2000

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Notice of Application for Amendment to Certificate of Operating Authority

On July 31, 2000, XIT Telecommunication & Technology, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its certificate of operating authority (COA) granted in COA Certificate Number 50010. Applicant intends to expand its geographic area to the Amarillo Local Access and Transport Area.

The Application: Application of XIT Telecommunication & Technology, Inc. for an Amendment to its Certificate of Operating Authority, Docket Number 22863.

Persons with questions about this docket, or who wish to intervene or otherwise participate in these proceedings should make appropriate filings or comments to the Public Utility Commission of Texas at P.O. Box 13326, Austin, Texas 78711-3326 no later than August 16, 2000. You may contact the commission's Office of Customer Protection at (512) 936-7120. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 22863.

TRD-200005350
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 1, 2000

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On July 28, 2000, Winstar Wireless, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60027. Applicant intends to reflect a proposed corporate reorganization whereby WCI Capital Corporation, a sister company of the Applicant and a wholly-owned subsidiary of Winstar Communications, Inc., will interpose Winstar Wireless, Inc., and WCI Capital Corporation.

The Application: Application of Winstar Wireless, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 22846.

Persons with questions about this docket, or who wish to intervene or otherwise participate in these proceedings should make appropriate filings or comments to the Public Utility Commission of Texas at P.O. Box 13326, Austin, Texas 78711-3326 no later than August 16, 2000. You may contact the commission's Office of Customer Protection at (512) 936-7120. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 22846.

TRD-200005352
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 1, 2000

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on July 24, 2000, 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 Telseon Carrier Services, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 22824 before the Public Utility Commission of Texas.

Applicant intends to provide a wide range of broadband and high-speed digital private line services.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas at P.O. Box 13326, Austin, Texas 78711-3326 or call the commission's Office of Customer Protection at (512) 936-7120 no later than August 16, 2000. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200005199
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 27, 2000

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on July 27, 2000, 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 Compass Telecommunications, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 22833 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, and long distance services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by Southwestern Bell Telephone Company.

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 August 16, 2000. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200005281
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 31, 2000

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on July 28, 2000, 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 ETEX Telecom for a Service Provider Certificate of Operating Authority, Docket Number 22845 before the Public Utility Commission of Texas.

Applicant intends to provide a full range of telecommunications services which will include but not be limited to: local exchange service, basic local telecommunications service, long distance service, Internet service, cable service, security systems, and switched access via the use of its own facilities.

Applicant's requested SPCOA geographic area includes the area comprising the Longview Local Access and Transport Area within the 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 August 16, 2000. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200005353
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 1, 2000

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on July 31, 2000, 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 NeoPrism Networks, L.P. for a Service Provider Certificate of Operating Authority, Docket Number 22862 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ISDN, DSL, SDSL, Optical Services, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T-1, long distance and wireless services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by Southwestern Bell Telephone Company and Verizon Southwest (formerly known as GTE Southwest, 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 August 16, 2000. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200005351
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 1, 2000

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Notice of Application for Transfer of Certificate of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application for transfer of a certificate of convenience and necessity on June 21, 2000, pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §37.154 (Vernon 1998).

Docket Style and Number: Application for Sale, Transfer, or Merger of Kimble Electric Cooperative, Inc. Docket Number 22697.

The Application: Kimble Electric Cooperative, Inc. (KEC) seeks approval of the transfer of the certificate of convenience and necessity of KEC to Pedernales Electric Cooperative, Inc. (PEC), pursuant to §37.154 of the Public Utility Regulatory Act. KEC does not seek approval of the transfer pursuant to PURA §14.101 regarding sales, transfers and mergers, but asserts that PURA §14.101 does not apply to this proceeding. KEC states that all customers of KEC will be charged different rates than they were charged before the transaction. KEC asserts that each KEC rate class will be rolled into a PEC rate class consisting of a rate that is, on that date, no higher than that of the previously corresponding KEC rate class.

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 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989.

TRD-200005188
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 26, 2000

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Notice of Application to Amend Certificate of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on July 24, 2000, to amend a certificate of convenience and necessity pursuant to §§14.001, 37.051, and 37.054, 37.056, 37.057 of the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998) (PURA). A summary of the application follows.

Docket Style and Number: Application of Texas Utilities Electric Company (TXU Electric) to Amend A Certificate of Convenience and Necessity for a Proposed Transmission Line Within Mitchell, Brown and Comanche Counties. Docket Number 22823.

The Application: TXU Electric proposes to construct a portion of a 345 kV transmission line from the Morgan Creek Steam Electric Station located southwest of the City of Colorado City in Mitchell County to the Comanche Switching Station located southwest of the City of Comanche in Comanche County. This 345 kV transmission line will also terminate, along its route, at the West Texas Utilities Company (WTU) proposed Twin Buttes Switching Station located west of the City of San Angelo and the WTU Red Creek Switching Station located east of the City of San Angelo in Tom Green County. This project, which is known as the Morgan Creek-Twin Buttes-Red Creek-Comanche Switch transmission line, was identified by the Electric Reliability Council of Texas (ERCOT) Independent System Operator (ISO) as necessary. Copies of the amended application and additional associated maps are available for review at the offices of TXU Electric, 1601 Bryan Street, Suite 19002, Dallas, Texas 75201-3411. Arrangements to view or obtain a map may be made by contacting David T. Gill, Rates and Regulatory Manager at (214) 812-4812.

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 or (888) 782-8477. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. The deadline for intervention in the proceeding will be established, but will be no earlier than September 7, 2000. The commission should receive a letter requesting intervention on or before that date.

TRD-200005189
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 27, 2000

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Notice of Application to Amend Certificate of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on July 31, 2000, to amend a certificate of convenience and necessity pursuant to §§14.001, 37.051, and 37.054, 37.056, 37.057 of the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998) (PURA). A summary of the application follows.

Docket Style and Number: Application of Central Power and Light Company (CPL) to Amend A Certificate of Convenience and Necessity for a Proposed Transmission Line Within Webb County. Docket Number 22860.

The Application: CPL proposes to design and construct a 2.7-mile, 138 kV transmission line circuit in Webb County approximately 9 miles north of Laredo. The project consists of a North Laredo transmission switching station to be located approximately 1.8 miles west of a test track located approximately 8 miles north of Laredo just off I-35. This transmission switching station is being built adjacent to and tapping into the 138 kV transmission line named "Wormser/Encinal Gateway Tap-Encinal." The project includes the construction of a 2.7 mile hair-pin double circuit line from the new switching station over to and tapping the CPL 138 kV transmission line name "Mines Road-Asherton." The Mines Road substation is located approximately 0.6 miles west of Middle Pasture Lake and just east of Farm to Market Road 1472. The tap point is located approximately 2.5 miles north-northeast of the Mines Road Substation. Copies of the amended application and additional associated maps are available for review at the offices of the CPL Office located at 1519 Calton Road, Laredo, Texas. Arrangements to view or obtain a map may be made by contacting Ralph Underbrink at (361) 881-5542.

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 or (888) 782-8477. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. The deadline for intervention in the proceeding will be established, but will be no earlier than September 14, 2000. The commission should receive a letter requesting intervention on or before that date.

TRD-200005362
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 1, 2000

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Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on July 28, 2000, to amend a certificated service area boundary in Medina County pursuant to §§14.001, 37.051, and 37.054, 37.056, 37.057 of the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998 & Supp. 2000) (PURA). A summary of the application follows.

Docket Style and Number: Application of City Public Service Board of San Antonio (CPSB) and Bandera Electric Cooperative, Inc (BEC) to Amend Certificated Service Area Boundaries Within Medina County. Docket Number 22847.

The Application: This service area exception is necessary since the majority of proposed lots of the Bear Springs Ranch Subdivision lie within the existing certificated service area of CPSB. The subdivision is located on FM 1283 approximately three miles west, northwest of the intersection of FM 471 North and FM 1283 in Medina County, Texas. CPSB has existing capacity to service this entire subdivision, and BEC agrees to amend their service boundary with CPSB to accommodate this realignment. CPSB intends on providing an overhead electric distribution extension, consisting of power poles, down guys and anchors, and approximately 11,300 feet of single phase conductors to eventually provide distribution infrastructure to the lots originally within the service boundary of BEC. Individual services will be provided from overhead mounted transformers when requested. The new load to be served is estimated to be about 15-17 kVA per lot. Copies of the application and additional associated maps are available for review at CPSB office at 145 Navarro, San Antonio, Texas. Persons with questions about this project should contact Richard Castrejana at (210) 353-2639.

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 or (888) 782-8477. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. The deadline for intervention in the proceeding will be established. The commission should receive a letter requesting intervention.

TRD-200005341
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 31, 2000

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Public Notice of Amendment to Interconnection Agreement

On July 21, 2000, New Edge Network, Inc. doing business as New Edge Networks and GTE Southwest, 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22814. 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 ten 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 22814. 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 August 23, 2000, 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 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. All correspondence should refer to Docket Number 22814.

TRD-200005172
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 26, 2000

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Public Notice of Amendment to Interconnection Agreement

On July 25, 2000, Southwestern Bell Telephone Company and SBC Advanced Solutions, 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22827. 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 ten 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 22827. 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 August 24, 2000, 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 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. All correspondence should refer to Docket Number 22827.

TRD-200005284
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 31, 2000

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Public Notice of Amendment to Interconnection Agreement

On July 27, 2000, Southwestern Bell Telephone Company and Excalibur Telephone, 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22841. 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 ten 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 22841. 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 August 25, 2000, 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 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. All correspondence should refer to Docket Number 22841.

TRD-200005337
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 31, 2000

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Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.215

Notice is given to the public of the filing with the Public Utility Commission of Texas of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.215.

Docket Title and Number. GTE Southwest, Inc.'s Application for Approval of LRIC Study for Long Distance Carrier Initiated Toll Blocking Requests Service Pursuant to P.U.C. Substantive Rule §26.215 on or after August 7, 2000, Docket Number 22839.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 22839. Written comments or recommendations should be filed no later than 45 days after the date of sufficiency and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may 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-200005336
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 31, 2000

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Public Notice of Interconnection Agreement

On July 21, 2000, Southwestern Bell Telephone Company and Texacom Corporation, collectively referred to as applicants, filed a joint application for approval of an 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22821. 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 ten 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 22821. 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 August 23, 2000, 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 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. All correspondence should refer to Docket Number 22821.

TRD-200005170
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 26, 2000

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Public Notice of Interconnection Agreement

On July 21, 2000, Progressive Concepts, Inc. and GTE Southwest, Inc., collectively referred to as applicants, filed a joint application for approval of an 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22815. 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 ten 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 22815. 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 August 23, 2000, 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 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. All correspondence should refer to Docket Number 22815.

TRD-200005171
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 26, 2000

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Public Notice of Interconnection Agreement

On July 20, 2000, TechTel Communications 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22807. 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 ten 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 22807. 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 August 22, 2000, 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 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. All correspondence should refer to Docket Number 22807.

TRD-200005173
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 26,2000

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Public Notice of Interconnection Agreement

On July 20, 2000, BroadBand Communications, Inc. 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22806. 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 ten 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 22806. 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 August 22, 2000, 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 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. All correspondence should refer to Docket Number 22806.

TRD-200005174
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 26, 2000

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Public Notice of Interconnection Agreement

On July 26, 2000, Southwestern Bell Telephone Company and Servisense.com, 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22830. 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 ten 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 22830. 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 August 24, 2000, 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 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. All correspondence should refer to Docket Number 22830.

TRD-200005282
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 31, 2000

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Public Notice of Interconnection Agreement

On July 27, 2000, United Telephone Company of Texas, Inc. doing business as Sprint, Central Telephone Company of Texas doing business as Sprint, and Tele-Touch Communications, 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22836. 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 ten 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 22836. 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 August 25, 2000, 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 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. All correspondence should refer to Docket Number 22836.

TRD-200005333
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 31, 2000

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Public Notice of Interconnection Agreement

On July 27, 2000, United Telephone Company of Texas, Inc. doing business as Sprint, Central Telephone Company of Texas doing business as Sprint, and Preferred Carrier Services, 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22837. 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 ten 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 22837. 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 August 25, 2000, 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 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. All correspondence should refer to Docket Number 22837.

TRD-200005334
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 31, 2000

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Public Notice of Interconnection Agreement

On July 27, 2000, United Telephone Company of Texas, Inc. doing business as Sprint, Central Telephone Company of Texas doing business as Sprint, and Quick-Tel Communications, 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22838. 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 ten 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 22838. 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 August 25, 2000, 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 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. All correspondence should refer to Docket Number 22838.

TRD-200005335
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 31, 2000

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Public Notice of Interconnection Agreement

On July 28, 2000, STPCS Joint Venture, LLC doing business as SOL Communications 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22844. 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 ten 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 22844. 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 August 25, 2000, 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 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. All correspondence should refer to Docket Number 22844.

TRD-200005340
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 31, 2000

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Public Notice of Interconnection Agreement

On July 28, 2000, United Telephone Company of Texas, Inc. doing business as Sprint, Central Telephone Company of Texas doing business as Sprint, and Pathnet 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22857. 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 ten 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 22857. 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 August 25, 2000, 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 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. All correspondence should refer to Docket Number 22857.

TRD-200005342
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 31, 2000

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Public Notice of Interconnection Agreement

On July 28, 2000, Southwestern Bell Telephone Company and Global Crossing Telemanagement, 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22858. 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 ten 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 22858. 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 August 25, 2000, 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 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. All correspondence should refer to Docket Number 22858.

TRD-200005343
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 31, 2000

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Public Notice of Interconnection Agreement

On July 28, 2000, Southwestern Bell Telephone Company and TGEC Communications Company, LLC, 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, Chapters 52 and 60 (Vernon 1998) (PURA). The joint application has been designated Docket Number 22859. 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 ten 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 22859. 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 August 25, 2000, 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 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. All correspondence should refer to Docket Number 22859.

TRD-200005338
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 31, 2000

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Texas Department of Transportation

Public Notice-Disadvantaged Business Enterprise Goals, FY 2001

In accordance with Title 49, Code of Federal Regulations, Part 26, recipients of federal-aid funds authorized by the Transportation Equity Act for the 21st Century (TEA 21) are required to establish Disadvantaged Business Enterprise (DBE) programs. Section 26.45 requires the recipients of federal funds, including the Texas Department of Transportation, to set overall goals for DBE participation in U. S. Department of Transportation assisted contracts. As part of this goal-setting process, the Texas Department of Transportation is publishing this notice to inform the public of the proposed overall goals, and to provide instructions on how to obtain copies of documents explaining the rationale for each goal.

The proposed Fiscal Year 2001 DBE goals are 11.90% for highway design and construction, 11.9% for aviation and 8.4% for public transportation. The proposed goals and goal-setting methodology for each are available for inspection between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday, beginning August 9, 2000, in the office of the Texas Department of Transportation, Construction Division, Business Opportunity Programs Section, 105 West Riverside Drive, Austin, Texas 78704.

The department will accept comments on the DBE goals for 45 days beginning August 9, 2000, and ending September 25, 2000. Comments can be sent to Cynthia F. Gonzales, Construction Division, 125 E. 11th St., Austin, Texas 78701; (512) 703-5837; Fax: (512) 703-5803; Email: **cgonza3@.dot.state.tx.us**

TRD-200005381
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: August 2, 2000

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Texas Water Development Board

Applications Received

Pursuant to the Texas Water Code, Section 6.195, the Texas Water Development Board provides notice of the following applications received by the Board:

City of Grandview, 304 East Criner, P.O. Box 425, Grandview, Texas, 76050, received July 5, 2000, application for financial assistance in the amount of $1,320,000 from the Texas Water Development Funds.

Greater Texoma Utility Authority, on behalf of the City of Van Alstyne, 5100 Airport Drive, Denison, Texas, 75050, application for financial assistance in the amount of $1,140,000 from the Texas Water Development Funds.

City of McAllen, 1300 Houston Street, McAllen, Texas, 78501, received May 16, 2000, application for loan/grant assistance in the total amount of $120,619 from the Colonia Plumbing Loan Program.

South Newton Water Supply Corporation, P.O. Box 659, Deweyville, Texas, 77614-0659, received August 1, 2000, application for financial assistance in the amount of $16,930,305 from the Economically Distressed Areas Program and the Texas Water Development Funds.

City of Laredo, 1100 Houston Street, Laredo, Texas, 78040, received April 3, 2000, application for financial assistance in the amount of

$16,770,920 from the Economically Distressed Areas Program and the Colonia Wastewater Treatment Treatment Assistance Program.

San Jacinto River Authority, P.O. Box 329, Conroe, Texas, 77305-0329, received July 7, 2000, application for grant assistance in an amount not to exceed $12,000 from the Research and Planning Fund.

Lower Colorado River Authority, P.O. Box 220, Austin, Texas, 78767-0220, received July 25, 2000, application for grant assistance in an amount not to exceed $171,080.66 from the Research and Planning Fund.

North Harris County Regional Water Authority, P.O. Box 680609, Houston, Texas, 77268-0609, received May 4, 2000, application for grant assistance in an amount not to exceed $181,500 from the Research and Planning Fund.

Brazos River Authority, P.O. Box 7555, Waco, Texas, 76714-7555, received May 5, 2000, application for grant assistance in an amount not to exceed $57,650 from the Research and Planning Fund.

Brazos River Authority, P.O. Box 7555, Waco, Texas, 76714-7555, received May 5, 2000, application for grant assistance in an amount not to exceed $32,650 from the Research and Planning Fund.

Brazos River Authority, P.O. Box 7555, Waco, Texas, 76714-7555, received May 5, 2000, application for grant assistance in an amount not to exceed $61,750 from the Research and Planning Fund

Eagle Pass Water Works System, P.O. Box 808, Eagle Pass, Texas, 78852-0808, received May 5, 2000, application for grant assistance in an amount not to exceed $82,892 from the Research and Planning Fund.

Lower Colorado River Authority, P.O. Box 220, Austin, Texas, 78767-0220, in conjunction with Brazos River Authority, P.O. Box 7555, Waco, Texas, 76714-7555, received May 5, 2000, application for grant assistance in an amount not to exceed $71,000 from the Research and Planning Fund.

City of Alice, P.O. Box 3229, Alice, Texas, 78333, received May 5, 2000, application for grant assistance in an amount not to exceed $175,000 from the Research and Planning Fund.

Sabine County, P.O. Box 716, Hemphill, Texas, 75948, received May 5, 2000, application for grant assistance in an amount not to exceed $220,000 from the Research and Planning Fund.

City of Alvin, 110 West Highway 6, Alvin, Texas, 77511, received May 5, 2000, application for grant assistance in an amount not to exceed $68,921 from the Research and Planning Fund.

San Antonio River Authority, P.O. Box 839980, San Antonio, Texas, 78283-9980, received May 5, 2000, application for grant assistance in an amount not to exceed $40,000 from the Research and Planning Fund.

TRD-200005391
Gail L. Allan
Director of Project-Related Legal Services
Texas Water Development Board
Filed: August 2, 2000

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Texas Workforce Commission

Request for Proposals Texas School-Linked Child Care Program

A. PROPOSAL DESCRIPTION

TWC invites proposals from Independent School Districts for the Texas School-Linked Child Care Program. The Texas School-Linked Child Care Program is defined as providing child care for school-age children before school, after school, during school vacation and on school holidays. The purpose of the awards is for planning and developing school-age child care services, including the implementation of research based reading programs, start up for school-age child care services, expanding existing school-age child care services and/or the enhancement of existing school-age child care services. As an example, enhancement can include such things as curriculum development, salaries for staff, training, equipment, supplies, field trips and tutoring.

B. AUTHORIZATION TO AWARD CONTRACT

TWC is authorized to issue this RFP and award contracts under §33.902 of the Education Code

C. AVAILABLE FUNDING

Up to four hundred thousand dollars ($400,000) will be available with a maximum of forty thousand dollars ($40,000) to each responsive district applying for funding. Depending on actual available funds, the funding and scope of the contract let as a result of this RFP may be adjusted accordingly without a new procurement. It is TWC intent to fund as many responsive proposals as possible. Even though TWC wants to fund as many proposals as possible, TWC is under no legal requirement to execute a contract on the basis of this RFP. In awarding the funds, TWC may consider the innovative use of the proposed program, prior success of the proposed program, prior receipt by a school district of funds under this program, and equitable allocation of funds between urban and rural areas of the state. The contracts utilizing the funds will be effective October 1, 2000, and terminating August 31, 2001.

D ELIGIBLE APPLICANTS

In order to be considered eligible, applicants submitting proposals must complete a Request for Proposal (RFP) Package and provide required documentation as requested in the application and have written acknowledgment from the Local Workforce Development Board that the Board has reviewed and supports the proposed plan.

E. PROJECT SCHEDULE

Application submission deadline is September 7, 2000. The anticipated contract effective date is October 1, 2000.

F. SCORING CRITERIA

The evaluation criteria for this RFP and their relative weights for scoring are: quality of program design - 35 points, demonstrated effectiveness - 30 points, collaboration and coordination -15 points, reasonableness of budgeted costs and cost documentation -10 points key financial controls - 10 points.

G. SELECTION, NOTIFICATION AND NEGOTIATION PROCESS

TWC will use competitive negotiation to determine awards. Proposals will be evaluated and tentatively ranked by TWC. Applicants submitting superior proposals may be invited to make oral presentations to TWC.

H. PAYMENT

The basis of payment for this award shall be reimbursement of actual allowable cost up to budgeted levels and subject to budget limitations.

I. TWC'S CONTACT PERSON

For further information and to request an Application Packet, contact Bill Turner, Texas Workforce Commission, Room 440T, 101 East 15th Street, Austin, TX 78778-0001, (512) 936-3203, fax (512) 936-3420, e-mail address bill.turner@twc.state.tx.us

TRD-200005385

J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Filed: August 2, 2000

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Request for Proposals Welfare-to -Work Match Technical Assistance

A. PROPOSAL DESCRIPTION

The Texas Workforce Commission is soliciting proposals from contractors to provide Technical Assistance to all Local Workforce Development Boards (Boards) in the development of these local systems: (a) a system to identify sources of Welfare-to-Work (WtW) match, (b) a system to assess value of WtW match, and (c) a reporting system to properly report WtW match. The contractor will also assist Local Workforce Development Areas (LWDAs) with the proper reporting of match funding expended, including the development of proper documentation to capture and report match. The contractor will be expected to fulfill the following deliverables: (a) Visit the following LWDAs initially (Tarrant County, Dallas County, Upper Rio Grande, Alamo, Coastal Bend, Lower Rio Grande, Gulf Coast, and Cameron County) and then the remaining LWDAs to assess the current status of efforts to secure, record and report match resources for WtW in the LWDA, and to provide initial on-site technical assistance to the systems described above. (b) Provide follow-up technical assistance to LWDAs by preparing a report for each, and (c) Prepare a technical assistance guide for securing, recording and reporting WtW match.

B. AUTHORIZATION TO AWARD CONTRACT

TWC is authorized to issue this RFP and award contracts under the Welfare-to-Work Grants Rules at 20 CFR Part 645, Subparts D and E, implementing Section 403(a)(5) of the Social Security Act [42 U.S.C.A. 603 (a)(5)].

C. AVAILABLE FUNDING

Approximately $600,000 will be available for the 23-month period beginning October 1, 2000, to run through August 31, 2002.

D. ELIGIBLE APPLICANTS

: Applicants submitting proposals must complete a Request for Proposal (RFP) Package and provide required documentation as requested in the application in order to be considered eligible.

E. PROJECT SCHEDULE

Application submission deadline is September 8, 2000. The anticipated contract effective date is October 1, 2000.

F. SCORING CRITERIA

The evaluation criteria for this RFP and their relative weights for scoring are: Demonstrated effectiveness to perform the services, this includes documentation of past work experience and references, 45 points; Quality of Proposal, this includes a description of proposed plan for the completion of the deliverables, 45 points; Cost Reasonableness, 10 points.

G. SELECTION, NOTIFICATION AND NEGOTIATION PROCESS

TWC will use competitive negotiation to determine awards. Proposals will be evaluated and tentatively ranked by TWC. Applicants submitting superior proposals may be invited to make oral presentations to TWC.

H. PAYMENT

The basis of payment for this award shall be reimbursement of actual allowable cost up to budgeted levels and subject to budget limitations.

I. TWC'S CONTACT PERSON

For further information and to request a package for RFP # GPFP 00-07 contact Elwood (Woody) Engebretson, Program Specialist, Texas Workforce Commission, Room 440T, 101 East 15th Street, Austin, TX 78778-0001, (512) 936-4874, fax (512) 936-3420, e-mail address elwood.engebretson@twc.state.tx.us

TRD-200005378
J. Ferris Duhon
Assistant General Counsel
Texas Workforce Commission
Filed: August 2, 2000

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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

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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

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