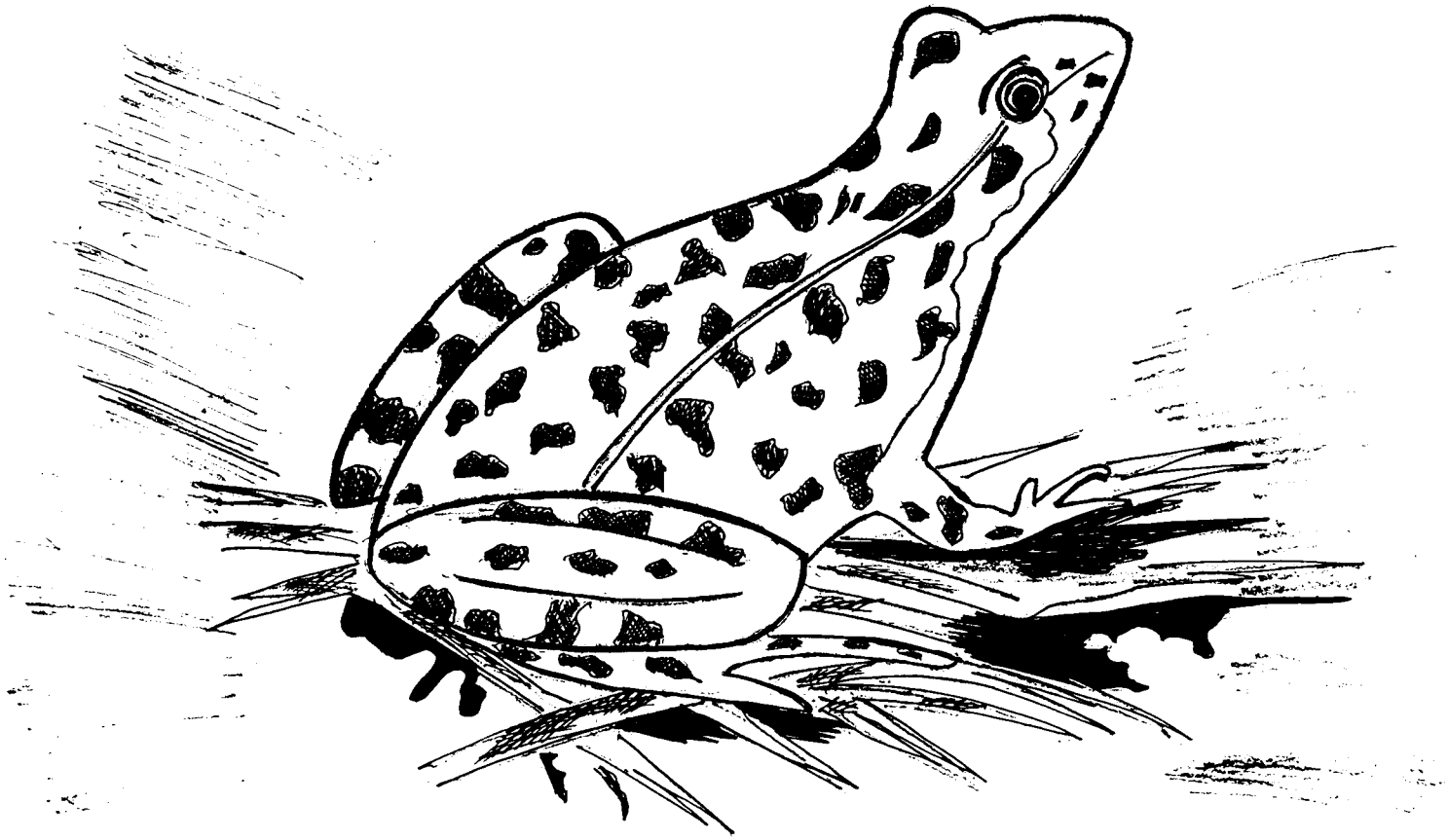
# TEXAS REGISTER

*Volume 25 Number 34 August 25, 2000* *Pages 8095--8528*



**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.

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

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

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



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

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


a section of the
Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(800) 22607199
(512) 463-5561
FAX (512) 463-5569

http://www.sos.state.tx.us

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## *RULE REVIEW*

## TABLES AND GRAPHICS

### Tables and Graphics



## IN ADDITION

### Coastal Coordination Council



### Comptroller of Public Accounts



### Office of Consumer Credit Commissioner



### Texas Credit Union Department



### Texas Commission for the Deaf and Hard of Hearing



### Texas Education Agency



### Commission on State Emergency Communications



### Golden Crescent Workforce Development Board



### Texas Health and Human Services Commission



### Texas Department of Health



### Texas Department of Insurance



### Texas Commission on Jail Standards



### Texas Department of Licensing and Regulation



### Texas Natural Resource Conservation Commission



### Panhandle Regional Planning Commission



### Public Utility Commission of Texas



### Stephen F. Austin State University

# OFFICE OF THE ATTORNEY GENERAL

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

## Open Records

**Open Records Decision No. 666.**

Re: Whether a municipality's disclosure to a municipally-appointed citizen advisory board of information pertaining to a municipally-owned power utility that is reasonably related to a competitive matter waives the municipality's claim to withhold such information under §552.131 of the Government Code.

**SUMMARY.**

A municipality's disclosure to a municipally appointed citizen advisory board of information pertaining to a municipally-owned power utility does not constitute a release to the public as contemplated under §552.007 of the Government Code, and therefore does not prevent the governmental body from thereafter asserting an exception under the Public Information Act to the public release of the information.

TRD-200005757
Susan Gusky
Assistant Attorney General
Office of the Attorney General
Filed: August 15, 2000

♦ ♦ ♦

## Opinions

**Opinion No. JC-0267**

The Honorable Susan Combs Commissioner Texas Department of Agriculture 1700 North Congress Avenue Room 933 Austin, Texas 78701

Re: Construction of section 58.014(b), Agriculture Code, which relates to the voting procedures of the board of the Texas Agricultural Finance Authority (RQ 0188-JC)

**S U M M A R Y**

Given the unamended language of section 58.014(b) of the Agriculture Code, it is possible for an affirmative vote of three members of the Texas Agricultural Finance Authority to pass a resolution when those three members constitute a majority of a quorum of the board. While the statutory language at issue may have been a matter of legislative oversight, the correction of such oversight, if any, is a matter for the legislature.

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

TRD-200005780
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: August 16, 2000

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## Request for Opinions

**RQ-0261-JC**

Mr. Wayne Thorburn Administrator Texas Real Estate Commission P.O. Box 12188 Austin, Texas 78711-2188

Re: Whether article 6573b, Texas Civil Statutes, is applicable to service contract providers required to register with the Texas Department of Licensing and Regulation under Acts 1999, 76th Leg., ch. 1559, § 1 (Request No. 0261-JC)

**Briefs requested by September 8, 2000**

**RQ-0262-JC**

The Honorable Jeff Wentworth Chair, Nominations Committee Texas State Senate P.O. Box 12068 Austin, Texas 78711

Re: Whether the Edwards Aquifer Authority is subject to the Open Meetings Act when a majority of board members attend a meeting of one of its component subcommittees (Request No. 0262-JC)

**Briefs requested by September 11, 2000**

**RQ-0263-JC**

The Honorable Tom O'Connell Criminal District Attorney Collin County Courthouse 210 South McDonald, Suite 324 McKinney, Texas 75069

Re: Responsibility of a sheriff for taking custody of a person hospitalized for injuries sustained while being arrested by law enforcement officers of a different jurisdiction (Request No. 0263-JC)

**Briefs requested by September 14, 2000**

**RQ-0264-JC**

The Honorable Susan D. Reed Bexar County Criminal District Attorney Bexar County Justice Center 300 Dolorosa, Fifth Floor San Antonio, Texas 78205

Re: File stamping duties of a county clerk (Request No. 0264-JC)

**Briefs requested by September 14, 2000**

TRD-200005779
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: August 16, 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 13. CULTURAL RESOURCES

# PART 3. TEXAS COMMISSION ON THE ARTS

## CHAPTER 31. AGENCY PROCEDURES

**13 TAC §31.10**

The Texas Commission on the Arts adopts on an emergency basis an amendment to §31.10, concerning Financial Assistance Application Form. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously proposes this amendment to §31.10.

The purpose of this amendment is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended September 2000.

This section is adopted on an emergency basis to enable the Texas Commission on the Arts to get the word out to the arts field about our programs in a timely manner in anticipation of our upcoming annual grants deadline.

The amendment is adopted on an emergency basis under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

*§31.10. Financial Assistance Application Form.*

The commission adopts by reference application form and instructions for the Financial Assistance Application Form as outlined in the Texas Arts Plan as amended September 2000 [~~September 1998~~]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005666
John Paul Batiste
Executive Director
Texas Commission on the Arts
Effective date: August 14, 2000
Expiration date: December 12, 2000
For further information, please call: (512) 463-5535

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## CHAPTER 35. A GUIDE TO OPERATIONS, PROGRAMS AND SERVICES

**13 TAC §35.1, §35.2**

The Texas Commission on the Arts adopts on an emergency basis amendments to §35.1 and 35.2, concerning A Guide to Operations and A Guide to Programs and Services. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously proposes amendments to §35.1 and §35.2.

The purpose of the amendments is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended September 2000.

These sections are adopted on an emergency basis to enable the Texas Commission on the Arts to get the word out to the arts field about our programs in a timely manner in anticipation of our upcoming annual grants deadline.

The amendments are adopted on an emergency basis under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

*§35.1. A Guide to Operations.*
The commission adopts by reference A Guide to Operations effective September 2000 [~~September 1999~~]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

*§35.2. A Guide to Programs and Services.*
The commission adopts by reference A Guide to Programs and Services effective September 2000 [~~September 1999~~]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005667
John Paul Batiste
Executive Director
Texas Commission on the Arts
Effective date: August 14, 2000
Expiration date: December 12, 2000
For further information, please call: (512) 463-5535

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## CHAPTER 37. APPLICATION FORMS AND INSTRUCTIONS FOR FINANCIAL ASSISTANCE

The Texas Commission on the Arts adopts on an emergency basis amendments to §§37.22-37.24, 37.26 and 37.28, concerning Application Forms and Instructions for Financial Assistance. The Texas Commission on the Arts also adopts the repeal of §37.27, concerning Application Form and Instructions for Operational Assistance Year 2 of 2. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously proposes amendments to §§37.22-37.24, 37.26 and 37.28 and the repeal of §37.27.

The purpose of the amendments is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended September 2000.

These sections are adopted on an emergency basis to enable the Texas Commission on the Arts to get the word out to the arts field about our programs in a timely manner in anticipation of our upcoming annual grants deadline.

**13 TAC §§37.22-37.24, 37.26, 37.28**

The amendments are adopted on an emergency basis under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

*§37.22. Application Form and Instructions for Artist-in-Education Program--Artist.*

The commission adopts by reference the application form and instructions for the Artist-in-Education Program--Artist as outlined in the Texas Arts Plan amended to be effective September 2000 [~~September 1998~~]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

*§37.23. Application Form and Instructions for Arts in Education Program--Sponsors.*

The commission adopts by reference application form and instructions for Arts in Education Program--Sponsors as outlined in the Texas Arts Plan as amended September 2000 [~~September 1998~~]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

*§37.24. Application Form and Instructions for Texas Touring Arts Program--Company/Artist.*

The commission adopts by reference the application form and instructions for the Texas Touring Arts Program--Company/Artist as outlined in the Addendum to the Texas Arts Plan, amended to be effective September 2000 [~~September 1998~~]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

*§37.26. Application Form and Instructions for Texas Touring Arts Program--Sponsors.*

The commission adopts by reference application form and instructions for the Texas Touring Arts Program--Sponsors as outlined in the Texas Arts Plan as amended September 2000 [~~September 1998~~]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

*§37.28. Application Form and Instructions for Arts Education Service Provider.*

The commission adopts by reference the application and instructions for Arts Education Service Provider as amended September 2000. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005668
John Paul Batiste
Executive Director
Texas Commission on the Arts
Effective date: August 14, 2000
Expiration date: December 12, 2000
For further information, please call: (512) 463-5535

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**13 TAC §37.27**

*(Editor's note: The text of the following section adopted for repeal on an emergency basis will not be published. The section may be examined in the offices of the Texas Commission on the Arts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The repeal is adopted on an emergency basis under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

*§37.27. Application Form and Instructions for Operational Assistance Year 2 of 2.*

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005669
John Paul Batiste
Executive Director
Texas Commission on the Arts
Effective date: August 14, 2000
Expiration date: December 12, 2000
For further information, please call: (512) 463-5535

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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 B. CUSTOMER SERVICE AND PROTECTION

**16 TAC §25.50**

The Public Utility Commission of Texas (commission) adopts on an emergency basis new §25.50, relating to Suspension of Disconnection of Electric Power Service During the Summer of 2000 Heat Emergency. Section 25.50 prohibits the disconnection of electric service for residential customers during the heat emergency, requires utilities and owners of master- metered or submetered residential facilities to offer deferred payment plans to

assist residential customers in managing their unusually high electric bills caused by the extreme heat, and requires utilities to provide notice of the rule to social service agencies within their service territories that provide low income energy assistance. This section is being adopted under Project Number 22869.

This section prohibits the disconnection of electric service for unpaid past due electric bills during the period August 10, 2000 through September 30, 2000, unless the customer in arrears has failed to enter into a deferred payment plan pursuant to subsection (c) of this section. This section does not affect a customer's ability to arrange a deferred payment plan pursuant to §25.28(i) of this title (relating to Bill Payment and Adjustments). The commission encourages customers and electric utilities to continue to work together to develop mutually agreeable deferred payment plans pursuant to §25.28(i) to avoid delinquent bills.

This emergency adoption is necessary because disconnection of electric service during the extreme and persistent heat currently being experienced in Texas poses an imminent peril to the health of residential customers.

The new section shall be effective immediately upon filing with the Secretary of State because of imminent peril to the public health.

The new section is adopted on an emergency basis under §§11.002, 14.001 and 14.002 of the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated (Vernon 1998 & Supplement 2000). Section 11.002 states the purpose of the Public Utility Regulatory Act is to protect the public interest inherent in the rates and services of public utilities; §14.001 grants the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; and §14.002 provides the commission with the authority to adopt rules which are necessary and convenient to the exercise of its authority. This section is also adopted pursuant to the procedures for emergency rulemaking set forth in the Texas Government Code, §2001.034 (Vernon 2000).

Cross Reference to Statute: Public Utility Regulatory Act §§11.002, 14.001 and 14.002; Texas Government Code §2001.034.

*§25.50. Suspension of Disconnection of Electric Power Service During the Summer 2000 Heat Emergency.*

(a) Definition. For purposes of this section, the term "electric utility" shall include an entity defined as an electric utility in the Public Utility Regulatory Act (PURA) §31.002(6), owners of master-metered residential facilities, or owners of submetered residential facilities.

(b) Disconnection prohibited. No electric utility may discontinue service to a residential customer, a master-metered residential facility, or a submetered residential facility during the period August 10, 2000 through September 30, 2000, for delinquent payment of utility service, unless the customer in arrears has failed to enter into a deferred payment plan pursuant to subsection (c) of this section. An electric utility may not send disconnection notices, or perform other related collection activities except as otherwise provided in this section, to a residential customer, residential user of a master-metered residential facility, or residential user of a submetered residential facility during the period August 10, 2000 through September 30, 2000, unless that customer has failed to enter into a deferred payment plan pursuant to subsection (c) of this section.

(1) If notice of disconnection was provided prior to August 10, 2000, and the electric utility has contacted the customer within the disconnect moratorium period and offered a deferred payment plan, then an electric utility may disconnect service in keeping with §25.29 of this title (relating to Disconnection of Service) not less than ten days after the notice of disconnection was issued, provided that the delinquent bill remains unpaid and the customer has not entered into a deferred payment plan.

(2) If notice of disconnection was not provided prior to August 10, 2000, and the customer in arrears fails to enter into a deferred payment plan after being contacted and offered one by the electric utility, then an electric utility must provide notice of disconnection as required by §25.29 of this title and may disconnect service not less than ten days after notice of disconnection is issued in keeping with §25.29(k).

(c) Deferred payment plan. An electric utility shall contact and offer a deferred payment plan for any delinquent bill of a residential customer that has been rendered prior to or that comes due during the period August 10, 2000 through September 30, 2000. The information included in the deferred payment plan shall be provided in English and Spanish as necessary to adequately inform the customer of the provisions of the plan. The deferred payment plan shall provide that the delinquent amount may be paid in equal installments over a period of up to six billing cycles, at the customer's request. However, if the customer and electric utility agree, then the customer may enter into a level payment plan that recovers the delinquent amount, with other months' bills, over a 12- month period.

(1) A deferred payment plan under this subsection may not include:

(A) a late payment penalty for the delinquent balance as long as the installments are made on time;

(B) interest on the delinquent balance; or

(C) a deposit.

(2) A residential customer may enter into a deferred payment plan pursuant to this subsection by visiting the electric utility's business office or by telephone. If the customer visits the electric utility's business office, the plan shall be reduced to writing at that time. If the agreement is made over the telephone, the electric utility shall send a copy of the plan to the customer. Immediately preceding the customers' signature, the plan shall state in boldface capitals of at least 14 point type the following: IF YOU ARE NOT SATISFIED WITH THIS CONTRACT, OR IF AGREEMENT WAS MADE BY TELEPHONE AND YOU BELIEVE THIS CONTRACT DOES NOT REFLECT YOUR UNDERSTANDING OF THAT AGREEMENT, CONTACT THE UTILITY IMMEDIATELY AND DO NOT SIGN THIS CONTRACT. IF YOU DO NOT CONTACT THE UTILITY, OR IF YOU SIGN THIS AGREEMENT, YOU GIVE UP YOUR RIGHT TO DISPUTE THE AMOUNT DUE UNDER THE AGREEMENT EXCEPT FOR THE UTILITY'S FAILURE OR REFUSAL TO COMPLY WITH THE TERMS OF THIS AGREEMENT. In addition, where the customer and utility representative or agent meet in person, the utility representative shall read the preceding statement to the customer. The utility shall also provide information to the customer in English and Spanish as necessary to make the preceding boldface language understandable to the customer. A copy of the signed plan shall be provided to the customer by the electric utility.

(3) A deferred payment plan under this subsection shall include the following:

(A) the term of the plan;

(B) the total amount to be paid under the plan; and

(C) the specific amount of each installment.

(4) If a customer fails to fulfill the terms of a deferred payment plan pursuant to this subsection, the utility shall have the right to disconnect service subsequent to September 30, 2000. However, the utility may not disconnect service until a disconnect notice has been issued to the customer indicating the customer has not met the terms of the plan. Such notice and disconnection shall conform with the disconnection requirements of §25.29 of this title, or its successor.

(5) The Public Utility Commission of Texas encourages electric utilities to counsel customers about the benefits of collecting a mutually agreed upon minimum payment(s) during the period in which disconnection is prohibited so as to lessen the financial burden on the customer when the period of repayment begins.

(d) Notice to social service agencies. For purposes of this subsection, an electric utility shall not include owners of master-metered or submetered residential facilities. An electric utility shall provide written notice of this section by August 15, 2000, to:

(1) those social service agencies that distribute funds from the Low Income Home Energy Assistance Program within its certificated service area; and

(2) any other social service agency of which the electric utility is aware that provides energy assistance to low income customers in its certificated service area.

Filed with the Office of the Secretary of State, on August 10, 2000.

TRD-200005584
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: August 10, 2000
Expiration date: December 8, 2000
For further information, please call: (512) 936-7308

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# PROPOSED RULES

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

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

# TITLE 1. ADMINISTRATION

## PART 5. GENERAL SERVICES COMMISSION

### CHAPTER 111. EXECUTIVE ADMINISTRATION DIVISION

The General Services Commission proposes amendments to Title 1, T.A.C., Subchapter A - Administration, §§111.1 through 111.5 in order to revise statutory citations, delete definitions, streamline the protests/dispute resolution/hearing procedure by directing all protests to the procurement director, and improve the readability of the language in the rules. New rules are also proposed for §111.6 - Petition for Adoption of Rules pursuant to Texas Government Code, §2001.021; and §111.7 - Negotiation and Mediation of Certain Contract Disputes pursuant to Texas Government Code, §2260.052(c). Amendments to Subchapter C - Cost of Copies of Public Information, §111.62 are being proposed in order to delete obsolete language. The amendments and new rules are a part of the periodic rule review process mandated by Texas Government Code, §2001.039 (relating to Agency Review of Existing Rules).

Ann Dillon, General Counsel, has determined for the first five year period the rules are in effect, there will be no adverse effect to state or local government as a result of enforcing these rules.

Ann Dillon, General Counsel, further determines that for each year of the first five-year period the amendments are in effect, the public benefit anticipated as a result of enforcing these rules will be streamlined procedures, the deletion of obsolete language; and new procedures for petition by an interested person or organization for adoption of rules, and procedures for the more timely and efficient resolution of contract disputes between contractors and the commission pursuant to the Texas Government Code, Chapter 2260. There will be no effect on small or large businesses and/or persons.

Comments on the proposals may be submitted to Ann Dillon, General Counsel, General Services Commission, P.O. Box 13047, Austin, TX 78711-3047. Comments must be received no later than thirty days from the date of publication of the proposal to the Texas Register.

### SUBCHAPTER A. ADMINISTRATION

**1 TAC §§111.1 - 111.7**

The amendment and new rules are proposed under the authority of the Texas Government Code, Title 10, Subtitle A, §2001.021, Texas Government Code, Title 10, Subtitle D, §§2152.060, 2152.105, 2155.076, Texas Government Code, Title 10, Subtitle F, §2260.052, and Texas Government Code, Chapter 552, Subchapter F, which provides the General Services Commission with the authority to promulgate rules necessary to implement the sections.

The following code is affected by these rules: Government Code, Title 10, Subtitle D, Government Code, Title 10, Subtitle F, Chapter 2260, and Texas Government Code, Chapter 552, Subchapter F.

*§111.1. Organization.*

(a) The commission is composed of six members appointed by the governor to set policy, and employ and direct an executive director. The commissioners retain and exercise all authority and responsibility assigned to them by law and not delegated to the executive director.

(b) The executive director manages the day-to-day business of the commission, employs staff, and carries out other duties and responsibilities assigned by law or delegated by the commission.

(c) A delegation of authority to the executive director must be made by the commission in an open meeting. The commission may review, modify, or ratify a delegation at any open meeting. A change in membership of the commission does not void an existing delegation of authority; it remains in effect until another one is approved by a majority vote [~~quorum~~] of the commission at an open meeting.

(d) All decisions of the commission shall be by majority vote of commissioners present and voting.

*§111.2. Definitions.*

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

(1) Act--The State Purchasing and General Services Act, Chapter 2151, et seq., Texas Government Code [~~Texas Civil Statutes, Article 601b~~].

(2) Best interests of the state--Most advantageous to the state in light of all relevant circumstances.

(3) Commission--The General Services Commission.

(4) Competitive bidding--The process of inviting and obtaining bids from competing sources in response to advertised competitive specifications, by which an award is made as authorized by the relevant statute [~~made to the lowest and best bidder~~] meeting the specifications. The process contemplates giving potential bidders a reasonable opportunity to bid, and requires that all bidders be placed on the same plane of equality. Each bidder must bid on the same advertised specifications, terms, and conditions in all the items and parts of a contract. The purpose of competitive bidding is to stimulate competition, prevent favoritism, and secure the best goods and services at the lowest practicable price, for the benefit of the state. Competitive bidding cannot occur where contract specifications, terms, or conditions prevent or unduly restrict competition, favor a particular vendor, or increase the cost of goods or services without providing a corresponding benefit to the state.

(5) Electronic data interchange (EDI)--Exchange of information electronically between business parties in a structured format, including, but not limited to, computer direct or indirect electronic information exchange, exchange of computer tapes and disks, and telefacsimile transmission.

(6) Local government--A county, municipality, school district, special district, junior college district, or other legally constituted political subdivision of the state.

(7) Minor technicality--A requirement in a bid invitation which, if waived or modified by the commission when evaluating bids, would not give a bidder an unfair advantage over other bidders or result in a material change in the contract.

(8) Nonresident bidder--A bidder whose principal place of business is not in Texas, but does not include a bidder whose majority owner or parent company has its principal place of business in Texas.

~~[(9) Payment bond--A deposit, pledge, or contract of guaranty supplied by a successful bidder to protect the state against loss due to the bidder's failure to pay material suppliers and subcontractors. Acceptable forms of payment bonds are: cashier's check, certified check, or irrevocable letter of credit issued by a financial institution subject to the laws of Texas; a surety or blanket bond from a company chartered or authorized to do business in Texas; United States treasury bond; or certificate of deposit.]~~

~~[(10) Performance bond--A deposit, pledge, or contract of guaranty supplied by a successful bidder to protect the state against loss due to the bidder's inability to complete the contract as agreed. Acceptable forms of performance bonds are those listed in the definition of payment bond.]~~

(9) [~~(11)~~] Principal place of business in Texas--A permanent business office located in Texas from which a bid is submitted and from which business activities are conducted other than submitting bids to governmental agencies, where at least one employee works for the business entity submitting bids.

10 [~~(12)~~] Texas resident bidder--A bidder with its principal place of business in Texas, including a bidder whose majority owner or parent company has its principal place of business in Texas.

*§111.3. Protests/Dispute Resolution/Hearing.*

(a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation, evaluation, or award of a contract may formally protest to the procurement director [~~division director (the director) in whose division the action is (was) being processed~~]. Such protests must be in writing and received in the procurement[~~executive~~] director's office within 10 working days after such aggrieved person knows, or should have known, of the occurrence of the action which is protested. Formal protests must conform to the requirements of this subsection and subsection (c) of this section, and shall be resolved in accordance with the procedure set forth in subsections (d) and (e) of this section. Copies of the protest must be mailed or delivered by the protesting party to the using agency and other interested parties. For the purposes of this section, "interested parties" means all vendors who have submitted bids or proposals for the contract involved.

(b) In the event of a timely protest or appeal under this section, the state shall not proceed further with the solicitation or with the award of the contract unless the executive director, after consultation with the using agency and the procurement [~~appropriate division~~] director, makes a written determination that the award of contract without delay is necessary to protect the best [~~substantial~~] interests of the state.

(c) A formal protest must be sworn and contain:

(1) a specific identification of the statutory or regulatory provision(s) that the action complained of is alleged to have violated;

(2) a specific description of each act alleged to have violated the statutory or regulatory provision(s) identified in paragraph (1) of this subsection;

(3) a precise statement of the relevant facts;

(4) an identification of the issue or issues to be resolved;

(5) argument and authorities in support of the protest; and

(6) a statement that copies of the protest have been mailed or delivered to the using agency and other identifiable interested parties.

(d) The procurement director shall have the authority, prior to appeal to the executive director of the commission, to settle and resolve the dispute concerning the solicitation or award of a contract. The procurement director may solicit written responses to the protest from other interested parties.

(e) If the protest is not resolved by mutual agreement, the procurement director will issue a written determination on the protest.

(1) If the procurement director determines that no violation of rules or statutes has occurred, he shall so inform the protesting party, the using agency, and other interested parties by letter which sets forth the reasons for the determination.

(2) If the procurement director determines that a violation of the rules or statutes has occurred in a case where a contract has not been awarded, he shall so inform the protesting party, the using agency, and other interested parties by letter which sets forth the reasons for the determination and the appropriate remedial action.

(3) If the director determines that a violation of the rules or statutes has occurred in a case where a contract has been awarded, he shall so inform the protesting party, the using agency, and other interested parties by letter which sets forth the reasons for the determination, which may include ordering the contract void.

(f) The director's determination on a protest may be appealed by the protesting [~~an interested~~] party to the executive director of the commission. An appeal of the director's determination must be in writing and must be received in the executive director's office no later than

10 working days after the date of the director's determination. The appeal shall be limited to review of the director's determination. Copies of the appeal must be mailed or delivered by the protesting [~~appealing~~] party to the using agency and other interested parties and must contain a certified statement [~~an affidavit~~] that such copies have been provided.

(g) The executive director may confer with general counsel in his review of the matter appealed [~~The general counsel shall review the protest, director's determination, and the appeal and prepare a written opinion with recommendation to the executive director.~~] The executive director may, in his discretion, refer the matter to the commissioners for their consideration at a regularly scheduled open meeting or issue a written decision on the protest.

(h) When a protest has been appealed to the executive director under subsection (f) of this section and has been referred to the commissioners by the executive director under subsection (g) of this section, the following requirements shall apply:[~~,~~]

(1) Copies of the appeal and [~~,~~] responses of interested parties, if any, [~~and general counsel recommendation~~] shall be mailed to the commissioners.[~~, and copies of the general counsel's recommendation shall be mailed to the using agency, the appealing party, and other interested parties.~~]

(2) All interested parties who wish to make an oral presentation at the open meeting are requested to notify the commission general counsel at least 48 hours in advance of the open meeting.

(3) The commissioners may consider oral presentations and written documents presented by staff and interested parties. The chairman shall set the order and amount of time allowed for presentations.

(4) The commissioners' determination of the appeal shall be by duly adopted resolution reflected in the minutes of the open meeting, and shall be final.

(i) Unless good cause for delay is shown or the commission determines that a protest or appeal raises issues significant to procurement practices or procedures, a protest or appeal that is not filed timely will not be considered.

(j) A decision issued either by the commissioners in open meeting, or in writing by the executive director, shall be the final administrative action of the commission.

*§111.4. Ethical Standards.*

(a) This section states the ethical standards of conduct required of commission employees, vendors, potential vendors, and employees of other agencies when acting under authority delegated from the commission.

(b) A former employee who ceases service or employment with the commission on or after January 1, 1992, may not represent any person or receive compensation for services rendered on behalf of any person regarding a particular matter in which the former employee participated during the period of employment, either through personal involvement or because the case or proceeding was a matter within the employee's official responsibility.

(c) An employee may not:

(1) participate in work on a commission contract knowing that the employee, or member of their immediate family has an actual or potential financial interest in the contract, including prospective employment;

(2) solicit or accept anything of value from an actual or potential vendor;

(3) be employed by, or agree to work for, a vendor or potential vendor;

(4) knowingly disclose confidential information for personal gain.

(d) Subsection (b) of this section applies only to an employee who is compensated, as of the last date of state employment, at or above the amount prescribed by the General Appropriations Act for step 1, salary group 17, of the position classification salary schedule, including an employee who is exempt from the state's position classification plan.

(e) For subsections (b)-(d) of this section:

(1) "Participated" means to have taken action as an employee through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action.

(2) "Particular matter" means a specific investigation, application, request for a ruling or determination, rulemaking proceeding, contract, claim, charge, or other proceeding.

(f) A vendor or potential vendor may not[~~:~~] offer, give, or agree to give an employee anything of value.

(g) When an actual or potential violation of subsections (b)-(f) of this section is discovered, the person involved shall promptly file a written statement concerning the matter with an appropriate supervisor. The person may also request written instructions and disposition of the matter.

(h) If an actual violation of subsections (b)-(g) of this section occurs or is not disclosed and remedied, the employee involved may be either reprimanded, suspended, or dismissed. The vendor or potential vendor may have a pending bid or proposal rejected, be barred from receiving future contracts and/or have an existing contract canceled.

*§111.5. Complaints.*

Actual consumers, service recipients or persons contracting with the commission shall be provided notice of the commission's name, the mailing address and the telephone number where complaints may be directed to the commission's Customer Service Representative. Notice of this information [~~to such consumers, service recipients or persons contracting with the commission~~] shall be effective if provided by any of the following methods:

(1) [~~By~~] Notice - typed or stamped notice placed on or attached to each invoice, billing statement, contract or agreement between the commission and consumers, service recipients or persons contracting with the commission.

(2) [~~By~~] Notice - posting notice at locations on the commission's premises accessible to the commission's consumers, service recipients or persons contracting with the commission.

(3) [~~By~~] Notice - written notice from the executive director of the commission to the directors of all other state agencies and entities that are consumers, service recipients or persons contracting with the commission.

*§111.6. Petition for Adoption of Rules.*

(a) Any interested person or organization may petition the commission requesting the adoption or amendment of a rule.

(b) For the purpose of interpreting this section, the term "rule" shall have the same meaning as contained in Government Code, Chapter 2001, §2001.003.

(c) Petitions for adoption of rules must be submitted in writing and directed to the commission's executive director.

(d) The petitioner may either hand deliver the petition to the commission's central office at 1711 San Jacinto Boulevard, Austin, Texas, 78701, or mail the petition to P.O. Box 13047, Austin, Texas 78711-3047.

(e) For purposes of calculating days under this section, the date of submission of a petition under this section shall be the date the petition is hand delivered to the commission, or if the petition was sent by mail or carrier, the date it is date-stamped according to regular agency incoming mail procedures.

(f) The petition must include the following minimum requirements:

(1) specify or otherwise make clear that the petition is made pursuant to the provisions of the Administrative Procedure Act;

(2) clearly state the body or substance of the rule requested for adoption, and, if appropriate, relate the requested rule to an adopted rule or rules of the commission;

(3) contain the full name and address of the petitioner; and

(4) be signed by the petitioner.

(g) The executive director or the executive director's designee, shall:

(1) acknowledge receipt of the petition in writing and include in the letter the date the petition was received; and

(2) communicate with the petitioner, if necessary, to clarify the requested rule or to clarify other relevant information contained in the petition.

(h) Not later than the 60th day after the date of submission of a petition under this section, the executive director shall either:

(1) deny the petition in writing, stating the reasons for the denial; or

(2) initiate rulemaking procedures and inform the petitioner of the date rule action by the commission is scheduled pursuant to Government Code, Title 10, Chapter 2001.

(i) The executive director shall provide copies of all petitions, whether denied or approved, to the commissioners prior to scheduled commission meetings for review.

*§111.7. Negotiation and Mediation of Certain Contract Disputes.*

(a) The commission adopts by reference the rules of the Office of the Attorney General in Title 1, Part 3, Texas Administrative Code, Chapter 68 relating to Negotiation and Mediation of Certain Contract Disputes. The Office of the Attorney General rules are located at the Office of the Secretary of State's internet website: www.sos.state.tx.us/tac/index.html.

(b) The rules set forth a process to permit parties to structure a negotiation or mediation in a manner that is most appropriate for a particular dispute regardless of contract's complexity, subject matter, dollar amount, or method and time of performance.

(c) The adoption of this rule is required by the Texas Government Code, Chapter 2260, §2260.052(c).

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005663

Ann Dillon
General Counsel
General Services Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 463-3960

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## SUBCHAPTER C. COST OF COPIES OF PUBLIC INFORMATION

### 1 TAC §111.62

The amendment and new rules are proposed under the authority of the Texas Government Code, Title 10, Subtitle A, §2001.021, Texas Government Code, Title 10, Subtitle D, §§2152.060, 2152.105, 2155.076, Texas Government Code, Title 10, Subtitle F, §2260.052, and Texas Government Code, Chapter 552, Subchapter F, which provides the General Services Commission with the authority to promulgate rules necessary to implement the sections. Cross Reference to Statute. The following codes are affected by these rules: Government Code, Title 10, Subtitle D, Government Code, Title 10, Subtitle F, Chapter 2260, and Texas Government Code, Chapter 552, Subchapter F.

*§111.62. Definitions.*

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

(1) Actual cost--The sum of all direct costs plus a proportional share of overhead or indirect costs. Actual cost should be determined in accordance with generally accepted methodologies. [~~To determine actual costs, governmental bodies may utilize the cost methodology adopted by the Council on Competitive Government.~~]

(2) Client/Server System--A combination of two or more computers that serve a particular application through sharing processing, data storage, and end-user interface presentation. PCs located in a LAN environment containing file servers fall into this category as do applications running in an X-window environment where the server is a UNIX based system.

(3) Commission--The General Services Commission.

(4) Governmental Body--As defined by §552.003 of the Public Information Act, means:

(A) a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members;

(B) a county commissioners court in the state;

(C) a municipal governing body in the state;

(D) a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;

(E) a school district board of trustees;

(F) a county board of school trustees;

(G) a county board of education;

(H) the governing board of a special district;

(I) the governing body of a nonprofit corporation organized under Chapter 76, Acts of the 43rd Legislature, First Called Session, 1933 (Article 1434a, Texas Civil Statutes), that provides a water

supply or wastewater service, or both, and is exempt from ad valorem taxation under the Tax Code, §11.30; and

(J) the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds; and

(K) does not include the judiciary.

(5) Mainframe Computer--A computer located in a controlled environment and serving large applications and/or large numbers of users. These machines usually serve an entire organization or some group of organizations. These machines usually require an operating staff. IBM and UNISYS mainframes, and large Digital VAX 9000 and VAX Clusters fall into this category.

(6) Midsize Computer--A computer smaller than a Mainframe Computer that is not necessarily located in a controlled environment. It usually serves a smaller organization or a sub-unit of an organization. IBM AS/400 and Digital VAX/VMS multi-user single-processor systems fall into this category.

(7) Nonstandard copy-Under §§111.61 through 111.71 of this title, a [~~A~~]copy of public information that is made available to a requestor in any format other than a standard paper copy. Microfiche, microfilm, diskettes, magnetic tapes, CD-ROM are examples of nonstandard copies. Paper copies larger than 8 1/2 by 14 inches (legal size) are also considered nonstandard copies.

(8) Standalone PC--An IBM compatible PC, Macintosh or Power PC based computer system operated without a connection to a network.

(9) Standard paper copy-- Under §§111.61 through 111.71 of this title, a copy of public information that is a [~~A~~] printed impression on one side of a piece of paper that measures up to 8 1/2 by 14 inches. Each side of a piece of paper on which an impression is made is counted as a single copy. A piece of paper that is printed on both sides is counted as two copies.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005664
Ann Dillon
General Counsel
General Services Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 463-3960

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# PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

## CHAPTER 355. MEDICAID REIMBURSEMENT RATES

## SUBCHAPTER J. PURCHASED HEALTH SERVICES

## DIVISION 2. MEDICAID HOME HEALTH PROGRAM

**1 TAC §355.8021**

The Health and Human Services Commission (HHSC) proposes an amendment to §355.8021 concerning reimbursement methodology for home health services. Section 355.8021 is being amended to change the reimbursement methodology for skilled nursing visits, home health aide visits, physical therapy, and occupational therapy services provided by enrolled home health agencies. Currently, these services are reimbursed according to a reasonable cost methodology and are cost settled using final cost settlements from Medicare. Effective October 1, 2000, the Medicare program is scheduled to begin reimbursing home health services utilizing a prospective payment system (PPS). Since Medicaid will no longer be able to rely on Medicare's cost reports, the Medicaid reimbursement methodology will be changed from cost reimbursement to a fee schedule.

Don Green, Chief Financial Officer, has determined that for each year of the first five years 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. This amendment does not have any foreseeable implications relating to cost or revenues of local governments.

Mr. Green has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be to provide services to Medicaid recipients that are appropriately reimbursed. There will be no effect on small business or micro-businesses to comply with this section as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the rule as proposed. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There will be no impact on local employment.

A public hearing will be held at 1:30 p.m., Central Daylight Savings Time, on Monday, August 28, 2000, in the Public Hearing Room, Building 3, first floor of the Riata Crossing Facility, 12555 Riata Vista Circle, Austin, Texas 78727-6404, to accept comments on the proposal.

Comments on the proposal may be submitted to Jeff Phelps, Program Administrator, Medicaid Reimbursement Division, Texas Health and Human Services Commission, P.O. Box 13247, Austin, Texas 78711-3247 or at (512) 424-6657, within 30 days of publication of this proposal in the *Texas Register*. To comply with federal regulations, a copy of the proposal is being sent to each Texas Department of Human Services (DHS) office where it will be available for public review upon request.

The amendment is proposed under the Human Resources Code, §32.021 and the Texas Government Code, §531.021, which provide the Health and Human Services Commission with the authority to adopt rules to administer the state's medical assistance program.

The proposed amendment affects Chapter 32 of the Human Resources Code and Chapter 531 of the Government Code.

*§355.8021. Reimbursement Methodology for Home Health Services.*

(a) Reimbursement methodology for skilled nursing visits, home health aid visits, physical therapy and occupational therapy services provided by [~~a~~] enrolled home health agencies [~~agency~~]. Participating providers are reimbursed the maximum allowable fee for services established by the Health and Human Services Commission. The maximum allowable fee is based upon the lesser of the following:

(1) the billed amount; or [~~Except for expendable medical supplies and DME, authorized home health services provided for eligible Medicaid recipients are reimbursed the reasonable cost of supplying the service, applying the same standards, cost reporting period, and cost reimbursement principles currently used in computing reimbursement for comparable services under Title XVIII Medicare.~~]

(2) the fee schedule established by the department: [~~Reasonable cost will be based on annual reports covering a 12-month period of operation (based on a provider's reporting year) required by Medicare.~~]

(A) the fee schedule established by the department is determined from a representative sample of provider; and

(B) participating providers must, at the request of the department, provide information needed to determine the fee schedule.

(b) Reimbursement methodology for expendable medical supplies provided by enrolled home health agencies and DME providers/suppliers. Participating providers are reimbursed the maximum allowable fee for expendable medical supplies established by the department. The maximum allowable fee is based upon the lesser of the following:

(1) the billed amount; or

[~~(2) the Medicare fee schedule as defined in §29.301 of this title (relating to General); or~~]

(2) [~~(3)~~] the expendable medical supply acquisition fee as defined in §29.301 of this title (relating to General).

(c) (No change.)

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

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005681
Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 458-7236

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# CHAPTER 371. MEDICAID FRAUD AND ABUSE PROGRAM INTEGRITY
# SUBCHAPTER E. OPERATING AGENCY RESPONSIBILITIES RULE

**1 TAC §371.1000**

The Health and Human Services Commission (HHSC) proposes to amend 1 T.A.C. §371.1000, which requires a health and human services agency that operates part of the Medicaid program to re-enroll health care providers by September 1, 1999.

Background and Summary of Factual Basis for the Rules

The rule change was prompted by the establishment of an electronic method of re-enrollment currently supported through an Internet web site operated by the National Heritage Insurance Company. Section 10 of H.B. 2896 authorized HHSC to extend the re-enrollment period if an electronic method of re-enrollment is established and to extend that date if HHSC determines a significant number of providers have not met the re-enrollment deadline.

Section-by-Section Explanation

The current rule requires re-enrollment to be accomplished by September 1, 1999. The proposed amendment revises this date, consistent with § 10 of House Bill No. 2896, 76th Leg., to December 31, 2000.

Public Benefit

Don Green, Chief Financial Officer, has determined that during the first five years that the proposed rules are in effect, the public will benefit from adoption of the amendment because the amendment will accommodate electronic re-enrollment of providers and validate re-enrollments occurring after September 1, 1999. The amendment will also ensure that providers that have not re-enrolled to date are given the benefit of electronic re-enrollment and the extension of time to re-enroll.

Fiscal Note

Don Green, Chief Financial Officer, has determined that for the first five years that the proposed rules are in effect, there will be no additional costs to health and human services agencies.

Small and Micro-business Impact Analysis

The proposed amendment will not result in additional costs to persons required to comply with the rules, nor does the amendment have any anticipated adverse effect on small or micro-businesses. The amendment will not affect local employment.

Regulatory Analysis

The Health and Human Services Commission has determined that the proposed amendment is not a "major environmental rule" as defined by § 2001.0225, Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rule is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

The Health and Human Services Commission has conducted a takings impact assessment for these proposed rules under Texas Government Code, §2007.043. HHSC has determined that this action does not restrict or limit an owner's right to their property that would otherwise exist in the absence of governmental action and therefore does not constitute a taking. The proposed amendment is administrative in nature and does not impose any new regulatory requirements. The proposed rule is reasonably taken to fulfill requirements of state law.

Public Comment

Public comment may be submitted in writing to Steve Aragon, General Counsel, Health and Human Services Commission, by mail addressed to P.O. Box 13247, Austin, Texas 78711, or by facsimile to (512) 424-6587. Comments must be submitted by 5:00 p.m., September 25, 2000. Further information may be obtained by calling Steve Aragon at (512) 424-6603.

Statutory Authority

The amendment is proposed under the Texas Government Code, chapter 351, §531.033, which authorizes the Commissioner of Health and Human Services to adopt rules necessary to carry out the Health and Human Services Commission's duties under chapter 531.

The amendment affects chapter 531 of the Texas Government Code and chapter 32 of the Texas Human Resources Code.

*§371.1000. Provider Re-enrollment or Provider Contract Modification.*

By [~~September 1, 1999,~~] December 31, 2000, each agency operating part of the Medicaid program must, at the agency's discretion, either re-enroll each provider in the Medicaid program under a new contract approved by the Health and Human Services Commission or modify each existing provider contract using language approved by the Health and Human Services Commission.

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

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005701
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6576

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# TITLE 10. COMMUNITY DEVELOPMENT

## PART 5. TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT

### CHAPTER 172. TEXAS RURAL ECONOMIC DEVELOPMENT PROGRAM

**10 TAC §172.1**

The Texas Department of Economic Development (department) proposes amendments to Chapter 172. Texas Rural Economic Development Program, concerning the provision of standards of eligibility and application procedures for a loan guaranty under the Rural Economic Development Act.

The proposed amendments are necessary to accurately reflect current law and to allow for the adoption of new rules. Senate Bill 932 of the 75th Legislature, which abolished the Texas Department of Commerce and created the Texas Department of Economic Development, also abolished the Texas Department of Commerce policy board and created a new governing board for the Department. All references to the Texas Department of Commerce and the policy board have been amended to accurately reflect current law.

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

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

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

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

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

*§172.1. General Provisions.*

(a) Introduction. Pursuant to the authority granted by the Texas Rural Economic Development Act, Texas Government Code, Chapter 481, Subchapter F; and the Administrative Procedure Act, the Texas Government Code, Chapter 2001, the Texas Department of Economic Development [~~Commerce~~] prescribes the following sections regarding practice and procedure before the department in the administration and implementation of the Rural Economic Development Fund.

(b) Purpose. It is the purpose of the Texas Rural Economic Development Act to establish a program which promotes economic development and employment in rural communities across the state. Communities in this state are at a critical disadvantage in competing with communities in other states for location or expansion of businesses because of the availability of financing and other special incentives. The purpose of the new sections is to provide standards of eligibility and application procedures for a loan guaranty under the Rural Economic Development Act.

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

(1) Act--The Texas Rural Economic Development Act, Texas Government Code, Chapter 481, Subchapter F.

(2) Applicant--The private lender or user filing an application with the department for a loan guaranty.

(3) Application--An application, including supporting documentation, for participation in the program pursuant to the Act and this chapter.

(4) Business day--A day in which the department is open for business. The term shall not include any Saturday, Sunday, or traditional holiday officially observed by the state. The department's normal business hours are 8:00 a.m. to 5:00 p.m. each business day.

(5) City--Any municipality of the state incorporated under the provisions of any general or special law, or the home-rule amendment to the constitution.

(6) County--Any county of the State of Texas.

(7) Department--Texas Department of Economic Development [~~Commerce~~].

(8) Eligible enterprise--Pari-mutuel racing or a private-for-profit enterprise, new or existing, whose primary activity includes either providing a service, producing a product, or selling merchandise.

(9) Equity--The user's contribution to a project in the form of cash, land, or depreciable property.

(10) Executive director--The executive director of the department or his or her designee.

(11) Federal agency--The United States of America, the president of the United States of America, and any department of or corporation, agency, or instrumentality heretofore or hereafter created, designated, or established by the United States of America.

(12) Fund--Texas Rural Economic Development Fund.

(13) Guaranty amount--With respect to loans made by financial institutions, is a sum measured in terms of United States dollars, that in the case of default by the borrower, guarantees repayment of the loan, not to exceed 75% or 90% of the loan outstanding. This amount may not exceed $350,000, except in those instances where substantial job creation is a major component.

(14) Guarantee-to-reserve ratio--A ratio established by the governing [~~policy~~] board to determine the amount of guaranties exceeding the amount in the fund, which ratio cannot exceed two to one. The ratio shall be two to one effective January 1, 1994, and shall remain in effect until governing [~~policy~~] board adjusts. The governing [~~policy~~] board must review annually the ratio and adjust it if appropriate, based upon the payment experience of the loans and any recommendations of the state auditor. The state auditor must review annually the loan program and make recommendations to the governing [~~policy~~] board by September 1 of each year. For the initial period, the state auditor must recommend a ratio to the governing [~~policy~~] board by December 1, 1993, which will be effective through September 1, 1994.

(15) Historically underutilized business--

(A) a corporation formed for the purpose of making a profit in which at least 51% of all classes of the shares of stock or other equitable securities is owned by one or more persons who are members of certain groups including Black Americans, Hispanic Americans, women, Asian Pacific Americans, and American Indians;

(B) a sole proprietorship formed for the purpose of making a profit that is 100% owned, operated, and controlled by a person described by subparagraph (A) of this paragraph;

(C) a partnership formed for the purpose of making a profit in which 51% of the assets and interest in the partnership is owned by one or more persons described by subparagraph (A) of this paragraph. Those persons must have proportionate interest and demonstrate active participation in the control, operation, and management of the partnership's affairs; or

(D) a joint venture in which each entity in the joint venture is a historically underutilized business under this subdivision.

(16) Loan review committee--A committee consisting of department staff members selected by the department's executive director to review eligible projects for consideration.

(17) New enterprise--A private-for-profit enterprise which has actively been in business for a period of less than one year.

(18) Governing [~~Policy~~] board Governing [~~Policy~~] board of the Texas Department of Economic Development [~~Commerce~~].

(19) Private lender--A lending institution, including a bank, savings bank, saving and loan association, trust company, or insurance company, or an individual or municipal corporation that the department determines is an experienced and sophisticated investor.

(20) Program--Texas Rural Economic Development Program.

(21) Project--The land, building, equipment, facilities and improvements (one or more), and working capital found by the department to be required or suitable for the promotion of and for use by an eligible enterprise, irrespective of whether in existence or required to be acquired or constructed after the making of such finding by the department.

(22) Qualified application--A completed application, including all documents and information required by the department and submitted by a user or private lender for a project.

(23) Rural area--A city having a population of 50,000 or less, or the unincorporated area of a county, which has a population of 200,000 or less and which is predominantly rural in character. Population is to be determined by the decennial census or federal census estimate, whichever is most recently published by the United States Bureau of Census.

(24) Staff--The staff of the department.

(25) State--State of Texas.

(26) State auditor--State auditor of the State of Texas.

(27) User--An individual, partnership, corporation, or any other private entity found by the department to be financially responsible to assume the obligation in connection with a project.

(d) Conflicts of interest.

(1) A member of the governing [~~policy~~] board, committee, agent, or employee of the department, in his or her own name or in the name of a nominee, may not hold an ownership interest of more than 7-1/2% or in excess of $50,000 of the fair market value of an association, trust, corporation, partnership, or other entity that is, in its own name or in the name of a nominee, party to a contract or agreement under this chapter on which the member of the governing [~~policy~~] board, loan review committee, agent, or employee may be called on to act or vote.

(2) With respect to a direct or indirect interest, other than an interest prohibited by paragraph (1) of this subsection, in a contract or agreement under this chapter on which the member of the governing [~~policy~~] board, loan review committee, agent, or employee may be called on to act or vote, the member of the governing [~~policy~~] board, committee, agent, or employee shall disclose the interest to the department before the taking of final action by the department concerning the contract or agreement, and shall disclose the nature and extent of the interest and his or her acquisition of it. This disclosure shall be publicly acknowledged by the department and kept a part of its file. A member of the governing [~~policy~~] board, loan review committee, agent, or employee who holds such interest may not be officially involved in regard to the contract or agreement, may not vote on a matter relating to the contract or agreement, and may not communicate with other members, agents, or employees concerning the contract or agreement.

(3) A contract or agreement made in violation of this subsection is void.

(e) Examination of records. Any party requesting the examination of records pursuant to the Texas Public Information [~~Open Records~~] Act, Texas Government Code, Chapter 552 [~~(Vernon's Session Laws 1993)~~] shall indicate in writing the specific nature of the document to be viewed, and if photocopying is desired, the appropriate fee must accompany the request.

(f) Written communication with the department. Applications and other written communications to the department should be addressed to the attention of the Business Development Division, Capital Development, Texas Department of Economic Development [~~Commerce~~], P.O. Box 12728, Austin, Texas 78711.

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

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005700
Tracye McDaniel
Deputy Executive Director
Texas Department of Economic Development
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 936-0177

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## CHAPTER 182. SMALL BUSINESS ASSISTANCE
## SUBCHAPTER A. BUSINESS PERMIT OFFICE

**10 TAC §§182.1 - 182.4**

*(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Economic Development or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas Department of Economic Development (department) proposes the repeal of 10 Texas Administrative Code, Chapter 182. Small Business Assistance, Subchapter A. Business Permit Office in its entirety, concerning the procedure by which the department allows applicants to obtain permit and/or license application forms and related information required to be completed in order to obtain a particular state issued license or permit. The repeal is necessary to accurately reflect current law and to allow the adoption of new rules.

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

Mr. Wrenn has also determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of the repeal will be the avoidance of any confusion that may be caused by incorrect wording or legal citations. No economic costs are anticipated to persons who are required to comply with the proposed repeal.

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

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

Texas Government Code, Chapter 481, is affected by this proposal. Subchapter A. Business Permit Office

*§182.1. Definitions.*
*§182.2. Comprehensive Application Procedure.*
*§182.3. Comprehensive Application Request Form.*
*§182.4. Agency Response 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.

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005696
Tracye McDaniel
Deputy Executive Director
Texas Department of Economic Development
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 936-0177

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## CHAPTER 182. BUSINESS ASSISTANCE
## SUBCHAPTER A. OFFICE OF PERMIT ASSISTANCE

**10 TAC §§182.1 - 182.4**

The Texas Department of Economic Development (department) proposes new titles for Chapter 182 and Subchapter A., as well as new §§182.1 - 182.4.

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

Mr. Wrenn has also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of the proposed rules will be the avoidance of any confusion caused by incorrect wording or legal citations. No economic costs are anticipated to persons who are required to comply with the proposed rules.

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

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

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

*§182.1. Definitions.*

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

(1) Applicant-A person acting for himself or herself, or authorized to act on behalf of another person or entity to obtain a permit.

(2) Agency Response Form-The form specified in §182.4 of this title (relating to Agency Response Form).

(3) Comprehensive Application Request Form-The form specified in §182.3 of this title (relating to Comprehensive Application Request Form).

(4) Department-The Texas Department of Economic Development.

(5) Office-The Office of Permit Assistance of the Texas Department of Economic Development.

(6) Permit-Any initial license, certificate, registration, permit, or other form of authorization required by state law or by state agency rules that must be obtained by a person or other entity in order to engage in any particular business, but does not include a permit or license issued in connection with any form of gaming or gambling. It does not apply to a permit a federal agency has authorized a state agency to issue, or to federal or other local government requirements.

*§182.2. Comprehensive Permit Application Procedure.*

This procedure allows an applicant to obtain from the office all permit applications and related information required to be completed in order to obtain a particular state-issued permit. An applicant is not required to utilize this procedure, and may request permit applications and related information directly from the state agencies that issue the applicable permits. An applicant may withdraw a comprehensive application request form at any time without forfeiture of any permit approval applied for or obtained under this section.

(1) Within two business days after the office has received a written, oral, or electronic request from an applicant to participate in the comprehensive application procedure, the office shall send a comprehensive application request form to the applicant. The office shall also make available an electronic copy of the comprehensive application request form on the department's Web site.

(2) Within five business days after the date the office receives a completed comprehensive application request form from an applicant, the office shall send a copy of the form to each state agency having a possible interest in the proposed business undertaking, project, or activity identified on the form. Acceptable methods of transmitting forms to interested state agencies include interagency mail, facsimile, e-mail, or other electronic means the department has the technology to accept.

(3) Within 25 calendar days after the date the state agency receives a copy of the comprehensive application request form, the state agency shall determine whether one or more permits under its jurisdiction are or may be required for the business undertaking, project, or activity specifically described in the comprehensive application request form and shall send a completed agency response form and all required permit application forms, fee requirement, estimated processing time, and other related information to the office based on information provided by applicant. A state agency shall either specify on the agency response form the permits it believes are or may be required and the fees to be charged, or shall indicate that it does not have an interest in the permit requirements of the applicant.

(4) If, within the period specified in paragraph (3) of this section, the office does not receive a completed response form from a notified state agency, or a written response that the state agency does not have an interest in the applicant, the state agency cannot require a permit under the jurisdiction of the state agency the proposed undertaking, project, or activity specifically described in the comprehensive application request form. This paragraph does not apply if the comprehensive application request form contained false, misleading, or deceptive information or failed to include pertinent information, the lack of which could reasonably lead a state agency to misjudge whether permits under its jurisdiction are required. The determination of whether a permit is required shall be made by the state agency that has jurisdiction of the permit.

(5) Within five business days after the end of the period specified in paragraph (3) of this section, the office shall send to the applicant all permit application forms, fee schedules, and other related information for all permits specified by the interested state agencies and shall advise the applicant that all permit application and related forms are to be completed and submitted directly to the appropriate state agencies. The office shall also notify the applicant of all state agencies contacted and shall summarize their responses. Any completed permit applications, fees, or other related information sent to the office by the applicant in error shall be forwarded to the appropriate state agency by the office.

*§182.3. Comprehensive Application Request Form.*

An applicant shall complete the following form with sufficient detail to allow a state agency to identify which permits may be needed by the applicant.

Figure: 10 TAC §182.3

*§182.4. State Agency Response Form .*

A state agency shall use the following form to provide the information required under §182.2 of this title (relating to Comprehensive Application Procedure).

Figure: 10 TAC §182.4

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

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005697
Tracye McDaniel
Deputy Executive Director
Texas Department of Economic Development
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 936-0177

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# TITLE 13. CULTURAL RESOURCES

## PART 3. TEXAS COMMISSION ON THE ARTS

### CHAPTER 31. AGENCY PROCEDURES

**13 TAC §31.10**

The Texas Commission on the Arts proposes an amendment to §31.10, concerning Financial Assistance Application Form. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously adopts this amendment to §31.10 on an emergency basis.

The purpose of this amendment is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended September 2000.

Fred Snell, Director of Finance and Administration, Texas Commission on the Arts, 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 the section.

Mr. Snell also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the ability to utilize federal and state financial assistance funds in a more effective manner, thereby allowing more Texas organizations, communities, and citizens to participate in agency programs. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Ricardo Hernandez, Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711-3406. Comments will be accepted for 30 days after publication in the *Texas Register*.

The amendment is proposed under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

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

*§31.10. Financial Assistance Application Form.*

The commission adopts by reference application form and instructions for the Financial Assistance Application Form as outlined in the Texas Arts Plan as amended September 2000 [~~September~~ 1998]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

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

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005670
John Paul Batiste
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 463-5535

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## CHAPTER 35. A GUIDE TO OPERATIONS, PROGRAMS AND SERVICES

**13 TAC §35.1, §35.2**

The Texas Commission on the Arts proposes amendments to §35.1 and 35.2, concerning A Guide to Operations and A Guide to Programs and Services. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously adopts amendments to §35.1 and §35.2 on an emergency basis.

The purpose of the amendments is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended September 2000.

Fred Snell, Director of Finance and Administration, Texas Commission on the Arts, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing the sections.

Mr. Snell also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be the ability to utilize federal and state financial assistance funds in a more effective manner, thereby allowing more Texas organizations, communities, and citizens to participate in agency programs. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Ricardo Hernandez, Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711-3406. Comments will be accepted for 30 days after publication in the *Texas Register*.

The amendments are proposed under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

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

*§35.1. A Guide to Operations.*

The commission adopts by reference A Guide to Operations effective September 2000 [~~September~~ 1999]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

*§35.2. A Guide to Programs and Services.*

The commission adopts by reference A Guide to Programs and Services effective September 2000 [~~September~~ 1999]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

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

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005671
John Paul Batiste
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 463-5535

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## CHAPTER 37. APPLICATION FORMS AND INSTRUCTIONS FOR FINANCIAL ASSISTANCE

The Texas Commission on the Arts proposes amendments to §§37.22-37.24, 37.26 and 37.28, concerning Application Forms and Instructions for Financial Assistance. The Texas Commission on the Arts also proposes the repeal of §37.27, concerning Application Form and Instructions for Operational Assistance Year 2 of 2. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously adopts amendments to §§37.22-37.24, 37.26 and 37.28 and the repeal of §37.27 on an emergency basis.

The purpose of the amendments is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended September 2000.

Fred Snell, Director of Finance and Administration, Texas Commission on the Arts, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing the sections.

Mr. Snell also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be the ability to utilize federal and state financial assistance funds in a more effective manner, thereby allowing more Texas organizations, communities, and citizens to participate in agency programs. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Ricardo Hernandez, Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711-3406. Comments will be accepted for 30 days after publication in the *Texas Register*.

**13 TAC §§37.22-37.24, 37.26, 37.28**

The amendments are proposed under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

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

*§37.22. Application Form and Instructions for Artist-in-Education Program--Artist.*

The commission adopts by reference the application form and instructions for the Artist-in-Education Program--Artist as outlined in the Texas Arts Plan amended to be effective September 2000 [~~September 1998~~]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

*§37.23. Application Form and Instructions for Arts in Education Program--Sponsors.*

The commission adopts by reference application form and instructions for Arts in Education Program--Sponsors as outlined in the Texas Arts Plan as amended September 2000 [~~September 1998~~]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

*§37.24. Application Form and Instructions for Texas Touring Arts Program--Company/Artist.*

The commission adopts by reference the application form and instructions for the Texas Touring Arts Program--Company/Artist as outlined in the Addendum to the Texas Arts Plan, amended to be effective September 2000 [~~September 1998~~]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

*§37.26. Application Form and Instructions for Texas Touring Arts Program--Sponsors.*

The commission adopts by reference application form and instructions for the Texas Touring Arts Program--Sponsors as outlined in the Texas Arts Plan as amended September 2000 [~~September 1998~~]. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

*§37.28. Application Form and Instructions for Arts Education Service Provider.*

The commission adopts by reference the application and instructions for Arts Education Service Provider as amended September 2000. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

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

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005672
John Paul Batiste
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 463-5535

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**13 TAC §37.27**

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

The repeal is proposed under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

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

*§37.27. Application Form and Instructions for Operational Assistance Year 2 of 2.*

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

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005673
John Paul Batiste
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 463-5535

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# TITLE 16. ECONOMIC REGULATION

## PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

## CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

## SUBCHAPTER A. GENERAL PROVISIONS

**16 TAC §26.4**

The Public Utility Commission of Texas (commission) proposes an amendment to §26.4 relating to Statement of Nondiscrimination. The proposed amendment will implement the provisions of the Public Utility Regulatory Act (PURA) §17.004(a)(4) and §64.004(a)(4), both of which add "income level" and "source of income" as protected categories, and adds a prohibition on "unreasonable discrimination on the basis of geographic location." Project Number 22706 is assigned to this proceeding.

A previous proposed amendment to §26.4 was published in the *Texas Register* on November 5, 1999. Based on comments received at a Public Hearing on February 28, 2000, that proposed amendment was withdrawn to broaden the scope of the rule. This proposed amendment expands the application of the rule to all telecommunications providers.

John S. Capitano, Jr., Senior Investigator, Customer Protection Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Capitano has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be greater protection of the public interest, a reduction in the number of public complaints concerning disparate treatment, and an increase in compliance with the provisions of PURA by telecommunications providers. There will be no effect on small businesses or micro-businesses as a result of implementing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

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

The commission staff will conduct a public hearing on this rulemaking pursuant to Government Code §2001.029 at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Tuesday, October 24, 2000. The hearing will be held in the Commissioners' Hearing Room from 9:30 a.m. to 11:30 a.m.

Comments on the proposed amendment (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 within 30 days after publication. Reply comments may be submitted within 45 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed amendment. All comments should refer to Project Number 22706.

This amendment is proposed under 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 §17.004(a)(4) and §64.004(a)(4), that require protection from discrimination on the basis of race, color, sex, nationality, religion, marital status, income level, or source of income and from unreasonable discrimination on the basis of geographic location.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.004(a)(4), and 64.004(a)(4).

*§26.4. Statement of Nondiscrimination.*

(a) No telecommunications provider[~~utility~~] shall discriminate on the basis of race, nationality, color, religion, sex, [~~or~~ ]marital status, income level, or source of income.

(b) No telecommunications provider shall unreasonably discriminate on the basis of geographic location.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005600
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 936-7308

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# PART 8. TEXAS RACING COMMISSION

## CHAPTER 319. VETERINARY PRACTICES AND DRUG TESTING

## SUBCHAPTER D. DRUG TESTING

## DIVISION 3. PROVISIONS FOR HORSES

**16 TAC §319.362**

The Texas Racing Commission proposes an amendment to §319.362 concerning the procedures for sending a split specimen for testing. The amendment establishes a deadline for shipping a split specimen to avoid degradation of the specimen. The amendment also incorporates the text of §319.364, which provides the owner or trainer of the horse in question the right to be present at the time the split specimen is shipped for testing. §319.364 is being proposed for repeal.

Judith L. Kennison, General Counsel for the Texas Racing Commission, 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 this proposal.

Ms. Kennison has also determined that for each of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the repeal will be that the integrity of the Commission's drug testing program will be assured. There will be no fiscal implications for small or micro businesses. There is no anticipated economic cost to an individual required to comply with the amendment as proposed. The amendment has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Comments on the proposal; may be submitted on or before September 25, 2000, to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080.

The amendment is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §3.16, which authorizes the Commission to adopt rules prohibiting the unlawful influence of a race through the use of drug testing and relating to split testing procedures.

The proposal implements Texas Civil Statutes, Article 179e.

*§319.362. Split Specimen.*

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

(d) If the retained part of a specimen is sent for testing, the commission veterinarian shall arrange for the transportation of the specimen in a manner that ensures the integrity of the specimen. The person requesting the tests shall pay all costs of transporting and conducting tests on the specimen. To ensure the integrity of the specimen, the split specimen must be shipped to the selected laboratory no later than 10 days after the day the trainer is notified of the positive test. Subject to this deadline, the owner or trainer of the horse from whom the specimen was obtained is entitled to be present or have a representative present at the time the split specimen is sent for testing.

(e)-(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 August 14, 2000.

TRD-200005688
Judith L. Kennison
General Counsel
Texas Racing Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 833-6699

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**16 TAC §319.364**

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

The Texas Racing Commission proposes the repeal of §319.364 concerning the procedures for sending a split specimen for testing. The proposed repeal is appropriate because the language of this section will be moved and incorporated within §319.362.

Judith L. Kennison, General Counsel for the Texas Racing Commission, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of this repeal.

Ms. Kennison has also determined that for each of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be that the Commission's rules will be streamlined and easier for licensees to use. There will be no fiscal implications for small or micro businesses. There is no anticipated economic cost to an individual required to comply with the repeal as proposed. The repeal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Comments on the repeal may be submitted on or before September 25, 2000, to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080.

The repeal is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §3.16, which authorizes the Commission to adopt rules prohibiting the unlawful influence of a race through the use of drug testing and relating to split testing procedures.

The proposed repeal implements Texas Civil Statutes, Article 179e.

*§319.364. Representation of Owner or Trainer.*

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

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005689
Judith L. Kennison
General Counsel
Texas Racing Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 833-6699

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# TITLE 19. EDUCATION

## PART 2. TEXAS EDUCATION AGENCY

### CHAPTER 61. SCHOOL DISTRICTS
### SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

**19 TAC §61.1032**

The Texas Education Agency (TEA) proposes an amendment to §61.1032, concerning administration of the instructional facilities allotment (IFA) program. The section specifies provisions relating to definitions, the application process, district and debt eligibility, the payment process, deadlines, and prioritization and notice of award.

The proposed amendment to 19 TAC §61.1032 includes revisions to applicable definitions and administrative procedures pertaining to the IFA program's application, prioritization, and funding process in order to conform to changes to the Texas Education Code (TEC), Chapter 46, Subchapter A, amended by Senate Bill (SB) 4, 76th Texas Legislature, 1999. The amendment also adds content and modifies existing language related to the prioritization criteria and treatment of taxes brought about by the addition of TEC, Chapter 41, Subchapter B, Existing Debt Allotment, enacted by SB 4. The proposed amendment will affect all award decisions made after the effective date of the rule. The changes do not effect decisions made prior to the effective date of the rule.

Specific revisions to §61.1032 include the following. Debt eligibility language has been clarified in subsections (d)(2) for bonds and (d)(3) for lease-purchase agreements, and language has been changed in subsection (e) and new subsections (j)(1) and

(l)(4) for consistency. Language regarding additional applications has been removed from subsection (e) to form a new subsection (f) to add emphasis and to be more clear and easier to read. Content in new subsection (h)(4) and (5) has been added to incorporate prioritization data sources from SB 4. Changes in new subsection (l) revise and add language concerning application deadlines. Language regarding prioritization and notice of award has been amended and moved to new subsection (m) to incorporate prioritization criteria from SB 4. Content in new subsection (q) has been amended to clarify changes in the treatment of taxes due to the enactment of TEC, Chapter 46, Subchapter B.

Joe Wisnoski, managing director for school finance and fiscal analysis, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Wisnoski and Criss Cloudt, associate commissioner for policy planning and research, have determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be to reduce confusion caused by language that inadequately described program requirements and to streamline the administration of the program in situations in which no funds are available for awards. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Criss Cloudt, Policy Planning and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@tmail.tea.state.tx.us* or faxed to (512) 475-3499. All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of a proposed change in the section has been published in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §46.002, as amended by Senate Bill 4, 76th Texas Legislature, 1999, which authorizes the commissioner of education to adopt rules for the administration of the Instructional Facilities Allotment.

The amendment implements the Texas Education Code, §46.002.

*§61.1032. Instructional Facilities Allotment.*

(a) Definitions. The following definitions apply to the instructional facilities allotment governed by this section:

(1) Instructional facility--real property, an improvement to real property, or a necessary fixture of an improvement to real property that is used predominantly for teaching the curriculum required by Texas Education Code (TEC), §28.002.

(2) Noninstructional facility--a facility that may occasionally be used for instruction, but the predominant use is for purposes other than teaching the curriculum required by TEC, §28.002.

(3) Necessary fixture--equipment necessary to the use of a facility for its intended purposes, but which is permanently attached to the facility such as lighting and plumbing.

(4) Debt service--as used in this section, debt service shall include payments of principal and interest on bonded debt or the amount of a payment under an eligible lease-purchase arrangement.

(5) Allotment--represents the amount of eligible debt service that can be considered for state aid. The total allotment is comprised of a combination of state aid and local funds. The state share and local share are adjusted annually based on changes in average daily attendance, property values, and debt service.

(b) Application process. A school district must complete an application requesting funding under the Instructional Facilities Allotment. The commissioner may require supplemental information to be submitted at an appropriate time after the application is filed to reflect changes in amounts and conditions related to the debt. The application shall contain at a minimum the following:

(1) a description of the needs and projects to be funded with the debt issue or other financing, with an estimate of cost of each project and a categorization of projects according to instructional and noninstructional facilities or other uses of funds;

(2) a description of the debt issuance or other financing proposed for funding, including a projected schedule of payments covering the life of the debt;

(3) an estimate of the weighted average maturity of bonded debt; and

(4) drafts of official statements or contracts that fully describe the debt, as soon as available.

(c) District eligibility. All school districts legally authorized to enter into eligible debt arrangements as defined in subsection (d) of this section are eligible to apply for an Instructional Facilities Allotment.

(d) Debt eligibility. In order to be eligible for state funding under this section, a debt service requirement must meet all of the criteria of this subsection.

(1) The debt service must be an obligation of the school district which is entered into pursuant to the issuance of bonded debt under TEC, Chapter 45, Subchapter A; an obligation for refunding bonds as defined in TEC, §46.007; or an obligation under a lease-purchase arrangement authorized by Local Government Code, §271.004.

(2) Application for funding of [~~the~~] bonded debt service [~~or lease-purchase payments~~] must be made prior to the passage of an order by the school district board of trustees authorizing the bond issuance [~~pricing of the bonds or the passage of an order by the school district board of trustees authorizing a lease-purchase arrangement~~].

(3) Application for funding of lease-purchase payments must be made prior to the passage of an order by the school district board of trustees authorizing the lease-purchase arrangement.

(4) [~~(3)~~] Eligible bonded debt must have a weighted average maturity of at least eight years. The term of a lease-purchase agreement must be for at least eight years. For purposes of this section, a weighted average maturity shall be calculated by dividing bond years by the issue price, where "bond years" is defined as the product of the dollar amount of bonds divided by 1,000 and the number of years from the dated date to the stated maturity, and "issue price" is defined as the par value of the issue plus accrued interest, less original issue discount or plus premium.

(5) [~~(4)~~] Funds raised by the district through the issuance of bonded debt must be used for an instructional facility purpose as defined by TEC, §46.001. The facility acquired by entering into a lease-purchase agreement must be an instructional facility as defined by TEC, §46.001.

(6) [~~(5)~~] If the bonded debt is for a refunding or a combination of refunding and new debt, the refunding portion must meet the

same eligibility criteria with respect to dates of first debt service as a new issue as defined by TEC, §46.003(d)(1).

(7) [~~(6)~~] An amended application is required for any eligible refunding bonds, regardless of whether a complete or partial refunding is accomplished. Refunding bonds must also meet the following three criteria as defined by TEC, §46.007:

(A) Refunding bonds may not be called for redemption earlier than the earliest call date of the bonds being refunded.

(B) Refunding bonds must not have a maturity date later than the final maturity date of the bonds being refunded.

(C) The refunding of bonds must result in a present value savings, which is determined by computing the net present value of the difference between each scheduled payment on the original bonds and each scheduled payment on the refunding bonds. Present value savings shall be computed at the true interest cost of the refunding bonds.

(e) Biennial limitation on access to allotment. The cumulative amount of new debt service for which a district may receive approvals for funding within a biennium shall be the greater of $100,000 per year or $250 per student in average daily attendance per year. A district may submit multiple applications for approval during the same biennium. Timely application before executing the bond order for [~~the pricing of~~] bonds or authorizing the order for a lease-purchase agreement must be made to ensure eligibility of the debt for program participation. The calculation of the limitation on assistance shall be based on the highest annual amount of debt service that occurs within the state fiscal biennium in which payment of state assistance begins. [~~Increases in debt service payment requirements in subsequent biennia must receive approval through additional applications. The limitation on the allotment for subsequent biennia shall be the total dollar amount of debt service approved for the allotment, based on the calculation of the limitation on assistance at the time of approval.~~]

(f) Additional applications. For previously awarded debt, increases in debt service payment requirements in subsequent biennia must receive approval through additional applications. The portion of any increase in eligible, qualified debt service that may be funded in subsequent biennia is the amount that exceeds any previously approved amounts, subject to the biennial limitation on funding as calculated at the time of approval of the additional application.

(g) [~~(f)~~] Finality of award. Awards of assistance under TEC, Chapter 46, will be made based on the information available at the close of the application cycle. Changes in the terms of the issuance of debt, either in the length of the payment schedule or the applicable interest rate, that occur after the time of the award of assistance will not result in an increase in the debt service considered for award. Any reduction in debt service requirements resulting from changes in the terms of issuance of debt shall result in a reduction in the amount of the award of assistance.

(h) [~~(g)~~] Data sources.

(1) For purposes of determining the limitation on assistance and prioritization, the projected average daily attendance as submitted to the legislature by the Texas Education Agency (TEA) in March of an odd-numbered year, as required by TEC, §42.254, shall be used.

(2) For purposes of prioritization, the final property values certified by the Comptroller of Public Accounts for the tax year preceding the year in which assistance is to begin shall be used. If final property values are unavailable, the most recent projection of property values shall be used.

(3) For purposes of both the calculation of the limitation on assistance and prioritization, the commissioner may consider, prior to the close of an application cycle, adjustments to data values determined to be erroneous.

(4) For purposes of prioritization, enrollment increases over the previous five years shall be determined using Public Education Information Management System (PEIMS) submission data available at the time of application.

(5) For purposes of prioritization, outstanding debt is considered voter-approved bonded debt or lease- purchase debt outstanding at the time of the application deadline.

(6) [~~(4)~~] All final calculations of assistance earned shall be based on property values as certified by the Comptroller for the preceding school year, and the final average daily attendance for the current school year.

(i) [~~(h)~~] Allocation of debt service between qualified and nonqualified projects. Debt service shall be allocated among qualified and nonqualified purposes and among eligible and ineligible categories of debt. The method used for allocation among qualified and nonqualified purposes shall be on the basis of pro rata value of the instructional facility versus the noninstructional purposes over the life of the debt service, unless a different basis is indicated in the bond order. The method of allocation of debt service between eligible and ineligible categories must be the same method selected for approval by the Attorney General.

(j) [~~(i)~~] Payments and deposits.

(1) Payment of state assistance shall be made as soon as practicable after September 1 of each year. No payments shall be made until the execution of the bond order [~~pricing of bonds~~] is determined to be final or the contract for lease-purchase financing has been assigned.

(2) Funds received from the state for bonded debt must be deposited to the interest and sinking fund of the school district and must be considered in setting the tax rate necessary to service the debt.

(3) Funds received from the state for lease-purchase agreements must be deposited to the general fund of the district and used for lease-purchase payments.

(4) A final determination of state assistance for a school year will be made using final attendance data and property value information as may be affected by TEC, §42.257. Additional amounts owed to districts shall be paid along with assistance in the subsequent school year, and any reductions in payments shall be subtracted from payments in the subsequent school year.

(5) As an alternative method of adjustment of payments, the commissioner may increase or decrease allocations of state aid under TEC, Chapter 42, to reflect appropriate increases or decreases in assistance under TEC, Chapter 46.

(k) [~~(j)~~] Approval of Attorney General required. All bond issues and all lease-purchase arrangements must receive approval from the Attorney General before a deposit of state funds will be made in the accounts of the school district.

(l) [~~(k)~~] Deadlines.

(1) The commissioner of education shall establish application cycles based on the availability of appropriations for the purpose of awarding new allotments. The commissioner may conduct more than one application cycle to allocate funding appropriated for a fiscal year. [~~Two application cycles will be conducted each year. Applications shall be received by 5:00 p.m., on June 15 and December 15 of each year, or the last official business day that precedes these dates.~~]

(2) The commissioner shall announce the TEA's intention to have an application cycle no less than 90 days prior to the application deadline. The commissioner shall establish the relevant limit on the date of first debt service payment from property taxes for eligible bonded debt that will be considered for funding in the announced application cycle. [~~Based on availability of appropriations, the commissioner may cancel application cycles. In the event of cancellation of an application cycle, the commissioner shall provide for an interim application process to maintain eligibility of school district debt for consideration for funding at a later time. Applications received in this circumstance shall be considered in the next cycle only if the provisions of subsection (k)(4) of this section are met. Applications received in an interim in which no funds are available will be reviewed along with any other applications received for the next cycle for which funds are available. Interim applications receive no special consideration other than the adjustment to property wealth as indicated in subsection (l) of this section, if applicable.~~]

(3) An application received after the deadline shall be considered a valid application for the subsequent period unless withdrawn by the submitting district before the end of the subsequent period.

(4) [~~An application may be submitted no earlier than 180 calendar days prior to the prospective sale date/pricing date of the bond issue or the date the school board adopts the order authorizing a lease-purchase agreement.~~] If the execution of the bond order [~~pricing of the bonds~~] or the authorizing [~~signing~~] of a lease-purchase agreement has not taken place within 180 days of the deadline for the current application cycle [~~by the end of the 180-day period~~], the TEA shall consider the application withdrawn. In the case of a lease-purchase agreement, funding of the agreement, through the execution of a bond order for [~~sale of~~] revenue bonds or other comparable financing transaction, must also be accomplished within the 180-day limit.

(5) The school district may not submit an application for bonded debt prior to the successful passage of an authorizing proposition. The election to authorize the debt must be held prior to the close of the application cycle. An application for a lease-purchase agreement may not be submitted prior to the end of the 60-day waiting period in which voters may petition for a referendum, or until the results of the referendum, if called, approve the agreement.

[~~(l)~~ Prioritization and notice of award. Upon close of the application cycle, all eligible applications shall be ranked in order of property wealth per student in average daily attendance. State assistance will be awarded beginning with the district with the lowest property wealth and continue until all available funds have been utilized. If a district has not previously received any assistance due to a lack of appropriated funds, its property wealth for prioritization shall be reduced by 10% for each biennium in which assistance was not provided. The reduction in property wealth for prioritization purposes is only effective if the district actually entered the proposed debt without state assistance prior to the deadline for a subsequent cycle for which funds are available. Each district shall be notified of the amount of assistance awarded and its position in the rank order for the application cycle.]

(m) Prioritization and notice of award. Upon close of the application cycle, all eligible applications shall be ranked in order of property wealth per student in average daily attendance. State assistance will be awarded beginning with the district with the lowest property wealth and continue until all available funds have been utilized. Each district shall be notified of the amount of assistance awarded and its position in the rank order for the application cycle. A district's wealth per student may be reduced if any or all of the following criteria are met.

(1) A district's wealth per student is first reduced by 10% if the district does not have any outstanding debt at the time the district applies for assistance.

(2) A district's wealth per student is next reduced if a district has had substantial student enrollment growth in the preceding five-year period. For this purpose, the district's wealth per student is reduced:

(A) by 5.0%, if the district has an enrollment growth rate in that period that is 10% or more but less than 15%;

(B) by 10%, if the district has an enrollment growth rate in that period that is 15% or more but less than 30%; or

(C) by 15%, if the district has an enrollment growth rate in that period that is 30% or more.

(3) If a district has submitted an application with eligible debt and has not previously received any assistance due to a lack of appropriated funds, its property wealth for prioritization shall be reduced by 10% for each biennium in which assistance was not provided. The reduction is calculated after reductions for outstanding debt and enrollment are completed, if applicable. This reduction in property wealth for prioritization purposes is only effective if the district actually entered the proposed debt without state assistance prior to the deadline for a subsequent cycle for which funds are available.

(n) [~~(m)~~] Bond taxes. A school district that receives state assistance must levy and collect sufficient interest and sinking fund taxes to meet its local share of the debt service requirement for which state assistance is granted. Failure to levy and collect sufficient taxes shall result in pro rata reduction of state assistance. The requirement to levy and collect interest and sinking fund taxes specified in this subsection may be waived at the discretion of the commissioner for a school district that must maintain local maintenance tax effort in order to continue receiving federal impact aid.

(o) [~~(n)~~] Exclusion from taxes. The taxes collected for bonded debt service for which funding under TEC, Chapter 46, is granted shall be excluded from the tax collections used to determine the amount of state aid under TEC, Chapter 42. For a district operating with a waiver as described in subsection (n) [~~(m)~~] of this section, the amount of the local share of the allotment shall be subtracted from the total tax collections used to determine state aid under TEC, Chapter 42.

(p) [~~(o)~~] Calculation of bond tax rate (BTR) for lease-purchase arrangements. The value of BTR in the formula for state assistance for a lease-purchase arrangement shall be calculated based on the lease-purchase payment requirement, not to exceed the relevant limitations described in this section. The lease- purchase payment shall be divided by the guaranteed level (FYL), then by average daily attendance (ADA), then by 100. The value of BTR shall be subtracted from the value of district tax rate (DTR) as computed in TEC, §42.302, prior to limitation imposed by TEC, §42.303.

(q) [~~(p)~~] Continued treatment of taxes and lease-purchase payments. Taxes associated with bonded debt may not be considered for state aid under TEC, Chapter 42. [~~Once approved for funding under TEC, Chapter 46, a district may not select whether taxes associated with the bonded debt are considered for purposes stated in TEC, Chapter 46, or Chapter 42. Until approved for assistance under TEC, Chapter 46, taxes collected for debt service may be considered in the calculation of state aid in TEC, Chapter 42.~~] Bonded debt service or lease-purchase payments that were excluded from consideration for state assistance due to prioritization or due to the limitation on assistance may be considered for state assistance in subsequent biennia through additional applications. A modified application may be provided for previously rejected debt service or lease-purchase payments.

(r) [(q)] Variable rate bonds. Variable rate bonds are eligible for state assistance under the Instructional Facilities Allotment. For purposes of calculating the biennial limitation on access to the allotment, the payment requirement for a variable rate bond shall be valued at the interest rate specified in the official statement (or draft) as the rate to be used in calculating the minimum amount a district must budget for payment of interest cost and the scheduled minimum mandatory redemption amount, if applicable. For purposes of calculating state assistance under TEC, Chapter 46, the lesser of the actual interest rate or that used for the calculation of the limitation on access to the allotment shall be used. A district may exercise its ability to make payments in amounts in excess of the minimum, but the excess amount shall not be used in determining the value of BTR or in the calculation of state assistance under TEC, Chapter 46, in that year.

(s) [(r)] Reports required. The commissioner may require such information and reports as are necessary to assure compliance with applicable laws. The commissioner may require immediate notification by the district of relevant financing activities such as refunding or refinancing of bond issues, renegotiation of lease-purchase terms, change in use of bond proceeds, or other actions taken by the district that might affect state funding 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 August 14, 2000.

TRD-200005684
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 463-9701

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# TITLE 22. EXAMINING BOARDS

## PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

### CHAPTER 321. DEFINITIONS

**22 TAC §321.1**

The Texas Board of Physical Therapy Examiners proposes an amendment to §321.1, concerning Definitions. The amendment will add a definition for the term "endorsement", to parallel new terminology in §329.6, concerning licensure of persons already licensed in another state or jurisdiction of the U.S.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline 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 increased administrative efficiency. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us.

The amendment is proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Occupations Code is affected by this amended section.

*§321.1. Definitions.*

The following words, terms, and phrases, when used in the rules of the Texas Board of Physical Therapy Examiners, shall have the following meanings, unless the context clearly indicates otherwise.

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

(5) Endorsement - The process by which the board issues a license to a person currently licensed in another state, the District of Columbia, or territory of the United States that maintains professional standards considered by the board to be substantially equivalent to those set forth in the Act.

(6) [(5)] Emergency circumstances - Instances where emergency medical care is called for, including first aid.

(7) [(6)] Emergency medical care - Bona fide emergency services provided after the sudden onset of a medical condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part.

(8) [(7)] Evidence satisfactory to the board - Should all official school records be destroyed, sworn affidavits satisfactory to the board must be received from three persons having personal knowledge of the applicant's physical therapy education. These affidavits will not be used when official school records are available.

(9) [(8)] Foreign-trained applicant - Any applicant whose education is from a country outside the United States, the District of Columbia, or Territories of the United States.

(10) [(9)] Hearing - An adjudicative proceeding concerning the issuance, denial, suspension, reprimand, revocation of license, after which the legal rights of an applicant or licensee are to be determined by the board.

(11) [(10)] Jurisprudence exam - An open-book examination made up of multiple-choice and/or true/false questions covering information contained in the Texas Physical Therapy Practice Act and Board rules.

(12) [(11)] On-site supervision - The physical therapist or physical therapist assistant is on the premises and readily available to respond.

(13) [(12)] Physical therapy - The evaluation, examination, and utilization of exercises, rehabilitative procedures, massage, manipulations, and physical agents including, but not limited to, mechanical devices, heat, cold, air, light, water, electricity, and sound in the aid of diagnosis or treatment. Physical therapists may perform evaluations without referrals. Physical therapy practice includes the use of modalities, procedures, and tests to make evaluations. Physical therapy practice includes, but is not limited to the use of: Electromyographic (EMG) Tests, Nerve Conduction Velocity (NCV) Tests, Thermography,

Transcutaneous Electrical Nerve Stimulation (TENS), bed traction, application of topical medication to open wounds, sharp debridement, provision of soft goods, inhibitive casting and splinting, Phonophoresis, Iontophoresis, and biofeedback services.

(14)[~~(13)~~] Supervision - The delegation and continuing direction by a person or persons responsible for the practice of physical therapist, physical therapist assistant, or physical therapy aide as specified in the Physical Therapy Practice Act.

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

Filed with the Office of the Secretary of State, on August 7, 2000.

TRD-200005489
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 305-6900

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## CHAPTER 323. POWERS AND DUTIES OF THE BOARD

### 22 TAC §323.1

The Texas Board of Physical Therapy Examiners proposes an amendment to §323.1, concerning Types of Examinations. The amendment will update the description of the board's examination responsibilities.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline 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 a clearer description of the examination process. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us.

The amendment is proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Occupations Code is affected by this amended section.

*§323.1. Types of Examination.*

It is the duty of the board to evaluate the qualifications of applicants for licensure and to examine applicants through the national examinations selected by the board to [~~pass on all the qualifications of applicants and to conduct examinations that~~] measure those qualifications. The passing score on the National Physical Therapy Examination for physical therapists and physical therapist assistants shall be set by the board. In addition, the board shall examine applicants to determine successful completion of the jurisprudence examination covering the Physical Therapy Practice Act and board rules. [~~The written examination shall be approved by the board. At the discretion of the board, an applicant may also be required to satisfactorily complete an oral and/or practical examination. The education committee shall administer all examinations. Applicants will be given a 14-day notice of the time and place of examination.~~]

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

Filed with the Office of the Secretary of State, on August 7, 2000.

TRD-200005490
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 305-6900

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## CHAPTER 325. ORGANIZATION OF THE BOARD

### 22 TAC §325.7

The Texas Board of Physical Therapy Examiners proposes an amendment to §325.7, concerning Board member terms. The amendment eliminates references to past actions which are now complete.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline 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 an accurate description of board member terms. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us.

The amendment is proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Occupations Code is affected by this amended section.

*§325.7. Board Member Terms.*

(a) Members of the board serve staggered six-year terms expiring in January of an odd-numbered year, or as appointed by the governor.

(b) If a vacancy occurs during a member's term, the governor shall appoint a replacement to fill the unexpired part of the term.

[~~To comply with the intent of Section 2 of the Texas Physical Therapy Practice Act, one professional member whose term expires January 31, 1997 will extend to January 31, 1999. Two professional members whose terms expire January 31, 1999 will extend to January 31, 2001.~~]

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

Filed with the Office of the Secretary of State, on August 7, 2000.

TRD-200005491
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 305-6900

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## CHAPTER 329. LICENSING PROCEDURE

The Texas Board of Physical Therapy Examiners proposes the repeal of §329.1, concerning General Licensing Procedure, §329.2, concerning License by Examination, §329.3, concerning Temporary Licensure for Examination Candidates, §329.4, concerning Additional Education, and §329.6, concerning Licensure of Persons Currently Licensed in Other States, the District of Columbia, or Territories of the United States. The repealed sections are being replaced by new sections §329.1, General Licensure Requirements and Procedures, §329.2, Licensure by Examination, §329.3, Temporary Licensure for Examination Candidates, and §329.6, Licensure by Endorsement. The information currently found in §329.4, Additional education, duplicates information in §329.2. The repeal of these sections and the adoption of the replacement sections will restructure licensing procedure rules and update the descriptions of the requirements for licensure, reflecting current terminology and changes to the procedures. They also make administrative procedures for PT and OT application and licensure as uniform as possible to achieve greater administrative efficiency.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering them.

Mr. Maline also has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be easier comprehension of the application and licensure process, and greater administrative efficiency . There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rules as proposed.

Comments on the proposed changes may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us.

**22 TAC §§329.1 - 329.4, 329.6**

*(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Board of Physical Therapy Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The repeals are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Occupations Code is affected by these changed sections.

*§329.1. General Licensing Procedure.*

*§329.2. License by Examination.*

*§329.3. Temporary Licensure for Examination Candidates.*

*§329.4. Additional Education.*

*§329.6. Licensure of Persons Currently Licensed in Other States, the District of Columbia, or Territories of the United States.*

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

Filed with the Office of the Secretary of State, on August 7, 2000.

TRD-200005492
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 305-6900

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**22 TAC §§329.1 - 329.3, 329.6**

The new sections are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Occupations Code is affected by these changed sections.

*§329.1. General Licensure Requirements and Procedures.*

(a) Requirements. All applications for licensure shall include:

(1) a completed, notarized board application form with a recent color photograph of the applicant;

(2) the non-refundable application fee as set by the executive council;

(3) a successfully completed board jurisprudence exam on the Texas Physical Therapy Practice Act and Board rules; and

(4) documentation of academic qualifications.

(A) For applicants who completed their physical therapy education in the U.S., the documentation required is:

*(i)* an official transcript showing completion of an accredited physical therapy or physical therapist assistant program, as provided in §453.203 of the Act. For applicants applying for a physical therapist license, official transcripts must show completion of a an entry-level program of at least 4 years, and completion of 60 semester hours in general education, from an accredited college or university; and

*(ii)* a photocopy of the diploma or certificate awarded, showing graduation from a PT or PTA program; or

*(iii)* a statement signed by the program director or other authorized school official, with the school seal affixed, stating that the applicant has successfully completed the PT or PTA program.

(B) For applicants who completed their physical therapy education outside of the US, the documentation required is an evaluation by a board-approved credentialing entity, as set out in §329.5 of this title (relating to Licensing Procedure for Foreign-trained Applicants)

(b) Licensure by examination. If an applicant has not passed the national licensure exam, the applicant must also meet the requirements in §329.2 of this title (relating to Licensure by examination).

(c) Licensure by endorsement. If the applicant is licensed as a PT or PTA in another state or jurisdiction of the U.S., the applicant must also meet the requirements as stated in §329.6 of this title (relating to Licensure by endorsement).

(d) Application expiration. An application for licensure is valid for one year after the date it is received by the board.

(e) False information. An applicant who submits an application containing false information may be denied licensure by the board.

(f) Rejection. Should the board reject an application for licensure, the reasons for the rejection will be stated. The applicant may submit additional information and request reconsideration by the Board. If the applicant remains dissatisfied, a hearing may be requested as specified in the Act, §453.352.

(g) Changes to licensee information. Applicants and licensees must notify the board in writing of changes in residential and business address within 30 days of the change. For a name change at time of renewal, the licensee must submit a copy of the legal document enacting the name change with the renewal application.

(h) Replacement copy of license. The Board will issue a copy of a license to replace one lost or destroyed upon receipt of a written request and the appropriate fee from the licensee. The Board will issue a new original license after a name change upon receipt of a written request, the appropriate fee, and a copy of the legal document enacting the name change.

*§329.2. License by Examination.*

(a) Requirements. An applicant applying for licensure by examination must:

(1) meet the requirements as stated in §329.1 of this title (relating to General licensure requirements and procedures); and

(2) pass the National Physical Therapy Exam (NPTE) for physical therapists or physical therapist assistants with the score set by the board. Score reports must be sent directly to the board by the authorized score reporting service.

(b) Notification of exam score. The Board will notify applicants in writing of the exam score.

(1) If an applicant passes the exam, the Board will include a permanent license with the score notification.

(2) If an applicant fails the exam, a re-examination application and fee is required for a subsequent examination.

(c) An applicant may take the examination for PT or PTA licensure only after the application process is complete and all requirements are met.

(d) Applying for licensure in more than one state. An applicant who applies for licensure by exam in another state, but does not receive a license from any other state, may apply for licensure by exam in Texas. The applicant must meet all other requirements for licensure in Texas, and must have the score report sent directly to the board from the authorized score reporting service.

(e) If an examinee has failed the physical therapy examination and wishes to take the physical therapist assistant examination, the examinee may apply under the Act, §453.203.

(f) Re-examination.

(1) First re-examination. An applicant who fails the exam the first time is eligible to take the examination a second time after submitting a re-exam application and fee.

(2) Second or subsequent re-examination. An applicant who fails the exam twice or more must complete additional education before taking the exam again. All additional education must be approved by the board before the applicant undertakes it. Additional education may be board-approved continuing education programs or individual tutorials.

(A) Individual tutorials. A tutor must be a physical therapist licensed in Texas. The tutor and the applicant must develop an outline of study to meet the required number of tutorial hours and submit it to the board office. The board will notify the applicant and the tutor when the outline has been approved. When the applicant has successfully completed the tutorial, the tutor must send the board a notarized statement to that effect.

(B) Board-approved continuing education. The amount of additional education required is set forth in the following chart.
Figure: 22 TAC §329.2(f)(2)(B)

(g) Failure of PT exam. An applicant who fails the physical therapy examination may apply for licensure as a PTA and take the physical therapist assistant examination if he meets all other requirements for licensure.

(h) License upgrading. An applicant who was licensed under the grandfather clause may take the NPTE to upgrade his or her score. The applicant must submit a written request and the examination registration materials and fee required by the FSBPT.

*§329.3. Temporary Licensure for Examination Candidates.*

(a) Requirements. To be eligible for a temporary license, the applicant must:

(1) meet all requirements as stated in §329.1 of this title (relating to General licensure requirements and procedures);

(2) meet all requirements as stated in §329.2 of this title (relating to Licensure by examination);

(3) submit notarized temporary supervision affidavits as provided by the board; and

(4) submit fees for temporary licensure as set by the executive council.

(b) Eligibility. The Board will issue a temporary license to an applicant who is taking the exam for the first time. An applicant who has received a license from another state is not eligible for temporary licensure. A candidate who has taken and failed the physical therapist examination is not eligible for temporary licensure as a physical therapist assistant.

(c) Duration. A temporary license is valid until the applicant receives the score report from the board, or until the last day of the third month after the month the license is issued, whichever occurs first. The coordinator may extend the temporary license for no more than 30 days to offset an unreasonable delay in reporting the examination results to the applicant.

(d) Failure of examination. If the applicant fails the exam, the temporary license is void and must be returned to the board when the notification of the failure is received.

(e) Supervision requirements. An applicant with a temporary PT license must have on-site supervision by a physical therapist with a permanent license when providing physical therapy services. An applicant with a temporary PTA license must have on-site supervision by either a physical therapist or a physical therapist assistant with a permanent license when providing physical therapy services.

*§329.6. Licensure by Endorsement.*

(a) Eligibility. The Board may issue a license by endorsement to an applicant currently licensed in another state, District of Columbia, or territory of the United States, if they have not previously held a permanent license issued by this board.

(b) Requirements. An applicant seeking licensure by endorsement must:

(1) meet the requirements as stated in §329.1 of this title (relating to General licensure requirements and procedures); and

(2) submit a passing score on the National Physical Therapy Examination sent directly to the board by the board-approved reporting service, or scores on the Registry Examination sent directly to the board by the American Physical Therapy Association. The applicant's score must meet one of the conditions listed in subparagraphs (A) - (C) of this paragraph:

(A) The applicant must have passed the national examination given on or after January 1, 1993, with the score required by the board for that exam.

(B) The applicant must have obtained a score of 1.5 standard deviations below the nationwide mean on an examination given prior to January 1, 1993.

(C) The applicant must have obtained a score of 75% or higher for the Registry Examination taken prior to September 1971; and

(3) submit verification of licensure in good standing from the licensing board in the jurisdiction in which the applicant is currently licensed. This verification must be sent directly to the board by the licensing board in that jurisdiction.

(c) Provisional licensure. The Board may grant a provisional license to an applicant who is applying for licensure by endorsement if there is an unwarranted delay in the submission of required documentation outside the applicant's control. All other requirements for licensure by endorsement must be met. The applicant must also submit the provisional license fee as set by the executive council, and notarized proof of sponsorship by a licensee of this board, before the license may be issued. The Board may not grant a provisional license to an applicant with disciplinary action in their licensure history, or to an applicant with pending disciplinary action.

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

Filed with the Office of the Secretary of State, on August 7, 2000.

TRD-200005493
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 305-6900

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## CHAPTER 339. FEES

### 22 TAC §339.1

The Texas Board of Physical Therapy Examiners proposes amendments to §339.1, concerning Examination. This amendment eliminates an incorrect fee and specifies that PT Board fees are found in the Executive Council of Physical Therapy and Occupational Therapy Examiners' rules, 40 TAC §651.2.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no effect on state or local government.

Mr. Maline 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 clearer instructions for licensees. There will be no effect on small business, and no economic cost to persons having to comply is anticipated.

Comments on the proposed amendment may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us.

The amendment is proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Occupations Code is affected by this amended section.

*§339.1. Fees.[~~Examination.~~]*

(a) Fees are set by the executive council and may be subject to change by the legislature. [~~Physical therapist--$100. (This fee will increase to $185 in 1995.)~~]

(b) Fees paid to the board or executive council may be in the form of a personal check, cashier's check, money order, or other certified funds. [~~Physical therapist assistant--$100. (This fee will increase to $185 in 1995.)~~]

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

Filed with the Office of the Secretary of State, on August 7, 2000.

TRD-200005494
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 305-6900

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### 22 TAC §§339.2 - 339.4

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

The Texas Board of Physical Therapy Examiners proposes the repeal of §339.2, concerning Application, §339.3, concerning License, and §339.4, concerning Renewal. The repeals eliminate references to specific fees, which are set by the Executive Council of Physical Therapy and Occupational Therapy Examiners in 40 TAC §651.2, Physical Therapy Board Fees.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering them.

Mr. Maline also has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing them will be increased administrative efficiency. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rules as proposed.

Comments on the proposed repeals may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us.

The repeals are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Occupations Code is affected by these repealed sections.

*§339.2. Application.*
*§339.3. License.*
*§339.4. Renewal.*

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

Filed with the Office of the Secretary of State, on August 7, 2000.

TRD-200005495
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 305-6900

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## CHAPTER 341. LICENSE RENEWAL

### 22 TAC §341.3

The Texas Board of Physical Therapy Examiners proposes amendments to §341.3, concerning Qualifying Continuing Education. This amendment clarifies that only the author of a publication may submit it to satisfy continuing education requirements.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no effect on state or local government.

Mr. Maline 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 clearer instructions for licensees. There will be no effect on small business, and no economic cost to persons having to comply is anticipated.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us.

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Occupations Code is affected by this amended section.

*§341.3. Qualifying Continuing Education.*

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

(c) Self-directed study

(1) A publication or publications may be submitted by the authors for consideration of up to one-half of their ~~[the]~~ CE requirement. The request and publication(s) must be sent to the board-approved organization at least 60 days prior to the license expiration date. Submissions after this date will not be approved.

(2) (No change.)

(d) (No change.)

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

Filed with the Office of the Secretary of State, on August 7, 2000.

TRD-200005496
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 305-6900

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### 22 TAC §341.15

*(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Board of Physical Therapy Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas Board of Physical Therapy Examiners proposes the repeal of §341.15, concerning Change of Address of Licensee. The repeal eliminates information which is being amended and moved to §329.1, General Licensing Requirements and Procedures.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering it.

Mr. Maline 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 it will be increased administrative efficiency. There will be no effect on small businesses. There are no anticipated

economic costs to persons who are required to comply with the rules as proposed.

Comments on the proposed repeal may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nhurter@mail.capnet.state.tx.us.

The repeal is proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Occupations Code is affected by this repealed section.

*§341.15. Change of Address of Licensee.*

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

Filed with the Office of the Secretary of State, on August 7, 2000.

TRD-200005497
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 305-6900

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# TITLE 25. HEALTH SERVICES

## PART 1. TEXAS DEPARTMENT OF HEALTH

### CHAPTER 29. PURCHASED HEALTH SERVICES

### SUBCHAPTER D. MEDICAID HOME HEALTH SERVICES

**25 TAC §29.307**

*(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

Subject to the approval of the State Medicaid Director, the Texas Department of Health (department) proposes to repeal §29.307, concerning reimbursement methodology for home health services.

The department has determined the need to repeal the rule because it is unnecessary. The Texas Government Code §531.021, as amended in 1997, 75th Legislature, gave the Health and Human Services Commission responsibility for adopting all reimbursement rules and statutes regarding the setting of Medicaid rates, fees and charges. Therefore, there is no need for the Texas Department of Health to have a rule that the Health and Human Services Commission is responsible for now and in the future.

Mr. Joe Moritz, Health Care Financing Budget Director, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications on state government on the proposal of repealing this rule. The proposed repeal does not have foreseeable implications relating to cost or revenues of local government.

Mr. Moritz 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 to ensure that all Medicaid reimbursement rules are administered by the Health and Human Services Commission per legislative mandate. There will be no effect on small business or micro-business to comply with the proposed repeal of this section. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the proposed rule repeal. There are no anticipated economic costs to persons who are required to comply with the proposed repeal of this section. There will be no impact on local employment.

Comments on the proposal may be submitted to Beverly Williams, Program Specialist III, Health Care Financing, Texas Department of Health, Mail Code Y-927, 1100 West 49th Street, Austin, Texas 78756-3168, within 30 days of publication in the *Texas Register*.

The repeal of this rule is in accordance with the Human Resources Code, §32.021 and the Texas Government Code, §531.021, which provides the Health and Human Services Commission with the authority to adopt rules to administer the state's medical assistance program. Rules are submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized by Acts of the 72nd Legislature, First Called Session, Chapter 15, §1.07, (1991).

The proposed rule repeal affects Chapter 32 of the Human Resources Code and Chapter 531 of the Government Code.

*§29.307. Reimbursement Methodology for Home Health Services.*

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

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005680
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 458-7236

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### SUBCHAPTER E. MEDICAID CHIROPRACTIC SERVICES

**25 TAC §§29.401, §29.403**

Subject to the approval of the State Medicaid Director, the Texas Department of Health (department) proposes amendments to §§29.401 and 29.403, concerning Medicaid Chiropractic Services.

The department has determined the need to amend its rules in accordance with §4513(a) of the Balanced Budget Act of 1997,

which eliminates the statutory provision that a spinal subluxation be demonstrated by an x-ray. The amendments will allow chiropractors participating in the Texas Medical Assistance Program to provide manual manipulations of the spine to correct a subluxation without an x-ray demonstrating the existence of subluxation.

Joe Moritz, Health Care Financing Budget Director, has determined that for each year of the first five years the sections are in effect, there will be fiscal implications as a result of enforcing or administering the sections as proposed. The effect on state government will mean an additional cost of $298,984 for Fiscal Year 2001, $301,562 for Fiscal Year 2002, $301,562 for Fiscal Year 2003, $301,562 for Fiscal Year 2004, and $301,562 for Fiscal Year 2005. The amendment does not have foreseeable implications relating to cost or revenues of local governments. It is anticipated that the amendments will result in increased provision of chiropractic services.

Mr. Moritz 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 an increase of services provided by a doctor of chiropractic. There will be no effect on small businesses or micro-businesses to comply with this section as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices to comply with the proposed rule. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There will be no impact on local employment.

A public hearing on the proposed amendments will be held at 9:00 a.m. on August 28, 2000, in the Public Hearing Room, Texas Department of Health, 12555 Riata Vista Circle, Austin, Texas, to accept comments on the proposal.

Comments on the proposed amendments may be submitted to Kathy Gussman, Program Specialist, Policy Development and Utilization, Texas Department of Health, Mail Code Y-927, 1100 West 49th Street, Austin, Texas, 78756-3199, within 30 days of publication in the *Texas Register*. In order to comply with federal regulations, a copy of this proposal is being sent to each field office of the Texas Department of Human Services where this will be available for public review upon request for a period of 30 days.

The amendments are proposed under the Human Resources Code, §32.021 and the Texas Government Code, §531.021, which provide the Health and Human Services Commission with the authority to adopt rules to administer the state's medical assistance program. Rules are submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized by Acts of the 72nd Legislature, First Called Session, Chapter 15, §1.07, (1991).

The proposed amendments affect Chapter 32 of the Human Resources Code and Chapter 531 of the Government Code.

*§29.401. Additional Claim Information Requirements.*

In addition to the general requirements in §29.1 of this title (relating to Claim Information Requirements), the following information is required on chiropractic claims:

(1) - (2) (No change)

~~[(3) Date of x-ray. In the case of an acute condition, the x-ray must be taken no more than three months prior to the initial date of treatment. For a chronic condition the x-ray must not have been taken more than 12 months prior to the initial course of treatment.]~~

~~[(4) Certification that an x-ray film is available demonstrating the existence of a subluxation at the specified level of the spine.]~~

(3) [~~(5)~~] Place of service.

(4) [~~(6)~~] The type of each treatment procedure.

(5) [~~(7)~~] The individual charge for each authorized service related to a major diagnosis.

(6) [~~(8)~~] Number of manual manipulations that have been performed.

*§29.403. Authorized Chiropractic Services.*

(a) Chiropractic services include those services provided by a doctor of chiropractic and which are within the scope of practice of his profession as defined by state law. Benefits are limited to services which consist of necessary treatment or correction by means of manual manipulation of the spine, by use of hands only, to correct a subluxation [~~demonstrated by x-ray to exist~~] to the same extent that such benefits are provided under Part B of Medicare. Benefits are available under this section only for services which are provided during the first 12 visits to any one eligible recipient by a doctor of chiropractic during any one benefit period. Benefit period for purposes of this section means a 12 consecutive month period which begins with the month of the first treatment.

(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 August 14, 2000.

TRD-200005679
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 458-7236

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## SUBCHAPTER L. GENERAL ADMINISTRATION

**25 TAC §29.1118**

Subject to the approval of the State Medicaid Director, the Texas Department of Health (department) proposes an amendment to §29.1118 concerning provider re-enrollment in the Medicaid Program.

The department has determined the need to amend the rule to comply with Human Resources Code, Chapter 32, as amended by Senate Bill 30, of the 75th Legislative Session, 1997, which requires each provider to re-enroll in the state Medicaid program or make necessary contract modifications, in accordance with commission or agency procedures as necessary, not later than September 1, 1999, to retain eligibility to participate in the program.

The 76th Legislative Session, 1999, passed House Bills 2641 and 2896, which grants an extension to the original Senate Bill 30 law date of September 1, 1999 to September 1, 2000, due to the

implementation of an electronic method of re-enrolling. House Bill 2896 allows for a further extension to ensure a significant number of providers re-enroll. In accordance with this section of House Bill 2896, the Texas Department of Health is extending the deadline to December 31, 2000.

Joe Moritz, Health Care Financing Budget Director, has determined that for each year of the first five years the section is in effect, there will be fiscal implications as a result of enforcing or administering the section as proposed. The impact on state government is a projected additional state cost of $895,104 for Fiscal Year 2000, $428,620 for Fiscal Year 2001, $0 for Fiscal Year 2002, $0 for Fiscal Year 2003, and $0 for Fiscal Year 2004, with an associated increase in the federal Medicaid matching funds received by the state. The amendment does not have foreseeable implications relating to cost or revenues of local government.

Mr. Moritz has also determined that the public benefit anticipated as a result of enforcing the section will be to provide increased access for Texas Medical Assistance Program recipients of medical services, due to a potential increase of enrolled providers. There will be no effect on small business or micro-businesses to comply with this section as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the rule as proposed. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There will be no impact on local employment.

A public hearing on the proposed amendment will be held at 9:00 a.m. on September 13, 2000, in the Public Hearing Room, Texas Department of Health, 12555 Riata Vista Circle, Austin, Texas, to accept comments on the proposal.

Comments on the proposed amendment may be submitted to Brenda Watson, Program Specialist, Health Care Financing, Texas Department of Health, Mail Code Y-927, 1100 West 49th Street, Austin, Texas, 78756-3168, within 30 days of publication in the *Texas Register*.

The amendment is proposed under the Human Resources Code, §32.021 and the Texas Government Code, §531.021, which provide the Health and Human Services Commission with the authority to adopt rules to administer the state's medical assistance program. Rules are submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized by Acts of the 72nd Legislature, First Called Session, Chapter 15, §1.07, (1991).

The proposed amendment affects Chapter 32 of the Human Resources Code and Chapter 531 of the Government Code.

*§29.1118. Provider Re-enrollment or Provider Contract or Agreement Modification.*

(a) No later than the date specified in Title 1 §371.1000 (Provider Re-enrollment or Provider Contract Modification) [~~September 1, 1999~~], a provider who is enrolled in the Medicaid program who wants to continue to participate in the program must, in accordance with instructions from an agency operating part of the Medicaid program, either re-enroll in the Medicaid program under a new contract or agreement approved by the Health and Human Services Commission or modify the provider's existing contract or agreement using language approved by the Health and Human Services Commission.

(b) A provider enrolled in the Medicaid program who does not re-enroll in the program under the new contract or agreement or modify the existing provider contract or agreement in accordance with the instructions of an agency operating part of the Medicaid program by the date specified in Title 1 §371.1000 (Provider Re-enrollment or Provider Contract Modification) [~~September 1, 1999~~], does not retain eligibility to participate in the Medicaid program.

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

Filed with the Office of the Secretary of State, on August 14, 2000.

TRD-200005694
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 458-7236

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# TITLE 28. INSURANCE

## PART 1. TEXAS DEPARTMENT OF INSURANCE

### CHAPTER 1. GENERAL ADMINISTRATION
### SUBCHAPTER AA. EMPLOYEE TRAINING

**28 TAC §1.2702**

The Texas Department of Insurance proposes amendments to §1.2702 relating to training for employees of the department. The proposed amendments are necessary to update Subchapter AA to reflect the department's policies and procedures regarding training offered to department employees. Subchapter AA was adopted to codify department policies and procedures regarding employee training. Section 656.048 of the Government Code requires state agencies to adopt rules relating to the eligibility of employees for training and education supported by the agency and the obligations assumed by the employees on receiving the training and education.

The proposed amendments are also necessary to address certain recently enacted statutory provisions regarding employee training. State agencies are required by §21.010 of the Labor Code to provide employees with an employment discrimination training program. Therefore, the proposed amendments to §1.2702 address training regarding policies prohibiting discrimination, including sexual harassment. Section 660.147 of the Government Code specifies when a state agency may pay or reimburse a state employee for a travel expense associated with a training seminar conducted by a state agency for its employees. Therefore, amendments are proposed to §1.2702 to specify when travel expenses may be incurred by department employees to attend department-sponsored training.

The proposed amendments to §1.2702 also address the payment of instructor fees and clarify the type of information provided to department employees about department-sponsored training. In addition, the amendments to §1.2702 reflect the current agency practice of recording education leave as emergency leave, rather than administrative leave, on an employee's

monthly attendance record. Several non-substantive clarifying amendments are also being proposed to §1.2702.

Stan Wedel, chief of staff, has determined that for each year of the first five years the sections are in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the sections. Mr. Wedel also has determined that there will be no effect on local employment or the local economy.

Mr. Wedel has determined that for each year of the first five years the sections are in effect the public benefit derived from enforcement and administration of the sections will be a department workforce which is effectively prepared for technological and legal developments; the provision of necessary services more effectively; and an increase in the proficiency of the department to deliver the level of regulatory services expected of it under Texas law. Mr. Wedel also has determined that no compliance cost results from the proposal of these sections, including no adverse impact on small businesses or on micro-businesses.

To be considered, comments on the proposal must be submitted in writing no later than 5:00 p.m. on September 25, 2000 to Lynda H. Nesenholtz, General Counsel and Chief Clerk, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of the comment should be simultaneously submitted to Ann Bright, Section Chief, Agency Counsel Section, Legal and Compliance, P.O. Box 149104, MC 110-1A, Austin, Texas 78714-9104. A request for public hearing on the proposed sections should be submitted separately to the Office of the Chief Clerk.

The amendments are proposed under the Insurance Code §36.001 and the Government Code §656.048. The Insurance Code §36.001 authorizes the commissioner to adopt rules and regulations for the conduct and execution of the duties and functions of the department as authorized by statute. The Government Code §656.048 provides for the adoption of rules by state agencies relating to training and education of agency employees.

The proposed amendments affect operational procedures pursuant to the following statutes: Government Code §§656.044 through 656.049, Government Code §660.147., Labor Code §21.010

*§1.2702. Employee Training Program.*

(a) (No change.)

(b) Agency-sponsored training. A program of in-house training for agency employees is provided.

(1) Training on Policies Prohibiting Discrimination. All new employees must attend an orientation session within 30 days of their date of hire containing information on the department's policies and procedures including information on discrimination and sexual harassment. Employees must attend supplemental training on discrimination, including sexual harassment, every two years.

(2) [~~(1)~~] Quarterly Training Calendar and Catalog [~~of courses~~]. A quarterly [~~monthly~~] training calendar lists course offerings. [~~and a~~] A training catalog [~~describes~~] contains course descriptions of all available courses. An employee wishing to register for in-house training courses should contact the training liaison for the employee's division. The employee's supervisor must approve all requests for in-house training.

(3) [~~(2)~~] Payment of Course Fees [~~material purchase for some in-house training~~]. Some in-house trainings may require a division to pay for instructor fees and/or [~~purchase~~] course materials, payment of which is coordinated though the Professional Development section of the department's Human Resources Division. [~~Upon approval by the division, the divisional training liaison should request purchase of the materials from the Professional Development Center of Human Resources.~~] If the course offers an optional examination for a fee, the employee taking the course will be responsible for payment of the examination fee. Any employee passing the examination may request reimbursement of the examination fee upon proof of payment of the fee and passing the examination. Some fees may be reimbursed at a percentage of base fee amounts as determined by the commissioner. Approval of payment is contingent upon availability of funds.

(4) Travel Expenses for Department-Sponsored Training. Travel expenses incurred by employees attending department-sponsored training will not be reimbursed unless the commissioner of insurance or his or her designee certifies the following:

(A) The department does not possess interactive television or videoconference facilities at the designated headquarters of the employee attending the seminar;

(B) The department cannot purchase or lease such facilities at a cost less than the total travel costs associated with the seminar; and

(C) The department does not have access to another agency's interactive television or videoconference facilities at the same location.

(5) The Professional Development Section of the department's Human Resources Division will assist the seminar coordinators in determining, on a case-by-case basis, the feasibility of using videoconferencing or interactive television for department-sponsored training. If it is determined that the travel expenses to attend agency sponsored training are justified, the requesting division's associate commissioner - or highest level manager who reports directly to the commissioner, if not an associate commissioner - in the employees' chain of command will prepare a written request to obtain certification from the commissioner of insurance prior to the training event. Copies of the certification must be submitted to the Professional Development section of the department's Human Resources Division and to the department's Accounting division.

(c) (No change.)

(d) Tuition reimbursement. The department may reimburse full-time regular employees for tuition and required fees or may grant education leave in lieu of tuition reimbursement if the criteria set out in paragraphs (1) - (5) of this subsection are met.

(1) Eligibility. Eligibility requirements for tuition reimbursement must be satisfied as set out in subparagraphs (A) - (I) of this paragraph.

(A) (No change.)

(B) An employee [~~must be performing consistently above that normally expected or required and~~] must have achieved an overall performance rating of at least 3.25 on the employee's most recent performance evaluation at the time of the request for approval to receive tuition reimbursement or education leave.

(C) - (I) (No change.)

(2) Reimbursable costs. Criteria addressing the extent to which cost of tuition may be reimbursed are set out in subparagraphs (A) - (E) of this paragraph.

(A) (No change.)

(B) Employees may be reimbursed for the cost of tuition and related fees at an educational institution [~~only~~].

(C) (No change.)

(D) Employees will not be reimbursed for items that are not part of tuition, such as textbooks, workbooks, lab supplies [~~and other such items which are not part of tuition~~].

(E) (No change.)

(3) Education leave in lieu of tuition reimbursement. Criteria for taking education leave in lieu of tuition reimbursement are set out in subparagraphs (A) - (F) of this paragraph.

(A) (No change.)

(B) Before requesting education leave, employees should fully consider and explore education options that would not involve education leave. For example, employees should consider registering for classes scheduled before or after work, or during the lunch hour when courses are available at those times. Employees may also request [~~should also consider requesting~~] a flex-time or compressed work week schedule that would allow for class attendance without the use of education leave. Such a work schedule must not disrupt or adversely affect performance by the employee or the employee's division, section, program or activity.

(C) - (D) (No change.)

(E) Education leave will be treated as emergency [~~administrative~~] leave on the employee's monthly attendance record with a notation that the emergency [~~administrative~~] leave is for the purpose of attending a course approved for education leave.

(F) An employee who has been approved for education leave in lieu of tuition reimbursement will receive, an a provisional basis, the approved amount of education leave. If the employee satisfactorily completes the course, the approved leave will remain designated as education leave. However, if the employee fails to satisfactorily complete the course for which education leave was granted, of if the employee separates from employment with the department before submitting the final grade report for any courses for which education leave was granted, the leave will be changed to annual leave, compensatory time leave or overtime leave, and the employee's leave balances will be adjusted accordingly. If the employee's leave balances are exhausted, the remaining education leave will be changed to leave without pay, and the employee's pay will be adjusted accordingly.

(4) Procedure. Specific procedural steps required to complete the tuition reimbursement process are set out in subparagraphs (A) - (G) of this paragraph.

(A) - (B) (No change.)

(C) To receive reimbursement for tuition, within two weeks after receipt of the final grade in a course for which reimbursement has been approved, the employee must submit a purchase request, a copy of the final grade report, and an itemized tuition receipt to the associate commissioner -- or highest level manager who reports directly to the commissioner, if not an associate commissioner -- in the employee's chain of command [~~within two weeks after receipt of the final grade in a course for which reimbursement has been approved~~]. The department will not reimburse tuition if an employee separates from employment with the department before submitting the final grade report for any courses for which tuition reimbursement was granted.

(D) If an employee has been approved for education leave, within two weeks after receipt of the final grade in a course for which education leave has been approved, the employee must submit a copy of the final grade report to the associate commissioner -- or highest level manager who reports directly to the commissioner, if not an associate commissioner -- in the employee's chain of command [~~within two weeks after receipt of the final grade in a course for which education leave has been approved~~].

(E) - (G) (No change.)

(5) Use of equipment [~~Prohibition on use of state resources~~]. Employees may not use department equipment, such as computers, calculators, or typewriters [~~or other department equipment~~] to complete course work.

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

Filed with the Office of the Secretary of State, on August 10, 2000.

TRD-200005583
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 463-6327

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## CHAPTER 19. AGENTS' LICENSING
## SUBCHAPTER G. LICENSING OF INSURANCE ADJUSTERS

**28 TAC §19.602**

The Texas Department of Insurance proposes amendments to §19.602 concerning types of adjuster's licenses. These amendments are necessary to reduce the number of license types, eliminate specific license types, create greater uniformity among the states and consolidate license types that are similar in nature. The proposal amends §19.602 to consolidate casualty; fire, allied lines, inland marine; fidelity and surety; boiler and machinery; and marine adjuster license types into a single property, casualty and surety license type. The proposal combines the multi-lines and all lines license types into a single, all lines license type and retains the workers' compensation license type. Under the proposal, licensees currently holding casualty; fire, allied lines, inland marine; fidelity and surety; boiler and machinery; or marine adjuster license types on September 1, 2000 will be issued a property, casualty and surety adjuster's license to replace the license type that is being eliminated. Under the proposal, licensees holding the multi-lines adjuster's license type on September 1, 2000 will be issued an all lines adjuster's license to replace the license type that is proposed to be eliminated. The proposal allows those persons holding the CPCU or AIC designation to be licensed without an examination, eliminating the additional requirement of one year claims experience.

Matt Ray, Deputy Commissioner, Licensing Division, has determined that for each year of the first five years the proposed section 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 rule. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Mr. Ray has also determined that for each year of the first five years the amendments are in effect, the public benefits anticipated as a result of the proposal will be the streamlining of the adjuster application process and the reduction of record-keeping and storage. There will be no economic cost to the adjusters required to comply as the amendments will consolidate the license types. There will be no effect on small or micro businesses.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on September 25, 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 Matt Ray, Deputy Commissioner, Licensing Division, Mail Code 107-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any requests for a public hearing should be submitted separately to the Office of the Chief Clerk.

The amendments are proposed under the Insurance Code Article 21.07-4 and §36.001. Article 21.07-4 provides the various licensing and application procedures for adjusters and grants the commissioner the broad authority to prescribe the form an application for license will take and what information will be requested on the application. Section 36.001 provides that the Commissioner of Insurance may adopt regulations to execute the duties and functions of the Texas Department of Insurance only as authorized by statute.

The following article is affected by this proposal: TEX. INS. CODE art. 21.07-4

*§19.602. Types of Adjuster's Licenses.*

(a) Any references to the Act in this subchapter are references to Insurance Code Article 21.07-4. The following types of adjuster's licenses are approved for issuance:

(1) all lines (issuance of "all lines" adjuster's license for those adjusters who qualify in paragraphs (2) and (3) of this subsection) [~~(licenses issued to applicants who for the 90-day period next preceding the effective date of the Insurance Code, Article 21.07-4 (hereinafter referred to as the Act) had been principally engaged in the investigation, adjustment, or supervision of losses and who were so engaged on the effective date of the Insurance Code, Article 21.07-4)~~];

(2) property, casualty, and surety [~~including auto physical damage, auto liability, general liability, aircraft~~ ]; and

(3) workers' compensation, employer's liability, USL&H (U.S. Longshoremen's and Harbor Workers' Compensation Insurance).[~~;~~]

[~~(4) fire, allied lines, inland marine;~~]

[~~(5) fidelity and surety;~~]

[~~(6) boiler and machinery;~~]

[~~(7) marine;~~]

[~~(8) multi-lines (issuance of "multi-lines" adjuster's license for those adjusters who qualify in paragraphs (2)-(4) of this subsection)~~].

(b) Pursuant to the Act, §10(4) [§10(a)(4)], the following persons are exempted from the requirement of an adjuster's license examination:

(1) those persons holding CPCU designation [~~plus one year of Texas claims experience~~]; and

(2) those persons who have received the Associate in Claims (AIC) designation [~~completing all six parts of the Insurance Institute of America adjusting course plus one year of Texas claims experience~~].

This 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-200005316
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: September 24, 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 101. GENERAL AIR QUALITY RULES

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §101.29, Emission Credit Banking and Trading. In addition, the commission proposes new §101.300, Definitions; §101.301, Purpose; §101.302, General Provisions; §101.303, Protocols; §101.304, Program Audits; §101.350, Definitions; §101.351, Applicability; §101.352, General Provisions; §101.353, Allocation of Allowances; §101.354, Allowance Deductions; §101.356, Allowance Banking and Trading; §101.358, Emission Monitoring and Compliance Demonstration; §101.359, Reporting; §101.360, Level of Activity Certification; §101.370, Definitions; §101.371, Purpose; §101.372, General Provisions; §101.373, Protocols; and §101.374, Program Audits. The repeal and new sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the Texas state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The Houston/Galveston (HGA) ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post-1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base-case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxides ($NO_x$) waiver allowed by 42

USC, §7511a(f). The January 1995 SIP and the $NO_x$ waiver were based on early base-case episodes which marginally exhibited model performance in accordance with EPA modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revisions to the national ozone standard. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to the EPA on May 19, 1998 a revision to the HGA SIP which contained the following elements in response to EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to EPA in May 1998 became complete by operation of law. However, EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid-course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approvable attainment demonstration, EPA has indicated that the state must adopt those strategies modeled in the November submittal and then adopt sufficient controls to close the remaining gap in $NO_x$ emissions. The modeling included in this proposal indicates that a gap of an additional 81 tons per day (tpd) of $NO_x$ reductions is necessary for an approvable attainment demonstration.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of

stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains post-1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The Houston nonattainment area will need to ultimately reduce $NO_x$ more than 750 tons per day to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved.

The proposed emissions banking and trading program has been designed to offer flexibility in generating and using emission reduction credits (ERCs), mobile emission reduction credits (MERCs), discrete emission reduction credits (DERCs), and mobile discrete emission reduction credits (MDERCs). Flexibility has been built into the proposed rules to create incentives for the early or permanent retirement of volatile organic compounds (VOC) and nitrogen oxides ($NO_x$) emissions. The intent of the proposed rules is to also streamline the emissions banking and trading program by combining the stationary credits with mobile credits to achieve continuity within the banking programs.

The proposed new §§101.300 - 101.304 are to be grouped into Subchapter H, Division 1, Emission Credit Banking and Trading. The proposed rules consolidate the requirements for generating, using, banking, and trading ERCs and MERCs. The proposed rules are intended to achieve consistency between the rules governing the use of ERCs/MERCs and DERCs and MDERCs. The proposed rules also address concerns raised by the EPA regarding current rules on how reductions are calculated as surplus and to ensure that emission reductions are not double-counted, that is, not banked as credits and relied upon as SIP reductions. These proposed sections would reduce the life of ERCs/MERCs generated after January 1, 2001 to five years to restrict the use of ERCs/MERCs to meet current environmental conditions. The rules would require the registration of emission reductions as ERCs/MERCs within 180 days of the actual reduction and add recordkeeping requirements to sources generating or using ERCs/MERCs.

The proposed new §§101.350 - 101.354, 101.356, 101.358 - 101.360 are to be grouped into Subchapter H, Division 3, Mass Emissions Cap and Trade Program. These proposed sections will implement a mandatory annual $NO_x$ emission cap on all existing stationary sources located in the Houston/Galveston (HGA) ozone nonattainment area that emit more than ten tons or more per year (tpy) of $NO_x$ and that have SIP emission requirements in 30 TAC §117.106, Emission Specifications for Attainment Demonstrations, §117.206, Emission Specifications for Attainment Demonstrations, and §117.475, Emission Specifications. The cap would be enforced by the allocation, trading, and banking of allowances. An allowance is the equivalent of one ton of $NO_x$ emissions. $NO_x$ is a precursor gas that reacts with VOCs in the presence of sunlight to form ground-level ozone. This $NO_x$ cap would be established at levels demonstrated as necessary to allow HGA to attain the national ambient air quality standard (NAAQS) for ozone. The proposed cap would initially be implemented on January 1, 2002 at historical emission levels, with three mandatory annual reductions until achieving the final cap by January 1, 2005. These proposed sections would also require all new or modified sources in HGA to obtain unused allowances from other sources already participating under the cap to offset any increased $NO_x$ emissions.

At this time, the commission proposes to cap only those sources located in the eight-county HGA area. The commission will continue to evaluate ozone control strategies and may extend the cap and trade program to include other regions of the state in future rulemaking.

The proposed new sections §§101.370 - 101.374 are to be grouped into Subchapter H, Division 4, Discrete Emission Credit Banking and Trading. The proposed rules consolidate the requirements for generating, using, banking, and trading DERCs and MDERCs. The proposed rules are intended to achieve consistency between the rules governing the use of ERCs/MERCs and DERCs/MDERCs. The proposed rules also address concerns raised by the EPA regarding current rules on how reductions are calculated as surplus and to ensure that emission reductions are not double-counted, that is, not banked as credits and relied upon as SIP reductions.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION BY SECTION DISCUSSION

DIVISION 1

The proposed new §101.300 would contain the definitions to be used within Subchapter H, Emissions Credit Banking and Trading, Division 1, Emission Credit Banking and Trading. The definitions of "Activity", "Actual emissions", "Area Source", "Certified", "Emission Reduction Credit (ERC)", "Emission Reduction Strategy", "Generator", "Permanent", "Quantifiable", and "Shutdown" were defined in §101.29 and are proposed to be transferred unchanged to §101.300.

The following definitions are proposed to be moved from §101.29 to §101.300 and amended. "Applicable emission point" would be revised to refer to the emission point generating an emission reduction or using an emission credit. This revision will allow for consistency with the use of terms throughout the proposed rule language. The definition of "Baseline" would be amended to limit

the emissions occurring prior to a reduction strategy to levels not to exceed the most recent level of emissions reported in the emission inventory used for SIP determinations. The definition of "Baseline activity" would be amended to describe a source's actual level of activity based on actual data averaged over any consecutive two calendar year periods during the most recent year of emissions inventory used for SIP determinations or subsequent year(s). For sources in existence less than 24 months or not having two complete calendar years of data, a shorter time period, not less than 12 months, may be considered by the executive director. The definition of "Baseline emission rate" would be amended to refer to the source's rate of emissions per unit of activity during the baseline activity period. The definition of "Curtailment" would be amended to mean a reduction in activity level at any stationary or mobile source. The definition of "Mobile emission reduction credit (MERC or mobile credit)" would be amended to be a credit representing the amount of emission reductions from a mobile source strategy. These emission reductions are voluntary and must be in addition to compliance with requirements of state and federal regulations. MERCs are any enforceable, permanent, and quantifiable emission reduction (exhaust and/or evaporative) generated by a mobile source, which has been banked in accordance with the rules of the commission. MERCs can be banked, purchased, traded, and sold to meet clean air mandates for specified air programs, which can be applied to the emission reduction obligations of another air quality source or to air quality attainment goals. "Most stringent allowable emissions level" would be amended to include a reference to state emission limits. The definition of "Ozone season" would be revised to be the portion of the year when ozone monitoring is required to occur in a specific geographic area. This amendment removes specific references to dates for a given nonattainment area. "Protocol" would be amended to refer to replicable and workable methods for mobile, stationary, or area sources. "Real reduction" would mean a reduction in which actual emissions are reduced as opposed to a reduction in allowable emissions. "Surplus" would be amended to refer to an emission reduction which is not otherwise required of a source by any state or federal law, regulation, or agreed order and is beyond the emissions level utilized for SIP determinations. "User" would be amended to refer to the owner or operator which acquires and uses emission credits to meet a regulatory requirement, demonstrate compliance, or offset an emission increase.

The following new definitions are proposed for addition to §101.300. "Baseline emissions" would be defined as the source's total actual emissions based on the baseline activity and baseline emission rate. An "Emission credit" would be newly defined as a credible emission reduction such as an "Emission reduction credit" or "Mobile emission reduction credit." A new definition of "Emission reduction" would be added as an actual reduction of emissions from a stationary or mobile source. "Mobile emission baseline" would be newly defined as a mobile source reduction that occurs prior to a mobile emission reduction strategy, considering all limitations required by applicable state and federal regulations. A valid mobile emission baseline could be calculated by either use of measured emissions of an appropriately sized sample of the participating mobile sources using an approved EPA test procedure or by using estimated emissions of the participating mobile sources using the most recent edition of EPA's mobile emissions factor model or other applicable model. The baseline cannot be higher than the emissions that are estimated in the SIP for that vehicle. "Mobile source" would be defined as on-road (highway) vehicles (e.g., automobiles, trucks, and motorcycles) and non-road vehicles (e.g., trains, airplanes, agricultural equipments, industrial equipment, construction vehicles, off-road motorcycles, and marine vessels). A "Mobile source baseline activity" would be newly defined as the mobile source's level of activity during the applicable mobile source baseline year. "Mobile source baseline emissions" would be newly defined as the mobile source's total emissions based on the product of mobile source baseline activity and mobile source baseline emission rate. "Source" would be a point of origin of air contaminants, whether privately or publicly owned or operated. Upon request of a source owner, the executive director shall determine whether multiple processes emitting air contaminants from a single point of emission will be treated as a single source or as multiple sources.

The proposed new §101.301 states that the purpose of Division 1 is to allow an operator of a source to generate and use emission credits. The wording of this section would be revised from the previous language in §101.29 to refer to both ERCs and MERCs as emission credits, unless the rule language refers to specifically only one of these emission credits. This new section would also state that participation in the program is voluntary.

The proposed new §101.302 would contain the general provisions for the Emission Credit and Trading Program (Division 1). The wording of this section would be revised from the previous language in §101.29 to refer to both ERCs and MERCs as emission credits, unless the rule language refers to only one of these emission credits. The certification requirements of an emission credit would be revised to only allow credits which have occurred after the most recent year of emissions inventory used for SIP determinations and to require the source's annual emissions to have been represented in the emissions inventory of the most recent year of emissions inventory used for SIP determinations prior to the submittal of the emission credit application. Rule language would be added to this division which would not allow emission credits which are certified as ERCs or MERCs to be recertified as emission credits under any other division within Subchapter H. The rules associated with eligible sources would be changed to be consistent with the previous language of §101.29 for discrete emission credits. The changes would allow for stationary sources (including area sources), mobile sources and stationary sources (including area sources), and mobile sources associated with agencies under §101.30 to be eligible to generate emission credits. Effective January 2, 2001, the life of an emission credit would be revised to be available for use for 60 months from the date of the reduction except to the extent regulatory changes reduce or invalidate the reduction. Administratively complete applications for ERCs which are received prior to January 2, 2001 would continue to be available for 120 months from the date of the reduction except to the extent regulatory changes reduce or invalidate the reduction. The geographic scope would remain the same as previously stated in §101.29 except the new rule language would allow for the trading of emission credits achieved in the county, state, or nation, provided the applicant can demonstrate an improvement to the air quality in the county of use and which is approved by the executive director. To be consistent with the previous language of §101.29, rule language would be added which allows for the possibility of the trading of emission credits to be discontinued by the executive director, with commission approval, as a remedy for problems caused by localized trading of emission credits. Recordkeeping requirements would be revised to require users to maintain a copy of all notices and information submitted to the registry for at least two years after the beginning of the use period along with the name,

emission point number (EPN), and facility identification number (FIN) of each unit using emission credits, the amount of emission credits being used, and the specific identification number of the emission credits being used. The rule language concerning public information would be changed to be consistent with the discrete emission reduction requirements language previously located in §101.29(d)(1)(L). All information submitted with a notice or report regarding the nature and quantity of emissions associated with the use or generation of an emission credit is public information and will not be considered confidential. All non-confidential notices and information regarding generation, use, and availability of emission credits may be obtained from the Office of Permitting, Remediation, and Registration (OPRR). In addition, rule language is proposed which allows the executive director to prohibit a company from participating in the program if the company has violated or abused the program.

The proposed new §101.303 would outline the required protocols of generating, calculating, certifying and registering, using, and transferring emission credits. This section would require emission credits to be determined based on established EPA protocols or when available, actual monitoring results are calculated using good engineering practices. The existing procedures in §101.29 regarding the various means for generating emission credits would be transferred unchanged to this section. The rule addresses procedures for calculating MERCs although most mobile source strategies will likely only qualify for MDERCs, MERCs would be available for mobile source strategies that are ongoing, creating the same amount of mobile reduction each year. Language would be added which does not allow the generation of credits if the emissions have been transferred to another unit. This additional language would eliminate the potential of a company shutting down a unit to generate emission credits, but altering the operation of another piece of equipment to take the place of the shut down unit and thereby increasing the emissions at the altered unit. The new rules would require companies to apply for emission credits within 180 days of generation, except that those sources that have implemented strategies prior to the effective date of this rule will be given until June 1, 2001 to apply. When applying for credits, new language would be added to the rules specifying the information which must be submitted. The information, which is to be submitted on the EC-1 Form, includes the information necessary for the executive director to review the application in accordance with the proposed rules and to properly administer the program. As is currently stated in §101.29, applicants will be notified in writing if the executive director denies the application. Although it has been the commission's accepted practice, the proposed new rule language specifically states that emissions credits will be determined and certified to the nearest tenth of a ton per year. As is currently stated in §101.29, the proposed section would state that emission credits are determined and certified by using EPA methodologies, monitoring results, or otherwise good engineering practices, and all emission credits are deposited in the registry and reported as available credits until they are used, withdrawn, or expired. As is currently stated in §101.29, the proposed section would list the mechanisms which can be used to make emission credits enforceable. Rule language would be added which lists the OPCRE-1 form as an enforceable mechanism to establish new emission limits for grandfathered sources when applying for emission credits. Proposed rule language would also be added to make MERCs enforceable by registering them on a form approved by the executive director or by an agreed order that will set new maximum allowable mobile source emission limits which are not required to be implemented by a rule. The proposed language would limit the use of emission credits if there are permits under the same account number which contain a condition or conditions which preclude such use. As is currently stated in §101.29, the proposed section will allow ERCs to be used for offsets, mitigation offsets, and alternative compliance with reasonably available control technology (RACT) or SIP requirements. As has been the commission's practice, the proposed language would add the use of emission credits for netting only by the original applicant if the emission credits have not been previously sold or otherwise used and would also allow for emission credits to be used for other provisions as allowable within the guidelines of local, state, and federal laws. The proposed section would allow MERCs to be used as offsets, mitigation offsets, alternative compliance with RACT or SIP requirements, compliance with fleet requirements as allowed by the Texas Clean Fleet Program Requirements for Motor Vehicle Fleets, or other provisions as allowed within the guidelines of local, state, and federal laws. The requirements for compliance with §117.570, Trading, except for the equations for determining 30-day rolling average emission limits, would be changed to allow for emission reduction calculations in accordance with the methodology of this new division. These revisions would replace the former equations previously located in §117.570. The equations for calculating 30-day rolling average emission limits would be relocated from §117.570 to this section. The procedure for notifying the commission of the intent to use emission credits in accordance with 30 TAC Chapter 114, Control of Air Pollution from Motor Vehicles, §115.950, Emissions Trading, and §117.570 and any other commission rules would be revised to require the submittal of the EC-3 Form. The timelines for the review of this submittal would be removed from the rule language, revised, and included in the Emission Banking and Trading Program Technical Guidance Package. As previously required in §101.29, an additional 10% of emission credits would be retired as an environmental contribution. The proposed section would state that the user of credits shall submit an EC-3 Form along with the emission credit certificates when using the credits as offsets in accordance with 30 TAC Chapter 116, Division 7, Emission Reductions: Offsets, or for alternative compliance with 30 TAC Chapters 114, 115, or 117. The procedure for transfer would be revised to require emission credit certificate owners to submit an EC-4 Form, including the sale price, to the agency prior to the transfer. Transfers would only be considered final after the executive director has completed the transaction. This is a change to the existing language in §101.29, which requires notification within 30 days of the transfer. As currently stated in §101.29, the proposed section would state that the emission credits may be withdrawn from the registry at any time prior to the expiration date of the credit, and that emission reductions which have been certified as credits and have expired may still be used by the original owner for netting in accordance with §116.150. The proposed section would require applicants requiring offsets for a new source review permit to identify the credits at the time of permit issuance and to provide the original emission credit certificate prior to operation. It should be noted that emission credits will be evaluated to ensure that they are surplus at the time of use. The proposed section would require that any other uses of credits be approved by the executive director prior to commencement of the intended use. Rule language is proposed which would allow an applicant to file a motion of reconsideration with the executive director within 60 days of denying a use of emission credits.

The proposed new §101.304 would require the executive director to perform an audit of the emission reduction program within three years of the effective date of the new division and every

three years thereafter. The audit would evaluate the timing of credit generation and use, the impact of the program on the SIP, availability and cost of credits, compliance by participants, and any other elements chosen by the executive director.

DIVISION 3

The proposed new §101.350 would contain the definitions to be used with Subchapter H, Emissions Credit Banking and Trading, Division 3, Mass Emission Cap and Trade Program. The definition of "Allowance" would be the authorization to emit one ton of $NO_x$ during a control period. The definition of "Authorized account representative" would be the responsible person who is authorized in writing, to transfer and otherwise manage allowances. The definition of "Banked allowance" would be an allowance which is not used to reconcile emissions in the designated year of allocation, but which is carried forward for up to one year and noted in the compliance or broker account as banked. The definition of "Broker" would be a person not required to participate in the requirements of this division who opens an account under this division for the purpose of banking and trading allowances. The definition of "Broker account" would be the account where allowances held by a broker are recorded. Allowances held in a broker account may not be used to satisfy compliance requirements for this division. The definition of "Compliance account" would be the account where allowances held by a source or multiple sources are recorded for the purposes of meeting the requirements of this division. Sources not under common ownership or control may have separate compliance accounts. The definition of "Control period" would be the 12-month period beginning January 1 and ending December 31 of each year. The initial control period would begin January 1, 2002. The definition of "Level of activity" would be the amount of activity at a source measured in terms of production, fuel use, raw materials input, or other similar units that have a direct correlation with the economic output and emission rate of the source (i.e., mass emitted per unit of activity). The definition of "Person" would be, for the purpose of issuance of allowances under this division, an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation.

The new section refers to the following predefined definitions: "Houston/Galveston (HGA) ozone nonattainment area" as defined in §101.1; and "Source" as defined in §101.1.

The proposed new §101.351 would state that the requirements of Division 3 apply to all stationary $NO_x$ sources in the HGA nonattainment area subject to the emission specifications under §§117.106, 117.206, and 117.475 and that have a designed capacity to emit ten tons or more per year of $NO_x$.

The proposed new §101.352 would state that allowances may only be used to meet the requirements of Division 3 and cannot be used to meet or exceed the limitations of any annual emission limitation authorized under Chapter 116, Subchapter B, any applicable rule or law, or for netting purposes to avoid the applicability of federal and state new source review (NSR) requirements. The new section would require that each source subject to this division shall hold a quantity of allowances in its compliance account equal to or greater than its total emission of $NO_x$ emitted during the control period just ending. The cap and trade program would begin January 1, 2002. Beginning February 1, 2003, each source would be required to hold the amount of allowance it used in the previous year's control period. The new section would allow unused allowances to be banked as ERCs provided that an enforceable and permanent reduction of annual allowances is approved by the executive director, and all applicable requirements of Divisions 1 or 4 of Chapter 101, Subchapter H are met. The new section states that allowances may be simultaneously used to satisfy offset requirements for new or modified sources subject to federal nonattainment NSR requirements as provided in Chapter 116, Division 7 but not for netting requirements. The new section states that all allowances would be allocated, transferred, or used as whole allowances and that one compliance account shall be used for multiple sources located at the same property and under common ownership or control. The new section states that an allowance would not constitute a security or a property right. The commission would maintain a registry of the allowances in each compliance account. The registry would not contain proprietary information. Requests for information identified as proprietary when submitted to the agency would be subject to the procedures set out in the Texas Public Information Act.

The proposed new §101.353 describes how allowances will be allocated to individual sources. Initially, for any source operating prior to January 1, 1997, allowances will be based on its actual level of activity averaged over 1997, 1998, and 1999 multiplied by the higher of the source's actual emission factor averaged over 1997, 1998, and 1999 (not to exceed any applicable regulatory or permit limit) or the source's emission factor listed in Chapter 117. For a source not operating prior to January 1, 1997, but operating prior to January 1, 2000, allowances will be equal to the source's actual level of activity averaged over the most recent two consecutive calendar years (not to exceed any applicable regulatory or permit limit) multiplied by the higher of the source's actual emission factor averaged over the most recent two consecutive calendar years (not to exceed any applicable regulatory or permit limit) or the source's emission factor listed in Chapter 117. For a source authorized under Chapter 106 or 116 but not operating prior to January 1, 2000, allowances will be equal to the source's authorized level of activity multiplied by the higher of source's authorized emission factor or the source's emission factor listed in Chapter 117. The purpose for using a two- or three-year average, when available, is to limit the effect of a year in which the activity level was uncharacteristically low or high. The purpose for using the higher of the source's actual or allowable emission factor or its emission factor as listed in Chapter 117 is to prevent penalizing those sources already emitting or authorized to emit at levels equal to or lower than the requirements in Chapter 117. For the 2003 and 2004 control periods, a source's allowances will be reduced each year by one-third of the difference between its initial allocation in 2002 and calculated final allocation for 2005. For the 2005 and subsequent control periods, allowances will be allocated based on historical activity levels and emission factors as listed in Chapter 117 that are demonstrated necessary to reach attainment. The section states that any new source which has submitted an administratively complete application by January 2, 2001 will not be allocated any allowances. These new sources will be required to obtain allowances from other sources already participating in the cap and trade program or by obtaining DERC or MDERC. The section states that if a source emits more $NO_x$ than what was held in the compliance account on January 31 following the control period, that allocation of allowances for the next control period will be reduced by the amount equal to the emission exceeding the compliance account plus an additional 10%. The section states that allowances would be allocated by January 1 of each control period, beginning in 2002, and that the annual allocation of allowances may be adjusted for any new SIP requirement and that allowances may be added or subtracted from

compliance accounts after reviewing the trading reports required in §101.356 and the annual reporting requirements in §101.359. Proposed language would allow the executive director to deviate from the allocation methodology in extenuating circumstances.

The proposed new §101.354 describes how allowances will be subtracted out of compliance accounts. The section states that allowances are deducted in whole tons based on the source's level of activity during a control period and multiplied by the source's emission factor during the control period. The section states that a source shall hold a quantity of allowances equal to or greater than its actual $NO_x$ emissions by February 1 for the preceding control period.

The proposed new §101.356 describes how allowances may be traded and banked. Allowances may generally be banked for future use or traded during the control period for which they are allocated or the following control period. Any allowance not used for compliance may be banked or traded for use in the following control period, with the exception of unused allowances allocated under proposed §101.353(a)(1)(C). The section states that allowances that aren't expired or used could be traded at any time after they have been allocated. Only authorized account representatives may trade allowances. Trade requests would be made through the submittal of a completed form ECT-2. As part of the application, the account representative shall report the price paid per allowance. Trades would be completed through the executive director and would be considered complete when the executive director issues a letter finalizing the trade. This section would allow for the use of discrete emission credits in accordance with Chapter 101, Subchapter H, Division 4 in place of allowances for compliance with Division 3. Currently, the proposed §101.356(d) only allows $NO_x$ credits to be used as an alternative to allowances under the mass cap and trade program. The commission is soliciting comments on how to address allowing certain VOC reductions which produce equal or better ozone results in lieu of $NO_x$ reductions for compliance with the cap.

The proposed new §101.358 states that if monitoring is required of a source under a federal or state program, that monitoring or other data shall be used to determine actual $NO_x$ emissions. Sources not required to monitor shall calculate actual $NO_x$ emissions using good engineering practices, including calculation methodologies in general use and accepted in NSR permitting.

The proposed new §101.359 states that sources shall submit by March 31 a completed ECT-1 detailing the amount of actual $NO_x$ emission for the preceding control period and shall include the methods used in determining the $NO_x$ emissions and a summary of all final trades.

The proposed new §101.360 states that all sources required to participate in the cap and trade program would be required to submit a completed ECT-3 certifying their historical level of activity by June 30, 2001. This information will be used to calculate each source's allocations.

DIVISION 4

The proposed new §101.370 would contain the definitions to be used within Subchapter H, Emissions Credit Banking and Trading, Division 4, Discrete Emission Credit Banking and Trading. The definitions of "Activity," "Actual emissions," "Area Source," "Certified," "Emission Reduction Strategy," "Generator," "Permanent," "Quantifiable," "Shutdown," and "Use period" were defined in §101.29 and are proposed to be transferred unchanged to §101.370.

The following definitions are proposed to be moved from §101.29 to this section and amended. "Applicable emission point" will be revised to refer to the emission point generating an emission reduction or using an emission credit. This revision would allow for consistency with the use of terms throughout the proposed rule language. The definition of "Baseline" would be amended to limit the emissions occurring prior to a reduction strategy to levels not to exceed the most recent level of emissions reported in the emission inventory used for SIP determinations. The definition of "Baseline activity" would be amended to describe a source's actual level of activity based on actual data averaged over any consecutive two calendar year period during the most recent year of emissions inventory used for SIP determinations or subsequent year(s). For sources in existence less than 24 months or not having two complete calendar years of data, a shorter time period, not less than 12 months, may be considered by the executive director. The definition of "Baseline emission rate" would be amended to refer to the source's rate of emissions per unit of activity during the baseline activity period. The definition of "Curtailment" would be amended to mean a reduction in activity level at any stationary or mobile source. The definition of "Discrete emission reduction credit" would be revised to be a credible emission reduction that is created during a generation period, quantified after the period in which emission reductions are made, and expressed in tons. This change provides consistency with the new terms and definitions of the proposed rules. The definition of "Ozone season" would be revised to the portion of the year when ozone monitoring is federally required to occur in a specific geographic area. "Protocol" would be amended to refer to replicable and workable methods for mobile and stationary sources. The definition of "Real reduction" would mean a reduction in which actual emissions are reduced as opposed to a reduction in allowable emissions. "Surplus" would be amended to refer to an emission reduction which is not otherwise required of a source by any state or federal law, regulation, or agreed order and is beyond the emissions level utilized for SIP determinations. "User" would be amended to refer to the owner or operator which acquires and uses emission credits to meet a regulatory requirement, demonstrate compliance, or offset an emission increase. "Use strategy" would be revised to refer to the use of "emission credits" which is more consistent with the terms in the proposed new rules.

The following new definitions are proposed for addition to §101.370. "Baseline emissions" would be defined as the source's total actual emissions based on the baseline activity and baseline emission rate. A "Discrete emission credit" would be newly defined as a credible emission reduction such as a "Discrete emission reduction credit" or "Mobile discrete emission reduction credit." A new definition of "Emission reduction" would be added as an actual reduction of emissions from a stationary or mobile area source. The "Generation period" would be defined as the discrete period of time, not exceeding 12 months, over which a discrete emission reduction credit is created. A "Mobile discrete emission reduction credit (MDERC or discrete mobile credit)" would be defined as a credit that is surplus, generated by a mobile source strategy. It is a creditable emission reduction that is created during a generation period, quantified after the period in which emissions reductions are made, and expressed in tons. AMobile emissions "baseline" is proposed to be mobile emissions which occur prior to a mobile emission reduction strategy, considering all limitations required by applicable state and federal regulations. A valid mobile emission baseline could be calculated by either using measured emissions of an appropriately-sized sample of the participating

mobile sources using an approved EPA test procedure or by using estimated emissions of the participating mobile sources using the most recent edition of EPA's mobile emissions factor model or other applicable model. The baseline cannot be higher than the emissions which are estimated in the SIP for that vehicle. "Mobile source baseline activity" would be defined as the mobile source's level of activity during the applicable mobile source baseline year. A definition for "Mobile source baseline emissions" would be the source's total actual mobile source emissions based on the mobile source activity and the mobile source emissions rate. "Most stringent allowable emissions rate" would refer to the emission rate of a source, considering all limitations required by applicable local, state, and federal regulations. The term "Strategy activity" would be the source's level of activity during the discrete emission reduction generation period and "Strategy emission rate" would be the source's emission rate during the discrete emission reduction generation period. "Source" would be a point of origin of air contaminants, whether privately or publically owned or operated. Upon request of a source owner, the executive director shall determine whether multiple processes emitting air contaminants from a single point of emission will be treated as a single source or multiple sources.

The proposed new §101.371 states that the purpose of Division 4 is to allow an operator of a source to generate and use discrete emission credits. The wording of this section will be revised from the previous language in §101.29 to refer to both DERSs and MDERCs as discrete emission credits, unless the rule language refers to specifically only one of these discrete emission credits. This new section will also state that participation in the program is voluntary.

The proposed new §101.372 would contain the general provisions for the Discrete Emission Credit and Trading Program. The wording of this section will be revised from the previous language in §101.29 to refer to both DERCs and MDERCs as emission credits, unless the rule language refers to only one of these discrete emission credits. The section would specify to which pollutants the program will apply and is unchanged from those currently in §101.29. The section would state that DERCs and MDERCs must be real, quantifiable, and surplus. The certification requirements of a discrete emission credit would be revised to only allow credits which have occurred after the most recent year of emissions inventory used for SIP determinations and to require the source's annual emissions prior to the submittal of the emission credit application to have been represented in the emissions inventory of the most recent year of emissions inventory used for SIP determinations. Rule language would be added which prohibits emission credits certified as DERCs or MDERCs from being recertified as emission credits under any other division within Subchapter H. The proposed section would allow for stationary sources (including area sources), mobile sources, and stationary sources (including area sources) associated with agencies under §101.30 to be eligible to generate and use emission credits, if there are no permits under the same account number which contain a condition or conditions precluding the use of emission credits. The proposed rule language will allow DERCs and MDERCs to be available for use after the executive director has received a notice of generation and the discrete emission credits have been reviewed and deemed creditable. This is a change from previous procedures where emission credits were placed in the registry upon receipt of the notice and generation and were not reviewed for credibility until a notice of intent to use was received by the executive director. This change will allow for the emission reduction program and the discrete emission reduction program to operate on a more consistent basis. The proposed section states that DERCs and MDERCs may be used anytime after certification and do not expire. The geographic scope will remain the same as currently stated in §101.29, except the new rule language will allow for the trading and use of emission credits generated in other counties, states, or nations provided that a demonstration has been made and approved by the executive director showing that the reduction in the area where the credit was generated causes an improvement in air quality in the county where the credit is used. As currently stated in §101.29, the trading of discrete emission credits may be discontinued by the executive director, in whole or in part, with commission approval. As currently stated in §101.29 for areas having an ozone season less than 12 months, discrete emission credits generated outside the ozone season may not be used during the ozone season. The commission will maintain a registry that lists all discrete emission credits available or used. The proposed section would require the generator and user of discrete emission credits to maintain a copy of records for a minimum of five years regarding the generation and use of credits. The records shall include at a minimum the name, emission point, and facility identification number of each source using discrete reduction credits, the amount of discrete reduction credits being used, and the specific identification number of the credit being used. As currently stated in §101.29, all information submitted with any application to generate or use discrete emission credits may not be submitted as confidential and discrete emission credits do not constitute a property right. The proposed rules state that the executive director has the authority to prohibit either the generation or the use of discrete reduction credits if the executive director determines that the company has violated any of the requirements of the program or has abused the privileges provided by the program. Rule language concerning the start date for the discrete emission reduction program would be removed, since this program is currently ongoing.

The proposed new §101.373 outlines the required protocols of generating, calculating, certifying and registering, using, and transferring discrete emission credits. This section will require discrete emission credits, to be determined based on established EPA protocols or when available, actual monitoring results or calculated using good engineering practices. There are no changes from the existing §101.29 regarding the various means for generating discrete emission credits. The proposed section would revise the equation for calculating the amount of DERCs generated to use the lower of the baseline emission rate or the most stringent emission rate. This revision will allow for the correct calculation of DERCs if the baseline emission rate was exceeding the emission rate required by local, state, or federal requirements. As currently stated in §101.29, the proposed section would require DERCs to be rounded down to the nearest ton. The proposed section limits the generation period for DERCs to five years. The proposed section would not allow a source to generate discrete emission credits for any emissions exceeding its allowable emission limit. The proposed section deletes language from the existing §101.29 which restricted reductions used for netting from being generated as DERCs. The proposed section states what requirements and data must be documented to calculate MDERCs. The existing language located in §101.29 regarding registration and certification of emission credits would remain the same and would be relocated to this proposed section. The proposed section would add language detailing what information, at a minimum, would be required to generate mobile discrete

emission credits. The information, which is to be submitted on DEC-1 Form, includes the information necessary for the executive director to review the application in accordance with the proposed rules and to properly administer the program. It should be noted that, for continuing credits, each application will be reviewed for creditability at the time of submittal in addition to the time of strategy implementation. Although it has always been the accepted practice, the proposed new rule language specifically states that discrete emissions credits will be determined and certified to the nearest ton. The proposed section would include new language regarding the review of discrete emission reduction registrations for credibility upon receipt and that applicants being denied registration of discrete emission credits would be notified of such denial in writing. The proposed section states that discrete emission credits will be reviewed and certified based on actual monitoring data, EPA methodology, or other commission approved protocols. In addition, rule language is added which states that discrete emission credits will be deposited in the registry and will be available for use until they are used, withdrawn, or expire. The proposed compliance and burden language is essentially the same as currently stated in §101.29. The user would be responsible for ensuring that the discrete emission credits are certified and certification, by the executive director, does not relieve the user on any other responsibilities. There are no proposed changes to the existing §101.29 language regarding what discrete emissions can or cannot be used for; however, the language would be reorganized into subparagraphs which state what the discrete emission credits can be used for and a subparagraph which states what they cannot be used for. The proposed language would relocate the equations which provide flexibility to the 30-day rolling average emission limits, and the new maximum daily emission limit for source caps as defined in Chapter 117. The commission proposes to change the equation used to calculate the amount of discrete emission credits needed to demonstrate compliance or meet a regulatory requirement to be consistent with the terms proposed for this division, and to add language which would be consistent with the procedures and methodologies proposed within this division. The equations for calculating 30-day rolling average emission limits would be relocated to this section unmodified. There are no changes proposed to the existing requirements for additional credits needed as compliance margins or for environmental contributions. As previously stated in §101.29, the calculated discrete emission credits will be rounded up to the nearest ton and the user must retire 10% more than are needed. The amount of discrete emission credits needed for NSR offsets would remain equal to the quantity of tons needed to achieve the maximum allowable emission level set in the user's NSR program. As previously stated in §101.29, discrete emission credits which are not used during the use period would remain surplus and available for use or transfer by the holder. As previously stated in §101.29, a notice of intent to use the DEC-2 Form would be submitted to inform the executive director of the intent to use discrete emission credits. The information required to be submitted on the DEC-2 Form would remain the same as previously stated in §101.29. The proposed section would include a list of the required information to be submitted when a mobile source user intends to use discrete emission credits. The proposed language listing the requirements for a user to notify the executive director of actual discrete emission credit use would remain the same as previously stated in §101.29 with the exception of added language requiring the user to submit the information on a DEC-3 Form. The proposed language regarding compliance burden and enforcement for discrete emission credit users would remain the same as previously stated in §101.29.

The proposed new §101.374 is a relocation, and there will be no wording changes to previously existing language in §101.29, concerning auditing of the DERC program.

FISCAL NOTE: COST TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined for each year of the first five-year period the proposed amendments are in effect, there will be fiscal implications which are not anticipated to be significant for any single unit of state or local government as a result of administration or enforcement of the proposed amendments.

The proposed amendments would consolidate existing requirements for generating, using, banking, and trading ERCs, MERCs, DERCs, and MDERCs into two separate programs. The section containing the original program would be repealed. The two programs would be grouped under two divisions. Division 1, Credit Banking and Trading, would handle ERC and MERC issues. Division 4, Discrete Emission Credit Banking and Trading, would handle DERC and MDERC issues. The creation of two separate programs would facilitate improved management and control of the programs. The proposed amendments would update definitions, make administrative changes to Divisions 1 and 4, and should provide flexibility and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the use of emission credits to meet emission reduction requirements.

In addition to creating Divisions 1 and 4, the proposed amendments would create Division 3, The Mass Emission Cap and Trade Program. This program would implement and manage a mandatory annual $NO_x$ emission cap, phased-in between January 1, 2002 to January 1, 2005, on all existing and new stationary sources located in the HGA ozone nonattainment area consisting of: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. The $NO_x$ emission cap only affects sources in the HGA that have the capacity to emit ten tons of $NO_x$ or more per year, and that have SIP emission requirements. Examples of equipment and processes at sources that would be affected by the proposed amendments include: electric utility boilers and stationary gas turbines; ICI boilers and stationary gas turbines; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and carbon monoxide (CO) boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating and reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and BIF units. The agency would allocate to a source a number of allowances ($NO_x$ emissions in tons) which a source would be allowed to emit during the calendar year. The source is not allowed to exceed this number of allowances granted unless they obtain additional allowances from another facility's surplus allowances. Allowance trading should provide flexibility and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the purchase of other facility's surplus allowances to meet emission reduction requirements.

The commission is required to submit a new SIP revision by the end of 2000 which will bring the HGA into attainment by 2007.

The plan sets forth a control strategy that provides emission reductions necessary for attainment and maintenance of the national standards.

There will be fiscal impacts to state and local government facilities if they elect to participate in the voluntary programs under Division 1 and 4 programs; however, the total number of state or local government sites affected by these provisions is unknown. Division 1 covers facilities in nonattainment counties and Division 4 covers facilities statewide. The costs associated with participation in Division 1 and 4 programs would result from the purchase of emission credits and would be dependent on the market value of the emission credits. The current cost of credits in the HGA ranges from $750 per ton for DERCs/MDERCs to $3,600 per ton per year for ERCs/MERCs. Actual costs will be dependent on availability and demand. Total costs to state and local government sites that elect to participate in Division 1 and 4 programs will depend on the amount of emission credits purchased.

Although the total number is unknown, some of the approximately 6,000 pieces of equipment at sources in the HGA that are affected by Division 3 provisions will be owned and operated by state or local governments. The cost of allowances in similar programs nationwide has ranged from approximately $500 to $5,000 per allowance (ton), depending on availability and demand. Actual costs for allowances will be dependent upon market demand and availability. The total cost to state and local government sites will depend on the total number of allowances purchased.

Most of the sources which will have to comply with the proposed rules are currently subject to air permits and are already being inspected for compliance. Consequently, only a limited number of additional facilities will need to be inspected for compliance with the proposed amendments; therefore, there are no significant fiscal implications for the agency as a result of implementation of the proposed amendments.

PUBLIC BENEFIT AND COSTS

Mr. Davis has also determined for each of the first five years the proposed amendments to Chapter 101 are in effect, the public benefit anticipated as a result on implementing the amendments will be the reduction of emissions of $NO_x$ in the HGA to a level that will allow the area to meet the NAAQS for ozone.

The proposed amendments would consolidate existing requirements for generating, using, banking, and trading ERCs, MERCs, DERCs, and MDERCs into two separate programs. The section containing the original program would be repealed. The two programs would be grouped under two divisions. Division 1, Credit Banking and Trading, would handle ERC and MERC issues. Division 4, Discrete Emission Credit Banking and Trading, would handle DERC and MDERC issues. The creation of two separate programs would facilitate improved management and control of the programs. The proposed amendments would update definitions, make administrative changes to Divisions 1 and 4, and should provide flexibility and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the use of emission credits to meet emission reduction requirements.

In addition to creating Divisions 1 and 4, the proposed amendments would create Division 3, The Mass Emission Cap and Trade Program. This program would implement and manage a mandatory annual $NO_x$ emission cap, phased in between January 1, 2002 to January 1, 2005, on all existing and new stationary sources located in the HGA ozone nonattainment area consisting of: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. The $NO_x$ emission cap only affects sources in the HGA that have the capacity to emit ten tons of $NO_x$ or more per year, and that have SIP emission requirements. Examples of equipment and processes at sources that would be affected by the proposed amendments include: electric utility boilers and stationary gas turbines; ICI boilers and stationary gas turbines; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and CO boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating and reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and BIF units. The agency would allocate to a source a number of allowances ($NO_x$ emissions in tons) which a source would be allowed to emit during the calendar year. The source is not allowed to exceed this number of allowances granted unless they obtain additional allowances from another facility's surplus allowances. Allowance trading should provide flexibility and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the purchase of other facility's surplus allowances to meet emission reduction requirements.

There will be fiscal impacts to persons and businesses if they elect to participate in the voluntary programs under Division 1 and 4 programs; however, the total number private entities affected by these provisions is unknown. Division 1 covers facilities in nonattainment counties and Division 4 covers facilities statewide. The costs associated with participation in Division 1 and 4 programs would result from the purchase of emission credits and would be dependent on the market value of the emission credits. The current cost of credits in the HGA area ranges from $750 per ton for DERCs/MDERCs to $3,600 per ton per year for ERCs/MERCs. Actual costs will be dependent on availability and demand. Total costs to persons and businesses that elect to participate in Division 1 and 4 programs will depend on the amount of emission credits purchased.

There are approximately 6,000 pieces of equipment at sources in the HGA that are affected by Division 3 provisions, some of which will be owned and operated by persons and businesses. The cost of allowances in similar programs nationwide has ranged from approximately $500 to $5,000 per allowance (ton), depending on availability and demand. Actual costs for allowances will be dependent upon market demand and availability. The total cost to persons and businesses will depend on the total number of allowances purchased.

SMALL AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications are not anticipated for small or micro-businesses as a result of administration or enforcement of the proposed amendments. Under the proposed amendments, small or micro-businesses electing to participate in the program established by Divisions 1 and 4 would pay the same unit cost for emission credits as other participants. There is no feasible way to reduce the unit costs for small businesses. However, participation in this portion of the program is voluntary. Under the Mass Emissions Cap and Trade Program as established by Division 3, small or micro-businesses located in the HGA would pay the same unit costs for the purchase of allowances

as other businesses. Of the 6,000 identified pieces of equipment at sources in the HGA, some will be owned and operated by small or micro-businesses. Examples of likely equipment at sources operated by small or micro-businesses include boilers, process heaters, and internal combustion engines. The rules exempt sources which emit less than ten tons per year. There is no feasible way to further reduce the impact of the proposed amendments for small businesses.

DRAFT REGULATORY IMPACT ASSESSMENT

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. Proposed Divisions 1 and 4 create a voluntary mechanism which provides regulatory flexibility for compliance with state and federal emission limitations and do not add mandatory regulatory requirements or required costs. The proposed Division 3 would affect owners and operators of new and existing stationary sources emitting $NO_x$ subject to §§117.106, 117.206, and 117.475 requirements in the HGA nonattainment area. The commission has determined the proposed rulemaking in Division 3 of Chapter 101 meets the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225, but proposed rulemaking in Divisions 1 and 4 is not. "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. Existing sources would be limited to $NO_x$ emission levels under an emissions cap based on historical operating data and source specific emission rates determined by Chapter 117. New stationary sources would be required to identify a source(s) of allowances equal to allowable emissions prior to commencing operation. All sources subject to this division would be required to hold a quantity of allowances in their compliance account by January 31 following the end of a control period, which is equal to or greater than the total emissions from the preceding control period. The cost of allowances in similar programs nationwide has ranged from approximately $500 to $5,000 per allowance (ton), depending on availability and demand. Actual costs in the HGA nonattainment area will be dependent upon market demand and availability. The commission is proposing these sections as part of a strategy to reduce and permanently cap emissions of $NO_x$ to a level which would allow the HGA nonattainment area to attain the NAAQS for ozone. In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b), because the proposed rule does not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under the Federal Clean Air Act (FCAA), §7409, and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633) during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for

inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that $NO_x$ emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain $NO_x$ emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, and 382.017 as well as under 42 USC, §7410(a)(2)(A).

The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission has completed a takings impact assessment for the proposed rules. The following is a summary of that assessment. These sections are proposed as part of a strategy to reduce and permanently cap emissions of $NO_x$ to a level which would allow the HGA nonattainment area to attain the NAAQS for ozone. Promulgation and enforcement of the rules will not burden private real property. The proposed new sections do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the credits and allowances created under these rules are not property rights. Consequently, these proposed sections do not meet the definition of a takings under Texas Government Code, §2007.002(5). Although the proposed rule revisions do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under the FCAA, §7410. Specifically, the emission limitations and control requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under the FCAA, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under the FCAA, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rule proposal is to implement a $NO_x$ strategy which is necessary for the HGA area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these proposed revisions will not constitute a takings under Texas Government Code, Chapter 2007.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.) , and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and has determined that the proposed rules are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. If adopted, the new sections will reduce and cap emissions of $NO_x$ in the HGA nonattainment area to a level that would allow attainment of the NAAQS for ozone. No new contaminants will be authorized by these rules, and a reduction of $NO_x$ emissions should occur. Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMIT PROGRAM

The proposed new sections under Divisions 1, 3, and 4, if adopted, would become part of the state's ozone attainment strategy; therefore, these amendments would be submitted as part of the SIP. As a result, the proposed sections and any allowances allocated under these sections would become applicable requirements under the federal operating permit program.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearings, 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to *siprules@tnrcc.state.tx.us.* All comments should reference Rule Log Number 1998-089-101-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Matthew R. Baker at (512) 239-1091 or Beecher Cameron at (512) 239-1495.

## SUBCHAPTER A. GENERAL RULES

**30 TAC §101.29**

*(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 Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

STATUTORY AUTHORITY

The repeal is proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA, and 42 United States Code, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed repeal implements TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; and §382.017, Rules.

*§101.29. Emission Credit Banking and Trading.*

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005653
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-4808

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## SUBCHAPTER H. EMISSIONS BANKING AND TRADING
## DIVISION 1. EMISSION CREDIT BANKING AND TRADING

**30 TAC §§101.300-101.304**

STATUTORY AUTHORITY

The new sections are proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA, and United States Code, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed new sections implement TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; and §382.017, Rules.

*§101.300. Definitions.*

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

(1) Activity--The amount of activity at a source measured in terms of production, use, raw materials input, vehicle miles traveled (VMT), or other similar units that have a direct correlation with the economic output and emission rate of the source (i.e., mass emitted per unit of activity).

(2) Actual emissions--Actual emissions as of a particular date shall equal the total emissions during the selected time period, using the unit's actual daily operating hours, production rates, types of materials processed, stored, or combusted during the selected time period.

(3) Applicable emission point--The source which is either generating an emission reduction or using an emission credit.

(4) Area source--Any source included in the agency emissions inventory under the area source category.

(5) Baseline--Emissions that occur prior to an emission reduction strategy, considering all limitations required by applicable state and federal regulations. The baseline may not exceed the quantity of emissions reported in the most recent year of emissions inventory used for state implementation plan (SIP) determinations.

(6) Baseline activity--The source's level of activity based on the unit's actual daily operating hours, production rates, or types of materials processed, stored, or combusted averaged over any consecutive two calendar year period following or including the most recent year of emissions inventory used for SIP determinations or subsequent year(s) which precede the emission reduction strategy or credit use period. For sources in existence less than 24 months or not having two complete calendar years of activity data, a shorter time period of not less than 12 months may be considered by the executive director.

(7) Baseline emission rate (BER)--The source's rate of emissions per unit of activity during the baseline activity period.

(8) Baseline emissions--The source's total actual emissions based on the product of baseline activity and BER.

(9) Certified--Any emission reduction that is determined to be creditable upon review and approval by the executive director.

(10) Curtailment--A reduction in activity level at any stationary or mobile source.

(11) Emission Credit--An emission reduction credit (ERC) or mobile emission reduction credit (MERC).

(12) Emission Reduction--An actual reduction of emissions from a stationary or mobile source.

(13) Emission reduction credit (ERC)--A certified emission reduction that is created by eliminating future emissions, quantified during or before the period in which emission reductions are made, and expressed in tons per year.

(14) Emission reduction strategy--The method implemented to reduce the source's emissions which are surplus.

(15) Generator--The owner or operator of a source that creates an emission reduction.

(16) Mobile emissions baseline--Mobile emissions that occur prior to a mobile emission reduction strategy, considering all limitations required by applicable state and federal regulations. A valid mobile emission baseline can be calculated by either using measured emissions of an appropriately sized sample of the participating mobile sources using an approved EPA test procedure or by using estimated emissions of the participating mobile sources using the most recent edition of EPA's on-road or non-road mobile emissions factor models, or other model as applicable. To ensure that mobile credits are surplus, mobile source baseline emissions estimates for each year of the proposed mobile source control program must be the same as, or lower than, those used, or proposed to be used, in the SIP in which the control program is proposed.

(17) Mobile emission reduction credit (MERC or mobile credit)--A credit representing the amount of emission reductions from a mobile source strategy. These emission reductions are voluntary and must be in addition to compliance with requirements of state and federal regulations. MERCs are any enforceable, permanent, and quantifiable emission reduction (exhaust and/or evaporative) generated by a mobile source, which has been banked in accordance with the rules of the commission. MERCs can be banked, purchased, traded, and sold to meet clean air mandates for specified air programs, which can be applied to the emission reduction obligations of another air quality source or to air quality attainment goals.

(18) Mobile source--On-road (highway) vehicles (e.g., automobiles, trucks and motorcycles) and non-road vehicles (e.g., trains, airplanes, agricultural equipment, industrial equipment, construction vehicles, off-road motorcycles, and marine vessels).

(19) Mobile source baseline activity--Will be based on an estimate for each year for which the credits are to be generated. After the initial year, the annual estimates should reflect:

(A) the change in the mobile source emissions to reflect any deterioration in the emission control performance of the participating source;

(B) the change in the number of mobile sources resulting from normal retirement or attrition, and the replacement of retired mobile sources with newer and/or cleaner mobile sources;

(C) the change in usage levels, hours of operation or VMT in the participating population; and

(D) the change in the expected useful life of the participating population.

(20) Mobile source baseline emission--The source's total actual mobile source emissions based on the product of mobile source action and the mobile source emissions rate.

(21) Most stringent allowable emissions rate--The emission rate of a source, considering all limitations required by applicable local, state, and federal regulations.

(22) Ozone season--The portion of the year when ozone monitoring is federally required to occur in a specific geographic area.

(23) Permanent--An emission reduction that is long-lasting and unchanging for the remaining life of the source. Such a time period must be enforceable.

(24) Protocol--A replicable and workable method of estimating emission rates or activity levels used to calculate the amount of emission reduction generated or credits required for stationary or mobile sources.

(25) Quantifiable--An emission reduction that can be measured or estimated with confidence using replicable methodology.

(26) Real reduction--A reduction in which actual emissions are reduced as opposed to a reduction in allowable emissions.

(27) Shutdown--The permanent cessation of an activity producing emissions at a facility.

(28) Source--As defined in §101.1(90) of this title (relating to Definitions).

(29) Surplus--An emission reduction that is not otherwise required of a source by any local, state or federal law, regulation, or agreed order.

(30) User--The owner or operator of a source that acquires and uses emission credits to meet a regulatory requirement, demonstrate compliance, or offset an emission increase.

*§101.301. Purpose.*

The purpose of this division is to allow the operator of a source to generate emission credits by reducing emissions beyond the level required by any local, state, and federal regulation and to allow the operator of another source to use these credits. Participation under this division is strictly voluntary.

*§101.302. General Provisions.*

(a) Applicable pollutants. Reductions of volatile organic compounds (VOCs) and nitrogen oxides ($NO_x$) may qualify as emission credits. Reductions of other pollutants do not qualify as emission credits under this division. Reductions of one pollutant may not be used to meet the requirements of another pollutant, except at such time as urban airshed modeling demonstrates that one ozone precursor may be substituted for another.

(b) Emission reduction requirements.

(1) emission reduction credits (ERCs) are generated from reductions beyond those required. To be certified as an emission credit, an emission reduction must be enforceable, permanent, quantifiable, real, and surplus. The emission credit must be surplus at the time it is created, as well as when it is used. The certified reduction must have occurred after the most recent year of emissions inventory used for state implementation plan (SIP) determinations for VOC and $NO_x$, and the source's annual emissions prior to the emission credit application must have been reported or represented in the emissions inventory used for SIP determinations.

(2) mobile emission reduction credits (MERCs) are generated from reductions beyond those required, and derived from a calculation of the annual difference between the mobile source emissions baseline and the projected emissions level after the MERC strategy has been put in place. To be certified as a MERC, an emission reduction must be enforceable, permanent, quantifiable, real, and surplus. The emission credit must be surplus at the time it is created, as well as when it is used. The certified reduction must have occurred after the most recent year of emissions inventory used for SIP determinations for VOC and $NO_x$, the mobile source's emissions must have been represented in the emissions inventory used for SIP determinations, and the applicable

mobile sources must have been included in the attainment demonstration baseline.

(3) Emission reductions from a source which are certified as emission credits under this division cannot be recertified in whole or in part as credits under another division within this subchapter.

(c) Eligible sources. The following sources are eligible to generate emission credits:

(1) stationary sources (including area sources);

(2) any mobile source;

(3) any stationary source (including area sources) or mobile source associated with actions by federal agencies under §101.30 of this title (relating to Conformity of General Federal Actions to State Implementation Plans).

(d) Life of an emission credit.

(1) If an ERC is used prior to its expiration date, the ERC is effective for the life of the applicable user source.

(2) Effective January 2, 2001, an ERC is available for use for 60 months from the date of the emission reduction except to the extent regulatory changes occur after the date of reduction that reduce the certified amount or invalidate the entire reduction for affected emission points. ERCs certified or applied for prior to January 2, 2001 shall be available for use for 120 months from the date of the emission reduction except to the extent regulatory changes occur after the date of the emission reduction that reduce the certified amount or invalidate the entire reduction for affected emission points.

(e) Geographic scope. Only emission reductions generated in ozone nonattainment areas can be certified. The trading of emission credits may be discontinued by the executive director in whole or in part and in any manner, with commission approval, as a remedy for problems resulting from trading in a localized area of concern. An emission credit must be used in the nonattainment area in which it is generated unless:

(1) a demonstration has been made and approved by the executive director to show that the emission reductions achieved in another county, state, or nation provide an improvement to the air quality in the county of use; or

(2) the emission credit was generated in an ozone nonattainment area which has an equal or higher nonattainment classification than the ozone nonattainment area of use, and a demonstration has been made and approved by the executive director to show that the emissions from the ozone nonattainment area where the emission credit is generated contribute to a violation of the national ambient air quality standard in the ozone nonattainment area of use; or

(3) the user has obtained prior written approval of the executive director.

(f) The registry. All emission credit generators and users must register with the executive director. A notice submitted by a generator or user will be posted to the registry. The registry will assign a unique number to each ton of emission reductions generated. The registry will maintain current listings of all credits available or used for each ozone nonattainment area.

(g) Recordkeeping. The user must maintain a copy of all notices and backup information submitted to the registry during, and for at least two years after, the beginning of the use period. The user must also make such records available upon request to representatives of the executive director, EPA, and any local enforcement agency. The records shall include, but not necessarily be limited to:

(1) the name, emission point number, and facility identification number of each unit using emission credits;

(2) the amount of emission credits being used by each unit;

(3) the specific number, name, or other identification of emission credits used for each unit.

(h) Public information. All information submitted with a notice or report regarding the nature and quantity of emissions associated with the use or generation of an emission credit is public information and may not be submitted as confidential. Any claim of confidentiality for this type of information, or failure to submit all information, may result in the rejection of the emission reduction. All non-confidential notices and information regarding the generation, use, and availability of emission credits may be obtained from the Office of Permitting, Remediation, and Registration.

(i) Authorization to emit. An emission credit created under this division is a limited authorization to emit VOC and/or $NO_x$, unless otherwise defined, in accordance with the provisions of this section, the Federal Clean Air Act, and the Texas Clean Air Act, as well as regulations promulgated thereunder. An emission credit does not constitute a property right. Nothing in this division may be construed to limit the authority of the commission or the EPA to terminate or limit such authorization.

(j) Program participation. The executive director has the authority to prohibit an organization from participating in emission credit trading either as a generator or user, if the executive director determines that the organization has violated the requirements of the program or abused the privileges provided by the program.

*§101.303. Protocols.*

(a) All source categories must use an EPA approved protocol if one exists for the applicable source. If the source wants to deviate from an EPA approved protocol, EPA approval is required before the protocol can be used.

(b) If an EPA approved protocol does not exist, the following applies.

(1) Emission reduction credits (ERC)--The amount of emission credits in tons per year will be determined and certified based on actual monitoring results, when available, or otherwise calculated using good engineering practices including calculation methodologies in general use in new source review (NSR) permitting. The source must collect relevant data sufficient to characterize the process emissions of the affected pollutant and the process activity level for all representative phases of source operation during the period under which emission credits are created or used.

(2) Mobile emission reduction credits (MERC)--The amount of emission credits in tons per year will be determined and certified based on actual monitoring results, when available, or otherwise calculated using good engineering practices. The generator must collect relevant data sufficient to characterize the process emissions of the affected pollutant, and the process activity level for all representative phases of mobile source operation during the period under which mobile credits are created.

(c) Emission credit generation.

(1) ERCs may be generated using one of the following methods or any other method that is approved by the executive director:

(A) the permanent shutdown of a facility which causes a loss of capability to produce emissions;

(B) the installation and operation of pollution control equipment which reduces emissions below the level required of the emission source;

(C) a change in a manufacturing process which reduces emissions below the level required of the emission source;

(D) the permanent curtailment in production, which reduces the source's capability to produce emissions;

(E) pollution prevention projects that produce surplus emission reductions.

(2) MERCs may be generated by any mobile source emission reduction strategy that creates actual mobile source emission reductions under this rule, and subject to the approval of the commission.

(d) Emission credit calculation.

(1) The quantity of ERCs is determined by subtracting the source's new allowable emission limit (tons per year) from the emission source's baseline emissions. The source's new allowable emission limit equals the enforceable emission limit for the applicable emission point after the emission reduction strategy has been implemented.

(2) The quantity of MERCs must be calculated from the annual difference between the mobile source emissions baseline and the projected emissions level after the MERC strategy has been put in place. The projected emissions must be based on the best estimate of the actual in-use emissions of the replacement or substitute on-road or non-road vehicles or transportation system. Any estimate of a projected annual mobile source emissions level based on an assumption of reduced consumer service or transportation service would not be allowed without the support of a convincing analytical justification of the assumption. Emission baselines for quantifying MERCs should include the following information and data as appropriate, but not be limited to:

(A) the emission standard to which the mobile source is subject or emission performance to which the mobile source is certified;

(B) the estimated or measured in-use emissions levels per unit of use from all significant mobile source emissions sources;

(C) the number of mobile sources in the participating group;

(D) the type or types of mobile sources by model year;

(E) the actual or projected activity level, hours of operation or miles traveled by type, and model year; and

(F) the projected remaining useful life of the participating group of mobile sources.

(3) Emission credits cannot be generated from a source if the emissions have been transferred from that source to another source.

(e) Emission credit registration and certification.

(1) Stationary sources with potential ERCs must submit an ERC application (EC-1 Form), within 180 days of the implementation of the emission reduction strategy to the Office of Permitting, Remediation, and Registration (OPRR). Sources that have implemented a strategy prior to the effective date of this rule, must submit an application by June 1, 2001. Applications will be subjected to a review to determine the credibility of the reductions. Reductions determined to be creditable will be certified by the executive director and an ERC certificate will be issued to the owner.

(2) Mobile sources with potential MERCs must submit an emission credit application (EC-1 Form), within 180 days of implementation of the strategy to the OPRR if an obligation is exceeded, or if it is clearly demonstrated that actual mobile emission reductions are generated. Sources that have implemented a strategy prior to the effective date of this rule, must submit an application by June 1, 2001. The commission will then issue a MERC certificate(s) to the person, company, business, organization, or public entity generating the mobile emission reduction, upon approval of the application. A MERC certificate will be issued by the executive director which indicates the total amount of certified emission credits, the quantity available on an annual basis, and the date upon which the last annualized emission reduction expires.

(3) The application for a stationary source generator must include the following information, where applicable for either an ERC or MERC, on the EC-1 Form for each pollutant reduced at each applicable emission point:

(A) the name, address, county, telephone number, contact person, permit or permit by rule numbers, account number of the generator, and the unique facility identification number and emission point number of the applicable emission points;

(B) the name of the owner and/or operator of the generator source;

(C) the date of the reduction;

(D) a complete description of the generation activity;

(E) for shutdown or permanent curtailment emission reduction strategies, an explanation as to whether production shifted from the shut down facility to another facility in the same nonattainment area;

(F) the amount of emission credits generated;

(G) for volatile organic compound (VOC) reductions, a list of the specific compounds reduced;

(H) the baseline emission activity, baseline emission rate, baseline total emissions, emissions inventory data from the most recent year of emissions inventory used for state implementation plan determinations and emissions inventory data for the two consecutive years used to determine baseline activity for each applicable pollutant and emission point;

(I) the most stringent emission rate and the most stringent emission level for the applicable emission point, considering all the local, state, and federal applicable regulatory requirements,

(J) a complete description of the protocol used to calculate the emission reduction generated;

(K) the actual calculations performed by the generator to determine the amount of emission credits generated; and

(L) a statement that the emission reductions on which the emission credits are based are real, surplus, and are based on an eligible emission reduction strategy listed in subsection (c)(1) of this section.

(4) The application for a mobile source strategy must include the following information, where applicable for either an ERC or MERC, on the EC-1 Form for each pollutant reduced at each applicable mobile source strategy:

(A) the name, address, county, telephone number, and contact person;

(B) the name of the owner and/or operator of the generator source;

(C) the date of the reduction;

(D) a complete description of the generation activity;

(E) the amount of emission credits generated;

(F) the mobile source baseline emission activity, mobile source baseline emission rate, mobile source baseline total emissions, and the mobile source strategy;

(G) a complete description of the protocol used to calculate the emission reduction generated;

(H) the actual calculations performed by the generator to determine the amount of emission credits generated; and

(I) a statement that the emission reductions on which the emission credits are based are real, surplus, and based on an eligible emission reduction strategy that is prohibited.

(5) The applicant will be notified in writing if the executive director denies the emission credit application. The applicant may submit a revised application at any time.

(f) Emission credit practices.

(1) The amount of emission credits in tons per year will be determined and certified, to the nearest tenth of a ton per year.

(2) ERCs are based on EPA methodologies, when available, actual monitoring results, when available, or otherwise calculated using good engineering practices including calculation methodologies in general use and accepted in NSR permitting. The executive director shall have the authority to inspect and request information to assure that the emissions reductions have actually been achieved.

(3) MERCs will be determined and certified using:

(A) EPA methodologies, when available;

(B) actual monitoring results, when available;

(C) otherwise calculated using the most current EPA MOBILE model or other model as applicable; or

(D) otherwise calculated using creditable emission reduction measurement or estimation methodologies which satisfactorily address the analytical uncertainties of mobile source emissions reduction strategies.

(4) All emission credits are deposited in the registry and reported as available credits by the Emissions Banking and Trading Program until they are used, withdrawn, or expire.

(5) Compliance burden and enforcement.

(A) ERCs will be made enforceable by one of the following methods:

*(i)* amending or altering an NSR permit to reflect the emission reduction and set a new maximum allowable emission limit;

*(ii)* voiding an NSR permit when an emission source has been shut down;

*(iii)* registering on a PI-8 form the emission reduction and the new maximum allowable emission limit for any facility which is authorized by a standard exemption or permit by rule;

*(iv)* registering on an OPCRE-1 Form the emission reduction and the new maximum allowable emission limit for any facility which is not required to have a permit or qualifies for a permit by rule; or

*(v)* obtaining an agreed order which sets a new maximum allowable emission limit for a facility which is not required to have a permit or qualify for a permit by rule.

(B) MERCs will be made enforceable by one of the following methods:

*(i)* by registering, on a commission-provided form (MERC-1), that the MERCs are permanent, quantifiable, real, and surplus; or

*(ii)* by obtaining an agreed order which sets a new maximum allowable mobile source emission limits, which is not required to be implemented by a rule.

(6) Unless there are permits under the same commission account number which contain a condition or conditions precluding such use, ERCs may be used as the following:

(A) offsets for a new source or major modification to an existing source;

(B) mitigation offsets for action by federal agencies under §101.30 of this title (relating to Conformity of General Federal Actions to State Implementation Plans);

(C) an alternative means of compliance with VOC and $NO_x$ reduction requirements as provided in Chapter 115 of this title (relating to the Control of Air Pollution from volatile organic compounds (VOCs)) and Chapter 117 of this title (relating to the Control of Air Pollution from Nitrogen Compounds);

(D) netting by the original applicant, if not used, sold, or otherwise relied upon; or

(E) other provisions as allowable within the guidelines of local, state, and federal laws.

(7) MERCs may only be used for the following purposes:

(A) an alternative means of compliance with VOC and $NO_x$ reduction requirements as provided in Chapters 115 and 117 of this title;

(B) complying with fleet requirements to the extent allowed by the Texas Clean Fleet Program requirements for motor vehicle fleets;

(C) providing offsets for a new major source or major modifications;

(D) mitigation offsets for action by federal agencies under §101.30 of this title; or

(E) other provisions as allowable within the guidelines of local, state, and federal laws.

(8) The calculation of the number of ERCs of MERCs needed by the user for offsets or for compliance with Chapter 115 or Chapter 117 of this title are as follows:

(A) for emission credits used as offsets, the method for determining the number of emission credits needed by the user for offsets is provided in §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Area); or

(B) for emission credits used as compliance with Chapter 114, Chapter 115, or Chapter 117 of this title, the number of emission credits needed should be determined in accordance with the requirements of this section plus an additional 10% to be retired as an environmental contribution; or

(C) for emission credits used to comply with §117.210 of this title (relating to Source Cap) and §117.223 of this title (relating

to Source Cap), sources may reduce the amount of emission reductions otherwise required by complying with the following equations instead of the equations in §117.210(c)(1) and (2) and §117.223(b)(1) and (2) of this title.
Figure: 30 TAC §101.303(f)(8)(C)

(D) emission reductions used as compliance with any other applicable program should be determined in accordance with the requirements of the appropriate chapter and section and must contain at least 10% extra to be retired as an environmental contribution.

(9) Review schedule.

(A) For emission credits which are to be used for compliance with the requirements of Chapter 114, Chapter 115, or Chapter 117 of this title, the user must submit a Notice of Intent to Use, (EC-3 Form) at least 90 days prior to the planned utilization of the emission credit. Emission credits may be utilized only after the executive director grants approval of the notice of intent to use.

(B) For emission credits which are to be used as offsets in accordance with Chapter 116 of this title, the user must submit a Notice of Intent To Use Form (EC-3 Form), along with the emission credit certificate when providing the emission credits as offsets.

(10) Emission credits are freely transferable in whole or in part, and may be traded or sold to a new owner any time before the expiration date of the emission credit. The Emissions Banking and Trading Program must be notified by means of an EC-4 Form prior to the transfer. The old certificate must be submitted to the registry. The executive director will issue a new certificate to the emission credit purchaser reflecting the emission credits purchased by the new owner, and a revised certificate to the emission credit seller showing any remaining emission credits available to the original owner. Emission credits may be transferrable only after the executive director grants approval of the transaction.

(11) Emission credits may be withdrawn from the registry by the owner at any time prior to the expiration date of the credit and may be held by the owner. Emission credits may still be used by the original owner as an emission reduction for netting purposes after the emission credits have expired, as provided in §116.150 of this title.

(12) Recording use of emission credits.

(A) Emission credits to be used as offsets in an NSR permit must be identified prior to permit issuance. The original certificate must be submitted prior to operation.

(B) Use of emission credits for purposes other than those specified in subparagraph (A) of this paragraph may not commence until the user has received approval from the executive director. The user must also keep a copy of the emission credit certificate, the notice, and all backup in accordance with §101.303(e) of this section.

(C) If the executive director denies the stationary source's use of emission credits, any person affected by the executive director's decision may file a motion for reconsideration within 60 days of the denial. Notwithstanding the applicability provisions of §50.31(c)(7) of this title (relating to Purpose and Applicability), the requirements of §50.39 of this title (relating to Motion for Reconsideration) may apply. Only a person affected may file a motion for reconsideration.

*§101.304. Program Audits.*

(a) No later than three years after the effective date of this division, and every three years thereafter, the executive director will audit this program.

(b) The audit will evaluate the timing of credit generation and use, the impact of the program on the state's attainment demonstration and the emissions of hazardous air pollutants, the availability and cost of credits, compliance by the participants, and any other elements the executive director may choose to include.

(c) The executive director will recommend measures to remedy any problems identified in the audit. The trading of emission credits may be discontinued by the executive director in part or in whole and in any manner, with commission approval, as a remedy for problems identified in the program audit.

(d) The audit data and results will be completed and submitted to the EPA and made available for public inspection within six months of the date the audit begins.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005654
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-1966

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## DIVISION 3. MASS EMISSIONS CAP AND TRADE PROGRAM

**30 TAC §§101.350-101.354, 101.356, 101.358-101.360**

STATUTORY AUTHORITY

The new sections are proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA, and United States Code, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed new sections implement TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; and §382.017, Rules.

*§101.350. Definitions.*

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

(1) Allowance - The authorization to emit one ton of nitrogen oxides ($NO_x$) during a control period.

(2) Authorized account representative - The responsible person who is authorized, in writing, to transfer and otherwise manage allowances.

(3) Banked allowance - An allowance which is not used to reconcile emissions in the designated year of allocation, but which is carried forward for up to one year and noted in the compliance or broker account as "banked."

(4) Broker - A person not required to participate in the requirements of this division who opens an account under this division for the purpose of banking and trading allowances.

(5) Broker account - The account where allowances held by a broker are recorded. Allowances held in a broker account may not be used to satisfy compliance requirements for this division.

(6) Compliance account - The account where allowances held by a source or multiple sources are recorded for the purposes of meeting the requirements of this division. Sources not under common ownership or control may have separate compliance accounts.

(7) Control period - The 12-month period beginning January 1 and ending December 31 of each year. The initial control period begins January 1, 2002.

(8) Houston/Galveston (HGA) ozone nonattainment area - As defined in §101.1 of this title (relating to Definitions).

(9) Level of activity - The amount of activity at a source measured in terms of production, fuel use, raw materials input, or other similar units that have a direct correlation with the economic output and emission rate of the source (i.e., mass emitted per unit of activity).

(10) Person - For the purpose of issuance of allowances under this division, a 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.

(11) Source - As defined in §101.1 of this title.

*§101.351. Applicability.*

This division applies to all stationary nitrogen oxides ($NO_x$) sources in the Houston/Galveston nonattainment area subject to the emission specifications under §§117.106, 117.206, and 117.475 of this title (relating to Emission Specifications for Attainment Demonstration; Emission Specifications for Attainment Demonstration; and Emission Specifications) and which have a design capacity to emit ten tons or more per year of $NO_x$.

*§101.352. General Provisions.*

(a) Allowances are valid only for the purposes described in this division and cannot be used to meet or exceed the limitations of any annual emission limitation authorized under Chapter 116, Subchapter B, of this title (relating to New Source Review Permits), or any other applicable rule or law.

(b) Beginning February 1, 2003, and no later than February 1 following the end of every control period, each account, as defined in §101.1(1) of this title (relating to Definitions), shall hold a quantity of allowances in its compliance account that is equal to or greater than the total emissions of nitrogen oxides emitted during the control period just ending. Compliance with the allowance system will begin with the initial control period beginning January 1, 2002.

(c) Unused allowances can be certified as emission reduction credits, provided that:

(1) an enforceable and permanent reduction of annual allowances is approved by the executive director; and

(2) all applicable requirements of Division 1 of this subchapter (relating to Emission Credit Banking and Trading) are met.

(d) Allowances cannot be used for netting requirements to avoid the applicability of federal and state new source review (NSR) requirements.

(e) Allowances may simultaneously be used to satisfy offset requirements for new or modified sources subject to federal nonattainment NSR requirements as provided in Chapter 116, Subchapter B, Division 7 of this title (relating to Emission Reductions Offsets).

(f) An allowance does not constitute a security or a property right.

(g) All allowances will be allocated, transferred, or used as whole allowances. To determine the number of whole allowances, the number of allowances will be rounded down when determining excess allowances and rounded up when determining allowances used.

(h) One compliance account shall be used for multiple sources required to participate under this division and located at the same property and under common ownership or control.

(i) The commission will maintain a registry of the allowances in each compliance account. The registry will not contain proprietary information.

*§101.353. Allocation of Allowances.*

(a) Allowances will be allocated according to the requirements of this section.

(1) For the 2002 control period in the Houston/Galveston (HGA) nonattainment area:

(A) for sources operating prior to January 1, 1997, allowances will be equal to the source's actual level of activity averaged over 1997, 1998, and 1999 multiplied by the higher of the source's actual emission factor averaged over 1997, 1998, and 1999 (not to exceed any applicable regulatory or permit limit) or the source's emission factor listed in Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds);

(B) for sources not operating prior to January 1, 1997, but operating prior to January 1, 2000, allowances will be equal to the source's actual level of activity averaged over the most recent two consecutive calendar years multiplied by the higher of the source's actual emission factor averaged over the most recent two consecutive calendar years (not to exceed any applicable regulatory or permit limit) or the source's emission factor listed in Chapter 117 of this title.

(C) for sources that have submitted an administratively complete application under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and for sources that qualify for a permit by rule under Chapter 106 of this title (relating to Permits by Rule), but not operating prior to January 1, 2000, allowances will be equal to the source's authorized level of activity multiplied by the source's authorized emission factor.

(2) For the 2003 control period:

(A) for sources with allowances allocated in accordance with paragraph (1)(A) and (B) of this subsection the number of allocations shall be two-thirds of the sum of the number of allocations derived in paragraphs (1) and (4) of this subsection;

(B) for sources with allowances allocated in accordance with paragraph (1)(C) of this subsection, the number of allocations shall be determined according to the following:

*(i)* for sources operating prior to January 1, 2001, allowances will be equal to the source's actual level of activity averaged over the most recent two consecutive calendar years multiplied by two-thirds of the sum of the higher of the source's actual emission factor averaged over the most recent two consecutive calendar years (not to exceed any applicable regulatory or permit limit) or the source's emission factor listed in Chapter 117 of this title and the source's emission factor listed in Chapter 117 of this title;

*(ii)* for sources not operating prior to January 1, 2001, allowances will be equal to the source's authorized level of activity multiplied by two-thirds of the sum of the higher of the source's authorized emission factor or the source's emission factor listed in Chapter 117 and the source's authorized emission factor and the source's emission factor listed in Chapter 117.

(3) For the 2004 control period:

(A) for sources with allowances allocated in accordance with paragraph (1)(A) and (B) of this subsection, the number of allocations shall be one-third of the sum of the number of allocations derived in paragraphs (1) and (4) of this subsection.

(B) for sources with allowances allocated in accordance with paragraph (1)(C) of this subsection, the number of allocations shall be determined according to the following:

*(i)* for sources operating prior to January 1, 2002, allowances will be equal to the source's actual level of activity averaged over the most recent two consecutive calendar years multiplied by one-third of the sum of the higher of the source's actual emission factor averaged over the most recent two consecutive calendar years (not to exceed any applicable regulatory or permit limit) or the source's emission factor listed in Chapter 117 of this title and the source's emission factor listed in Chapter 117 of this title;

*(ii)* for sources not operating prior to January 1, 2002, allowances will be equal to the source's authorized level of activity multiplied by one-third of the sum of the higher of the source's authorized emission factor or the source's emission factor listed in Chapter 117 of this title and the source's authorized emission factor and the source's emission factor listed in Chapter 117 of this title.

(4) For the 2005 and subsequent control periods allowances will be calculated for each source using the following equation.
Figure: 30 TAC §101.353(a)(4)

(5) For sources submitting applications for permits or qualifying for a permit by rule after January 2, 2001, allowances for each control period or the annual allocation rights shall be acquired from sources already participating under this division, or in accordance with §101.356(d) of this title (relating to Allowance Banking and Trading).

(6) If actual emissions of $NO_x$ during a control period exceed the amount of allowances held in a compliance account no later than January 31 following the control period, allowances for the next control period will be reduced by an amount equal to the emissions exceeding the allowances in the compliance account plus an additional 10%.

(b) Allowances will be allocated:

(1) initially, by January 1, 2002;

(2) subsequently, by January 1 of each following year by the executive director, who will deposit allowances into each compliance account.

(c) The annual deposit for any control period may be adjusted to reflect new state implementation plan requirements.

(d) Allowances may be added or deducted from compliance accounts following the review of trading reports required under §101.356 of this title.

(e) In extenuating circumstances, the executive director may deviate from the requirements of this section to determine the amount of allowances to be allocated to a source.

*§101.354. Allowance Deductions.*

(a) Allowances will be deducted in whole tons from a source's compliance account for a control period based upon the following equation.
Figure: 30 TAC §101.354(a)

(b) On February 1 after every control period, a source shall hold a quantity of allowances in its compliance account that is equal to or greater than the total $NO_x$ emissions emitted during the prior control period.

*§101.356. Allowance Banking and Trading.*

(a) Allowances not used for compliance during a control period may be banked for use in the following control period or traded except as provided in subsection (b) of this section.

(b) Allowances not used for compliance during a control period which were allocated in accordance with §101.353(a)(1)(C) of this title (relating to Allocation of Allowances) may not be banked for future use or traded.

(c) Allowances which have not expired may be traded at any time after they have been allocated.

(1) Only authorized account representatives may trade allowances.

(2) Trades shall be completed by the executive director following the submittal of a completed ECT-2 Form, Application for Transfer of Allowances. The completed ECT-2 shall include the price paid per allowance. The executive director will issue a letter to the purchaser and seller reflecting this trade. The trade will be considered finalized upon issuance of this letter.

(d) Sources may use nitrogen oxides discrete emission credits (DERCs or MDERCs) which have been generated, acquired, and used in accordance with Division 4 of this subchapter (relating to Discrete Emission Credit Banking and Trading) in place of allowances for compliance with this division.

*§101.358. Emission Monitoring and Compliance Demonstration.*

(a) Monitoring data or other emission quantifications for sources required to monitor or quantify emissions under any other federal or state program shall be used to show compliance with this division.

(b) Sources not required to monitor or quantify nitrogen oxides emissions shall calculate emissions using good engineering practices, including calculation methodologies in general use and accepted in new source review permitting.

*§101.359. Reporting.*

Beginning March 31, 2003, for each control period, sources under each compliance account shall submit a completed ECT-1 Form, Annual Compliance Report, to the executive director by March 31 of each year detailing the following:

(1) the amount of actual nitrogen oxides ($NO_x$)emissions during the preceding control period;

(2) the method of determining $NO_x$ emissions, including, but not limited to, any monitoring protocol and results, calculation methodology, level of activity, and emission factor; and

(3) a summary of all final trades for the preceding control period.

*§101.360. Level of Activity Certification.*

No later than June 30, 2001, the owner or operator of any source subject to this division shall certify its historical level of activity by submitting to the executive director a completed ECT-3 Form, Level of

Activity Certification, along with any supporting information such as usage records, testing or monitoring data, and production 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 August 11, 2000.

TRD-200005655
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-1966

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## DIVISION 4. DISCRETE EMISSION CREDIT BANKING AND TRADING

**30 TAC §§101.370-101.374**

STATUTORY AUTHORITY

The new sections are proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA, and United States Code, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed new sections implement TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; and §382.017, Rules.

*§101.370. Definitions.*

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

(1) Activity--The amount of activity at a source measured in terms of production, use, raw materials input, vehicle miles traveled, or other similar units that have a direct correlation with the economic output and emission rate of the source (i.e., mass emitted per unit of activity).

(2) Actual emissions--Shall equal the total emissions during the selected time period, using the unit's actual daily operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(3) Applicable emission point--The emission point that is either generating an emission reduction or using a discrete emission credit.

(4) Area source--Any source included in the agency emissions inventory under the area source category.

(5) Baseline--Emissions that occur prior to an emission reduction strategy, considering all limitations required by applicable state and federal regulations. The baseline may not exceed the most recent level of emissions reported in the emissions inventory used for state implementation plan (SIP) determinations. For reduction strategies that exceed 12 months, the baseline is established after the first year of generation and is fixed for the life of the strategy. A new baseline is established for each emission reduction strategy.

(6) Baseline activity--The source's actual level of activity based on the unit's actual daily operating hours, production rates, or types of materials processed, stored, or combusted averaged over any consecutive two calendar year period including and following the most recent year of emissions inventory used for SIP determinations or subsequent year(s) which precede the emission reduction strategy or credit use period. For sources in existence less than two years, a shorter time period not less than 12 months may be considered by the executive director.

(7) Baseline emission rate--The source's rate of emissions per unit of activity during the baseline activity period.

(8) Baseline emissions--The source's total actual emissions based on the baseline activity and baseline emission rate.

(9) Certified--Any emission reduction that is determined to be creditable upon review and approval by the executive director.

(10) Curtailment--A temporary or partial reduction in activity level at any facility or mobile source.

(11) Discrete emission credit--An emission reduction generated over a discrete period of time, and measured in tons. A creditable emission credit such as a discrete emission reduction credit (DERC) or mobile discrete emission reduction credit (MDERC).

(12) Discrete emission reduction credit (DERC)--A creditable emission reduction which is created during a generation period, quantified after the period in which emissions reductions are made, and expressed in tons.

(13) Emission reduction--An actual reduction of emissions from a stationary or mobile source.

(14) Emission reduction strategy--The method implemented to reduce the source's emissions beyond that required by state or federal law, regulation, or agreed order.

(15) Generation period--The discrete period of time, not exceeding 12 months, over which a DERC is created.

(16) Generator--The owner or operator of a source that creates an emission reduction.

(17) Mobile discrete emission reduction credit (MDERC or discrete mobile credit)--A credit that is surplus, generated by a mobile source strategy. It is a creditable emission reduction that is created during a generation period, quantified after the period in which emissions reductions are made, and expressed in tons.

(18) Mobile emissions baseline--Mobile emissions that occur prior to a mobile emission reduction strategy, considering all limitations required by applicable state and federal regulations. A valid mobile emission baseline can be calculated by either using measured emissions of an appropriately sized sample of the participating mobile sources using an approved EPA test procedure or by using estimated emissions of the participating mobile sources using the most recent edition of EPA's on-road or non-road mobile emissions factor models, or other model as applicable. To ensure that mobile credits are surplus, mobile source baseline emissions estimates for each year of the proposed mobile source control program must be the same as, or lower than, those used, or proposed to be used, in the SIP in which the control program is proposed.

(19) Mobile source--On-road (highway) vehicles (e.g., automobiles, trucks, and motorcycles) and non-road vehicles (e.g., trains,

airplanes, agricultural equipments, industrial equipment, construction vehicles, off-road motorcycles, and marine vessels).

(20) Mobile source baseline activity--The mobile source's level of activity during the applicable mobile source baseline year.

(21) Mobile source baseline emissions--The mobile source's total emissions based on the product of mobile source baseline activity and mobile source baseline emission rate.

(22) Most stringent allowable emissions rate--The emissions rate of a source, considering all limitations required by applicable local, state, and federal regulations.

(23) Ozone season--The portion of the year when ozone monitoring is federally required to occur in a specific geographic area.

(24) Permanent--An emission reduction that is long-lasting and unchanging for the remaining life of the source.

(25) Protocol--A replicable and workable method of estimating emission rates or activity levels used to calculate the amount of emission reduction generated or credits required for stationary or mobile sources.

(26) Quantifiable--An emission reduction that can be measured or estimated with confidence using replicable techniques.

(27) Real reduction--A reduction in which actual emissions are reduced.

(28) Source--As defined in §101.1 of this title (relating to Definitions).

(29) Shutdown--The permanent cessation of an activity producing emissions at a facility.

(30) Strategy activity--The source's level of activity during the DERC generation period.

(31) Strategy emission rate--The source's level of activity during the DERC generation period.

(32) Surplus--An emission reduction that is not otherwise required of a source by a state or federal law, regulation, or agreed order.

(33) Use period--The period of time over which the user source applies discrete emission credits to an applicable emission reduction requirement.

(34) User--The owner or operator of a source that acquires and uses discrete emission credits to meet a regulatory requirement, demonstrate compliance, or offset an emission increase.

(35) Use strategy--The compliance requirement for which discrete emission credits are being used.

*§101.371. Purpose.*

The purpose of this division is to allow the operator of a source to generate discrete emission credits by reducing emissions beyond the level required by any local, state, and federal regulation, and to allow the operator of another source to use these credits. Participation under this division is strictly voluntary.

*§101.372. General Provisions.*

(a) Applicable pollutants. Reductions of volatile organic compounds (VOCs), nitrogen oxides ($NO_x$), carbon (CO), sulfur dioxide ($SO_2$), and particulates with an aerodynamic diameter of less than or equal to a nominal ten microns ($PM_{10}$) may qualify as discrete emission credits as appropriate. Reductions of other criteria pollutants are not creditable. Reductions of one pollutant may not be used to meet the reduction requirements for another pollutant, except at such time as modeling demonstrates that one may be substituted for another or as approved by the executive director.

(b) Discrete emission credit requirements.

(1) Discrete emission reduction credit (DERC)--To be creditable as a DERC, an emission reduction must be real, quantifiable, and surplus at the time the discrete emission credit is generated. The creditable reduction must have occurred after the most recent year of emissions inventory used for state implementation plan (SIP) determinations for all applicable pollutants and the source's annual emissions prior to the discrete emission credit application must have been reported or represented in the emissions inventory used for SIP determinations.

(2) Mobile discrete emission reduction credit (MDERC)--To be creditable as an MDERC, an emission reduction must be quantifiable, real, and surplus. The discrete emission credit must be surplus at the time it is created, as well as when it is used. The creditable reduction must have occurred after the most recent year of emissions inventory used for SIP determinations for all applicable pollutants, the mobile source's emissions must have been represented in the emissions inventory used for SIP determinations, and the mobile sources are in the attainment demonstration baseline. If a mobile reduction is implemented that is not in the baseline for emissions, this would not constitute an emission reduction.

(3) Emission reductions from a source which are certified as discrete emission credits under this division cannot be recertified in whole or in part as emission credits under another division within this subchapter.

(c) Eligible sources include the following:

(1) stationary sources (including area sources);

(2) mobile sources; or

(3) any stationary source (including area sources) associated with actions by federal agencies under §101.30 of this title (relating to Conformity of General Federal Actions to State Implementation Plans).

(d) Life of a discrete emission credit. A discrete emission credit is available for use after the notice of generation, DC-1 Form, has been received and deemed creditable by the commission registry in accordance with subsection (h) of this section, and may be used anytime thereafter.

(e) Geographic scope. Emission reductions generated in the State of Texas may be creditable and used in the state with the following limitations.

(1) VOC and $NO_x$ discrete emission credits generated in an ozone attainment area may be used in any county or portion of a county designated as attainment or unclassified, but may not be used in an ozone nonattainment area.

(2) VOC and $NO_x$ discrete emission credits generated in an ozone nonattainment area may be used either in the same ozone nonattainment area in which they were generated, or in any county or portion of a county designated as attainment or unclassified.

(3) VOC and $NO_x$ discrete emission credits generated in an ozone nonattainment area may not be used in any other ozone nonattainment area, except as provided in this subsection.

(4) CO, $SO_2$, and $PM_{10}$ discrete emission credits must be used in the same metropolitan statistical area in which the reduction was generated.

(5) VOC and $NO_x$ discrete emission credits generated in other counties, states, or nations can be used in any attainment or nonattainment county provided a demonstration has been made and approved by the executive director to show that the emission reductions achieved in the other county, state, or nation improves the air quality in the county where the credit is being used.

(f) Trading discontinuation. The trading of discrete emission credits may be discontinued by the executive director in whole or in part and in any manner, with commission approval, as a remedy for problems resulting from trading in a localized area of concern.

(g) Ozone season. In areas having an ozone season of less than 12 months, VOC and $NO_x$ discrete emission credits generated outside the ozone season may not be used during the ozone season.

(h) The registry. All required notices of discrete emission credit generators and users must be submitted to the registry. A notice submitted by a generator or user will be reviewed for credibility and when deemed certified, posted to the registry. The registry will assign a unique number to each ton of emission reductions generated. The registry will maintain current listings of all credits available or used for each ozone nonattainment area. One combined listing for all the counties or portions of counties designated as attainment or unclassified will be provided by the registry.

(i) Recordkeeping. The generator must maintain a copy of all notices and backup information submitted to the registry for a minimum of five years, following the completion of the generation period. The user must maintain a copy of all notices and backup information submitted to the registry for a minimum of five years, following the completion of the use period. Other relevant reference material or raw data must also be maintained on-site by the participating sources. The user must also maintain a copy of the generator's notice and backup information for a minimum of five years after the use is completed. The records shall include, but not necessarily be limited to:

(1) the name, emission point number (EPN), and facility identification number (FIN) of each unit using discrete emission credits;

(2) the amount of discrete emission credits being used by each unit;

(3) the specific number, name, or other identification of discrete emission credits used for each unit.

(j) Public information. All information submitted with a notice or report regarding the nature and quantity of emissions associated with the use or generation of discrete emission credits is public information and may not be submitted as confidential. Any claim of confidentiality for this type of material or failure to submit all information may result in the rejection of the emission reduction. All non-confidential notices and information regarding the generation, use, and availability of discrete emission credits may be obtained from the registry.

(k) Authorization to emit. A discrete emission credit created under this division is a limited authorization to emit the specified pollutants in accordance with the provisions of this section, the Federal Clean Air Act, and the Texas Clean Air Act, as well as regulations promulgated thereunder. A discrete emission credit does not constitute a property right. Nothing in this division should be construed to limit the authority of the commission or the United States Environmental Protection Agency to terminate or limit such authorization.

(l) Program participation. The executive director has the authority to prohibit a company from participating in discrete emission credit trading either as a generator or user, if the executive director determines that the company has violated the requirements of the program or abused the privileges provided by the program.

*§101.373. Protocols.*

(a) All discrete emission credit source categories must use an EPA approved protocol if one exists for the applicable source. If the source wants to deviate from an EPA approved protocol, EPA approval is required before the protocol can be used.

(b) If an EPA approved protocol does not exist, the amount of discrete emission credits in tons will be determined and certified based on actual monitoring results, when available, or otherwise calculated using good engineering practices, including calculation methodologies in general use in new source review (NSR) permitting. The source must collect relevant data sufficient to characterize the process emissions of the affected pollutant and the process activity level for all representative phases of source operation during the period under which discrete emission credits are created or used.

(c) Discrete emission credit generation.

(1) Discrete emission reduction credits (DERCs) may be generated by any strategy that reduces a source's emission rate below its baseline and is approved by the executive director, except for the following:

(A) temporary curtailment of an activity at a source;

(B) modification or discontinuation of any activity that is otherwise in violation of a federal, state, or local law;

(C) emissions reductions required to comply with any provision under Title I of the Federal Clean Air Act (FCAA) regarding tropospheric ozone, or Title IV of the FCAA regarding acid rain;

(D) emission reductions of hazardous air pollutants, as defined in the FCAA, §112, from application of a standard promulgated under FCAA, §112;

(E) emission reductions which have occurred as a result of transferring the emissions to another source;

(F) emission reductions credited or used under any other emissions trading program;

(G) emission reductions occurring at a source which received an alternative emission limitation to meet a state reasonably available control technology requirement, except to the extent that the emissions are reduced below the level that would have been required had the alternative emission limitation not been issued; and

(H) emission reductions at a facility with a flexible permit, unless the reductions are made permanent and enforceable or the generator can demonstrate that the emission reductions were not used to satisfy the conditions for the facilities under the flexible permit.

(2) A mobile discrete emission reduction credit (MDERC) may be generated by any mobile source emission reduction strategy that creates actual mobile source emission reductions under this rule, and is subject to the approval of the commission.

(d) Discrete emission credits generation calculation.

(1) DERCs, except for shutdowns, are calculated as follows.

Figure: 30 TAC §101.373(d)(1)

(A) The amount of DERCs generated must be rounded down to the nearest ton.

(B) For shutdown emission reduction strategies, the quantity of emission reduction generated is equivalent to the baseline emissions.

(C) The generation period for a shutdown is five years. Shutdown DERCs must be generated and noticed to the registry on an annual basis.

(D) If a source's emissions exceed its allowable emission limit, the amount of emissions exceeding the limit may not be certified as DERCs.

(2) An MDERC may be calculated from the annual difference between the mobile source emissions baseline and the actual emissions level after the MDERC strategy has been put in place. The MDERC must be based on actual in-use emissions of the replacement or substitute mobile source. Emission baselines for quantifying MDERCs should include the following information and data as appropriate, but not be limited to:

(A) the emission standard to which the mobile source is subject or emission performance to which the mobile source is certified;

(B) the measured in-use emissions levels per unit of use from all significant mobile source emissions sources;

(C) the number of mobile sources in the participating group;

(D) the type or types of mobile sources by model year; and

(E) the actual activity level, hours of operation or miles traveled by type, and model year.

(e) Registration and certification.

(1) A notice of generation and generator certification (DEC-1 Form), must be submitted to the Office of Permitting, Remediation, and Registration (OPRR) no later than 90 days after the discrete emission reduction strategy activity has been completed, or no later than 90 days after the completion of the first 12 months of generation, if the generation period exceeds 12 months, whichever is sooner. Submission of the DEC-1 Form should continue every 12 months thereafter for each subsequent year of generation.

(2) In the notice for a stationary source, including area source, the generator must include the following information for each pollutant reduced at each applicable emission point:

(A) the name, address, county, telephone number, contact person, permit or standard exemption numbers, account number of the generator, and the unique facility identification number (FIN) and emission point number (EPN) of the applicable emission points;

(B) the name of the owner and/or operator of the generator source;

(C) the generation period;

(D) a complete description of the generation activity;

(E) for shutdown emission reduction strategies, an explanation as to whether production shifted from the shut down facility to another facility in the same nonattainment area;

(F) the amount of emission credits generated;

(G) for volatile organic compound (VOC) reductions, a list of the specific compounds reduced;

(H) the baseline emission activity, baseline emission rate, emission reduction strategy emission rate, emission reduction strategy activity, emissions inventory data from the most recent year of emissions inventory used for state implementation plan determinations and emissions inventory data for the two consecutive years used to determine the baseline activity for each applicable pollutant and emission point;

(I) the most stringent emission rate for the applicable emission point, considering all the local, state, and federal applicable regulatory requirements;

(J) a complete description of the protocol used to calculate the emission reduction generated;

(K) the actual calculations performed by the generator to determine the amount of discrete emission credits generated; and

(L) a statement that the emission reductions on which the emission credits DERCs are based are real, surplus, and not based on an emission reduction strategy that is prohibited.

(3) The notice for a mobile source generator must include the following information to verify the credit calculation, but is not limited to:

(A) the name, address, county, telephone number, and contact person;

(B) the name of the owner and/or operator of the generator source;

(C) the date of the reduction;

(D) a complete description of the generation activity;

(E) the amount of discrete mobile source emission credits generated;

(F) the mobile source baseline emission activity, mobile source baseline emission rate, mobile source baseline total emissions, and the mobile source strategy;

(G) a complete description of the protocol used to calculate the discrete mobile source emission reduction generated;

(H) the actual calculations performed by the generator to determine the amount of discrete mobile source emission credits generated; and

(I) a statement that the discrete mobile source emission reductions on which the MDERCs are based are real, surplus, and not based on a mobile source emission reduction strategy that is prohibited.

(4) Registrations will be reviewed in order to determine the credibility of the reductions. Reductions determined to be creditable will be certified by the executive director.

(5) The applicant will be notified in writing if the executive director denies the notification. The applicant may submit a revised notification at any time.

(f) Discrete emission credit practices.

(1) The amount of DERCs, in tons, will be determined and certified based on actual monitoring results, when available, or otherwise calculated using good engineering practices, including calculation methodologies in general use in NSR permitting. The source must collect relevant data sufficient to characterize the process emissions of the affected pollutant and the process activity level for all representative phases of source operation during the period under which DERCs are created or used.

(2) The amount of MDERCs will be quantified in tons. MDERCs will be determined and certified based on: EPA methodologies, when available; actual monitoring results, when available; otherwise calculated using the most current EPA MOBILE model; or otherwise calculated using creditable emission reduction measurement or estimation methodologies which satisfactorily address the analytical uncertainties of mobile source emissions reduction strategies. The generator must collect relevant data sufficient to characterize the process emissions of the affected pollutant and the process activity level for all representative phases of source operation during the period under which the MDERCs are created or used.

(3) All discrete emission credits are deposited in the registry and reported as available credits until they are used, withdrawn, or expire.

(4) Compliance burden and enforcement.

(A) The generator is responsible for assuring that the discrete emission credits generated are certified.

(B) The user is responsible for ensuring that discrete emission credits which currently reside in the registry and are not certified are certified prior to use.

(5) Discrete emission credits may be used if the following requirements are met.

(A) The user must have ownership of a sufficient amount of discrete emission credits before the use period for which the specific discrete emission credits are to be used.

(B) The user must hold sufficient discrete emission credits to cover the user's compliance obligation at all times.

(C) The user shall acquire additional discrete emission credits during the use period if the user determines that he does not possess enough discrete emission credits to cover the entire use period. The user must acquire additional credits as allowed under this section prior to the shortfall, or the user will be in violation of this section.

(D) Source operators may acquire and use only discrete emission credits listed on the registry.

(6) With the exception of uses prohibited in paragraph (7) of this subsection or strictly prohibited in other rules or regulatiuons, discrete emission credits may be used to meet or demonstrate compliance with any mobile or stationary regulatory requirement including the following:

(A) to exceed any allowable emission level, if the following conditions are met:

*(i)* in ozone nonattainment areas, permitted facilities may use discrete emission credits to exceed permit allowables by no more than 25 tons for nitrogen oxides ($NO_x$) or five tons for VOC in a 12-month period as approved by the executive director. This use is limited to one exceedance up to 12 months, within any 24-month period per use strategy. The use must extend beyond a 24-hour period; or

*(ii)* at permitted facilities in counties or portions of counties designated as attainment or unclassified, discrete emission credits may be used to exceed permit allowables by values not to exceed the prevention of significant deterioration significance levels as provided in 40 Code of Federal Regulations, §52.21(b)(23), as approved by the executive director prior to use. This use is limited to one exceedance up to 12 months, within any 24-month period per use strategy. The user must demonstrate that there will be no adverse impacts from the use of discrete emission credits at the levels requested;

(B) as NSR offsets if the following requirements are met:

*(i)* the user must obtain the executive director's approval prior to the use of specific discrete emission credits to cover, at a minimum, one year of operation of the new or modified source in the NSR permit;

*(ii)* the NSR permit must contain an enforceable requirement that the source obtain at least one additional year of offsets before continuing operation in each subsequent year;

(C) compliance with $NO_x$ cap and trade requirements as provided in §101.356(d)of this title (relating to Allowance Banking and Trading).

(D) compliance with §115.950 of this title (relating to Emissions Trading) and §117.570 of this title (relating to Use of Emission Credits for Compliance), as allowed.

(7) A discrete emission credit, under this division, may not be used:

(A) before it has been acquired by the user;

(B) for netting to avoid the applicability of federal and state NSR requirements;

(C) to meet FCAA requirements for:

*(i)* new source performance standards under FCAA, §111;

*(ii)* lowest achievable emission rate standards under FCAA, §173(a)(2);

*(iii)* best available control technology standards under FCAA, §165(a)(4);

*(iv)* hazardous air pollutants standards under FCAA, §112, including the requirements for maximum achievable control technology;

*(v)* standards for solid waste combustion under FCAA, §129;

*(vi)* requirements for a vehicle inspection and maintenance program under FCAA, §182(b)(4) or (c)(3);

*(vii)* ozone control standards set under FCAA, §183(e) and (f);

*(viii)* clean-fueled vehicle requirements under FCAA, §246;

*(ix)* motor vehicle emissions standards under FCAA, §202;

*(x)* standards for nonroad vehicles under FCAA, §213;

*(xi)* requirements for reformulated gasoline under FCAA, §211(k); or

*(xii)* requirements for Reid vapor pressure standards under FCAA, §211(h) and (i).

(D) to allow an emissions increase of an air contaminant that exceeds the limitations of §106.261(3) or (4) or §106.262(3) of this title (relating to Facilities (Emission Limitations) and Facilities (Emission and Distance Limitations)) except as approved by the executive director;

(E) to authorize a source whose emissions are enforceably limited to below applicable major source threshold levels, as defined in §122.10 of this title (relating to General Definitions), to operate with actual emissions above those levels without triggering applicable requirements that would otherwise be triggered by such major source status;

(F) to exceed an allowable emission level where the exceedance would cause or contribute to a condition of air pollution as determined by the executive director.

(8) Calculation of discrete emission credits.

(A) A user may use the following equation to calculate the amount of discrete emission credits necessary to comply with §117.223 of this title (relating to Source Cap) instead of the equations in §117.223(b)(1) and (2) of this title.
Figure: 30 TAC §101.373(f)(8)(A)

(B) Otherwise, the amount of discrete emission credits needed to demonstrate compliance or meet a regulatory requirement is calculated as follows.
Figure: 30 TAC §101.373(f)(8)(B)

(C) The amount of discrete emission credits needed must be rounded up to the nearest ton.

(D) The user must possess 10% more discrete emission credits than are needed, as calculated in subparagraph (B) of this paragraph, to ensure that the source's environmental contribution retirement obligation will be met.

(E) If the amount of discrete emission credits needed to meet a regulatory requirement or to demonstrate compliance is greater than ten tons, an additional 5.0% of the discrete emission credits needed, as calculated in subparagraph (B) of this paragraph, must be acquired to ensure that sufficient discrete emission credits are available to the user with an adequate compliance margin.

(F) The amount of discrete emission credits needed for NSR offsets equals the quantity of tons needed to achieve the maximum allowable emission level set in the user's NSR permit. The user must also purchase and retire enough discrete emission credits to meet the offset ratio requirement in the user's ozone nonattainment area. The user must purchase and retire either the environmental contribution of 10% or the offset ratio, whichever is higher.

(G) Discrete emission credits that are not used during the use period are surplus and remain available for transfer or use by the holder. In addition, any portion of the calculated environmental contribution not attributed to actual use is also available.

(g) Notice of intent to use. A notice of intent to use, DEC-2 Form, must be submitted to OPRR in accordance with the following requirements:

(1) discrete emission credits may be used only after the user has submitted the notice to the registry;

(2) the notice must be submitted at least 45 days prior to the first day of the use period if the generator is a stationary source, and 90 days if the generator is a mobile source, and every 12 months thereafter for each subsequent year if the use period exceeds 12 months;

(3) a copy of the notice must also be sent to the federal land manager 30 days prior to use if the user is located within 100 kilometers of a Class I area;

(4) the notice for a stationary or area source user must include the following information for each use:

(A) the name, address, county, telephone number, contact person, permit or standard exemption numbers, and account number of the user, and the unique FIN and EPN identification numbers for each emission point;

(B) the name of the owner and/or operator of the user source;

(C) the applicable state and federal requirements that the discrete emission credits will be used to comply with and the intended use period;

(D) the amount of discrete emission credits needed;

(E) the baseline emission rate, activity level, and total emissions for the applicable emission points;

(F) the actual emission rate, activity level, and total emissions for the applicable emission points;

(G) the most stringent emission rate and the most stringent emission level for the applicable emission points, considering all applicable regulatory requirements;

(H) a complete description of the protocol used to calculate the amount of discrete emission credits needed;

(I) the actual calculations performed by the user to determine the amount discrete emission credits needed;

(J) the date on which the discrete emission credits were acquired or will be acquired;

(K) the discrete emission credit generator and the serial numbers of the discrete emission credits acquired or to be acquired;

(L) the price of the discrete emission credits acquired or the expected price of the discrete emission credits to be acquired; and

(M) a statement that due diligence was taken to verify that the discrete emission credits were not previously used, that the discrete emission credits were not generated as a result of actions prohibited under this regulation, and that the discrete emission credits will not be used in a manner prohibited under this regulation.

(5) the notice for a mobile source user must include the following information:

(A) the name, address, county, telephone number, and contact person;

(B) the name of the owner and/or operator of the user source;

(C) the applicable state and federal requirements that the discrete emission credits will be used to comply with and the intended use period;

(D) the amount of discrete emission credits needed;

(E) the mobile source baseline emission rate, mobile source activity level, and total mobile source emissions for the applicable mobile sources;

(F) the actual mobile source emission rate, activity level, and total emissions for the applicable mobile source;

(G) the most stringent mobile source emission rate and the most stringent mobile source emission level for the applicable emission points, considering all applicable regulatory requirements;

(H) a complete description of the protocol used to calculate the amount of MDERCs needed;

(I) the actual calculations performed by the user to determine the amount MDERCs needed;

(J) the date on which the MDERCs were acquired or will be acquired;

(K) the MDERC generator and the serial numbers of the MDERCs acquired or to be acquired;

(L) the price of the MDERCs acquired or the expected price of the MDERCs to be acquired;

(M) a statement that due diligence was taken to verify that the MDERCs DERCs were not previously used, that the MDERCs were not generated as a result of actions prohibited under this regulation, and that the MDERCs will not be used in a manner prohibited under this regulation; and

(N) a certification of use, which must contain certification under penalty of law by a responsible official of the user source of truth, accuracy, and completeness. This certification must state that based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete;

(6) a user may submit a notice late in the case of an emergency, but the notice must be submitted before the discrete emission credits can be used. The user must include a complete description of the emergency situation in the notice of intent to use. All other notices submitted less than 45 days prior, or 90 days prior for a mobile source, to use will be considered late and in violation;

(7) the user is responsible for determining the credits it will purchase and notifying the executive director of the selected generating source in the notice of intent to use. If the generator's credits are rejected or the notice of generation is incomplete, the use of discrete emission credits by the user may be delayed by the executive director. The user cannot use any discrete emission credits that have not been certified by the executive director. The executive director may reject the use of discrete emission credits by a source if the credit and use cannot be demonstrated to meet the requirements of this section.

(A) Actual discrete emission credits use.

*(i)* The user shall calculate:

*(I)* the amount of discrete emission credits used, including the amount of discrete emission credits retired to cover the environmental contribution associated with actual use; and

*(II)* the amount of discrete emission credits not used, including the amount of excess discrete emission credits that were purchased to cover the environmental contribution but not associated with the actual use, and available for future use.

*(ii)* A report of use, DEC-3 Form, must be submitted to the registry in accordance with the following requirements:

*(I)* a report of use must be submitted within 90 days after the end of the use period;

*(II)* the report must be submitted within 90 days of the conclusion of each 12-month use period, if applicable;

*(III)* the report is to be used as the mechanism to update or amend the notice of intent to use and must include any information different from that reported in the notice of intent to use, including, but not limited to, the following items:

(-a-) purchase price of the discrete emission credits obtained prior to the current use period;

(-b-) the actual amount of discrete emission credits possessed during the use period;

(-c-) the actual emissions during the use period for VOC and $NO_x$;

(-d-) the actual amount of discrete emission credits used;

(-e-) the actual environmental contribution; and

(-f-) the amount of discrete emission credits available for future use.

*(iii)* The user is in violation of this section if the user submits the report of use later than the allowed 90 days following the conclusion of the use period.

*(iv)* The registry shall not contain proprietary information.

(B) Compliance burden and enforcement.

*(i)* The user is responsible for assuring that a sufficient quantity of discrete emission credits is acquired to cover the applicable source's emissions for the entire use period. The user should ensure that the credits are real, surplus, and properly quantified discrete emission credits for purchase.

*(ii)* The user is in violation of this section if the user does not possess enough discrete emission credits to cover the credit need for the use period. If the user possesses an insufficient quantity of discrete emission credits to cover its compliance need, the user will be out of compliance for the entire use period, unless the user can demonstrate otherwise. Each day the user is out of compliance may be considered a violation.

*(iii)* Users may not transfer their compliance burden and legal responsibilities to a third party participant. Third party participants may only act in an advisory capacity to the user.

(C) Discrete emission credits are freely transferable in whole or in part, and may be traded or sold to a new owner anytime before the expiration date of the discrete emission credit. The Emissions Banking and Trading Program must be notified by means of an DC-4 Form prior to the transfer. The executive director will issue a letter to the discrete emission credit purchaser reflecting the discrete emission credits purchased by the new owner, and a letter to the discrete emission credit seller showing any remaining discrete emission credits available to the original owner. Discrete emission credits may be transferrable only after the executive director grants approval of the transaction.

*§101.374. Program Audits.*

(a) No later than three years after the effective date of this section, and every three years thereafter, the executive director will audit this program.

(b) The audit will evaluate the timing of credit generation and use, the impact of the program on the state's attainment demonstration and the emissions of hazardous air pollutants, the availability and cost of credits, compliance by the participants, and any other elements the executive director may choose to include.

(c) The executive director will recommend measures to remedy any problems identified in the audit. The trading of discrete emission credits may be discontinued by the executive director in part or in whole and in any manner, with commission approval, as a remedy for problems identified in the program audit.

(d) The audit data and results will be completed and submitted to the EPA and made available for public inspection within six months after the audit begins.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005656
Margaret Hoffman
Director, Environmental Law Division
Earliest possible date of adoption:
For further information, please call:

♦ ♦ ♦

## CHAPTER 110. REDUCTION OF AIR POLLUTION FROM OZONE

### 30 TAC §§110.10, 110.12, 110.14, 110.15, 110.16, 110.17, 110.19

The Texas Natural Resource Conservation Commission (commission) proposes new §110.10, Definitions; §110.12, Performance Standards; §110.14, Technology Registration; §110.15, Testing Requirements; §110.16, Labeling Requirements; §110.17, Exemptions; and §110.19, Affected Counties and Compliance Schedules. The proposed new sections in new Chapter 110, Reduction of Air Pollution from Ozone, and corresponding revisions to the state implementation plan (SIP) are proposed in order to reduce ground-level ozone in the Houston/Galveston (HGA), Dallas/Fort Worth (DFW), and Beaumont/Port Arthur (BPA) ozone nonattainment areas, as well as in the 95-county central and eastern Texas region, and are one element of the strategy for the proposed HGA Post-1999 Rate-of-Progress (ROP)/Attainment Demonstration SIP. The purpose of these proposed rules is to incorporate a technology in the affected areas that will reduce ozone from ambient air that is drawn across the external heat exchanger units of air-cooled air conditioning units, including heat pumps.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post- 1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base case episodes, adopted rules to achieve a 9% ROP reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxides ($NO_x$) waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the $NO_x$ waiver were based on early base-case episodes which marginally exhibited model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, the EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revisions to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998, and submitted to EPA on May 19, 1998, a revision to the HGA SIP which contained the following elements in response to EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2, of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part

of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these control strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for, and effectiveness of, any controls which may be implemented outside the covered area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid- course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approvable attainment demonstration, the EPA has indicated that the state must adopt those strategies modeled in the November submittal and then adopt sufficient controls to close the remaining gap in $NO_x$ emissions. The modeling included in this proposal indicates a gap of an additional 77.98 tons per day (tpd) of $NO_x$ reductions is necessary for an approvable attainment demonstration. The commission estimates that this measure will achieve a minimum of 13.0 tpd of $NO_x$ equivalent reductions and is therefore a necessary measure to consider for closing the gap and successfully demonstrating attainment.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains post- 1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The HGA ozone nonattainment area will need to ultimately reduce $NO_x$ more than 750 tpd to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of the residential and commercial air conditioning rules will contribute to attainment and maintenance of the one-hour ozone standard in the HGA, DFW, BPA, and 95-county eastern and central Texas areas.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION BY SECTION DISCUSSION

Chapter 110 is proposed as a new chapter which will contain rules to reduce ambient levels of ozone directly rather than through the reduction of ozone precursor chemicals.

Proposed new §110.10 includes new definitions for "covered air conditioning unit," "inlet ozone concentration," "ozone reduction technology," "ozone reduction efficiency," and "outlet ozone concentration."

Proposed new §110.12(a) sets performance standards for covered air conditioning units that may be supplied or installed in the HGA, DFW, and BPA ozone nonattainment areas after January 1, 2002. These requirements are for the ozone reduction technology to have an initial ozone reduction efficiency equal to or greater than 70%, and to retain an ozone reduction efficiency equal to or greater than 50% averaged over any one-hour period, for a period of 15 years. The requirements further mandate labeling of the covered air conditioning units. Proposed new §110.12(b) prohibits persons from tampering with, or knowingly disabling, ozone reduction technology on covered air conditioning units.

Proposed new §110.14(a) requires persons supplying or manufacturing ozone reduction technology to certify in a registration letter that each make and model of covered air conditioning unit will be compliant with the performance standards. Proposed new §110.14(b) clarifies that the ozone reduction technology is not

registered until the executive director provides the persons supplying or manufacturing the ozone reduction technology with a written registration confirmation letter and a registration number for each covered air conditioner. Proposed new §110.14(c) provides the executive director the authority to revoke or deny any registration if he determines that the technology does not work.

Proposed new §110.15(a) establishes the testing requirements for determining the ozone reduction efficiency for covered air conditioning units. The requirements include the use of EPA reference methods for ozone concentration determination, sets the range of ambient air inlet conditions under which the technology must be able to show ozone reduction efficiency, and allows for testing in artificially-created atmospheres, as well as ambient air, under properly controlled conditions. Proposed new §110.15(b) allows the executive director to approve alternate air sampling test methods so long as those methods are equivalent to the methods listed in the section. Proposed new §110.15(c) clarifies that the executive director is authorized to require the ozone reduction technology manufacturer or supplier to conduct testing of any covered air conditioning unit then in use.

Proposed new §110.16(a) requires covered air conditioning units to be permanently labeled to identify that they are compliant with the rules. The label must identify the unit's ozone reduction technology registration number, the year and month of the unit's manufacture, and shall state whether the unit meets the performance standards of §110.12.

Proposed new §110.17(a) allows the executive director to exempt a manufacturer's covered air conditioning unit from specific rules in the chapter if the manufacturer can prove that the technology is not available for, or adaptable to, that unit.

Proposed new §110.19 lists the counties in which the rules apply, and specifies a compliance date for those rules.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Mr. John Davis, Technical Specialist with Strategic Planning and Appropriations determined for the first five-year period the proposed rules are in effect, the commission does not anticipate significant fiscal implications for any unit of state and local government as a result of administration or enforcement of the proposed new sections.

The proposed rulemaking action would require that all air conditioning units sold in the eight- county HGA, four-county DFW, and three-county BPA ozone nonattainment areas and 95 additional central and eastern Texas counties after January 1, 2002 have ozone reduction technology installed. The ozone reduction technology must achieve an initial ozone reduction efficiency equal to or greater than 70%, and an overall ozone reduction efficiency equal to or greater than 50% averaged over any one-hour period, for a period of 15 years. Each new unit will have to be permanently labeled to identify that it is compliant with the new requirements, and the manufacturers and suppliers of ozone reduction technology will have to provide a registration letter to the commission certifying that each make and model of covered air conditioning unit will be compliant with the performance standards.

Any unit of state or local government in the affected counties that purchases air conditioning units after January 1, 2002, will be affected by the proposed rulemaking action. The commission anticipates that it will cost manufacturers more to design and manufacture air conditioning units incorporating the ozone reduction technology. Based on estimates provided by air conditioning manufacturers and a potential ozone reduction technology manufacturer and supplier, affected air conditioning units are projected to cost between $42 and $116 more per ton of air conditioning capacity. Covered air conditioning units range in size from 1.0 ton and less window units; 1.5 to 5.0 ton residential and small commercial units; to 10 to 50 ton large air-cooled commercial units, such as rooftop units. The resulting price increase would be $42 to $116 for typical 1.0 ton window unit, $63 to $580 for a typical residential unit, and $420 to $5,800 for large commercial units. The overall fiscal impact to state and local governments is not anticipated to be significant unless a very large number of the new air conditioning units are purchased.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined for each of the first five years the proposed rules are in effect, the public benefit anticipated as a result on implementing the new sections will be the reduction of ambient ground-level ozone concentrations. The rules are expected to help the agency achieve the ozone NAAQS in the HGA, DFW, and BPA nonattainment areas, as well as maintain the ozone NAAQS in the central and eastern Texas region.

Under the proposed rulemaking, the commission will require that all air conditioning units supplied or installed in the affected counties after January 1, 2002 have some type of ozone reduction technology, unless otherwise exempted. The ozone reduction technology must achieve an initial ozone reduction efficiency equal to or greater than 70%, and an overall ozone reduction efficiency equal to or greater than 50% averaged over any one-hour period, for a period of 15 years. Each new unit will have to be permanently labeled to identify that it is compliant with the new requirements and the manufacturers and suppliers of ozone reduction technology will have to provide the agency a registration letter certifying that each make and model of covered air conditioning unit will be compliant with the performance standards.

Any individual or business in the affected counties that purchases covered air conditioning units after January 1, 2002, will be affected by the proposed rulemaking. The commission anticipates that it will cost manufacturers more to design and manufacture air conditioning units incorporating the ozone reduction technology. These increased costs will be offset by price increases to consumers. Based on estimates provided by air conditioning manufacturers and a potential ozone reduction technology manufacturer and supplier, affected air conditioning units are projected to cost between $42 and $116 more per ton of air conditioning capacity. Covered air conditioning units range in size from 1.0 ton and less window units; 1.5 to 5.0 ton residential and small commercial units; to 10 to 50 ton large air- cooled commercial units, such as rooftop units. The resulting price increase would be $42 to $116 for typical 1.0 ton window unit, $63 to $580 for a typical residential unit, and $420 to $5,800 for large commercial units. The overall fiscal impact to individuals and businesses will depend on the number and capacity of new air conditioning units purchased.

SMALL AND MICRO BUSINESS ASSESSMENT

The commission does not anticipate adverse fiscal implications for small or micro-businesses as a result of administration or enforcement of the proposed new sections. The total fiscal impact to small or micro-businesses in the affected counties will depend on how many air conditioning units they buy or produce after January 1, 2002.

Under the proposed rulemaking, the commission will require that all air conditioning units sold in the affected counties after January 1, 2002 have ozone reduction technology installed. Incorporation of the new technology will result in a price increase for air conditioners sold in the affected counties after January 1, 2002. Small and micro-businesses in the affected counties that purchase air conditioning units after January 1, 2002 can expect to pay approximately $42 to $116 more per ton of air conditioning capacity. Covered air conditioning units range in size from 1.0 ton and less window units; 1.5 to 5.0 ton residential and small commercial units; to 10 to 50 ton large air-cooled commercial units, such as rooftop units. The resulting price increase would be $42 to $116 for typical 1.0 ton window unit, $63 to $580 for a typical residential unit, and $420 to $5,800 for large commercial units.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action meets 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. Proposed new Chapter 110 is intended to protect the environment or reduce risks to human health from environmental exposure to ozone and may affect in an adverse material way, a sector of the economy, or competition.

However, the proposed rules do not meet any of the four criteria which would cause them to be subject to Texas Government Code, §2001.0225(b). Specifically, the ozone reduction technology required by the rules is part of a plan to help meet the ozone NAAQS in the HGA, DFW, and BPA ozone nonattainment areas. The rules are therefore being proposed to meet a federal requirement. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established those standards. Under 42 USC, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS. The proposed rules do not exceed a requirement of a delegation agreement, and were not developed solely under the general powers of the agency, but were specifically developed to meet the air quality standards established under federal law as NAAQS and under TCAA, §§382.002, 382.011, 382.012, 382.017, and 382.019.

TAKINGS IMPACT ASSESSMENT

The staff prepared a takings impact assessment for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking is to require ozone reduction technology on covered air conditioning units supplied or installed in the HGA, DFW, and BPA ozone nonattainment areas, and the 95-county eastern and central Texas region on or after January 1, 2002. This proposed rulemaking is part of an air pollution strategy to reduce the level of ozone in those areas. Promulgation and enforcement of the proposed rules will not burden private, real property. Although the proposed rules do not directly prevent a nuisance, do not prevent an immediate threat to life or property, and do not prevent a real and substantial threat to public health and safety, they do partially fulfill a federal mandate under 42 USC, §7410 requiring states to develop and submit to the EPA a SIP which details the state's plans for the attainment and maintenance of the NAAQS. Because the purpose of the rule proposal is to require certain ozone reduction technology in order to meet federal air quality standards for ozone it is exempted from the requirements of Texas Government Code, §2007.043 as an action reasonably taken to fulfill an obligation mandated by federal law. Consequently, this rulemaking action does not constitute a takings under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and commission rules in 30 TAC Chapter 281, Subchapter B, concerning consistency with the CMP. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this action for consistency with the goals and policies of the Coastal Coordination Council, and has determined that they are consistent. The CMP goal applicable to this rule making action is to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and ambient ozone concentrations will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is that commission rules comply with regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR Part 50, National Primary and Secondary Ambient Air Quality Standards, and 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal Of Implementation Plans. Accordingly, the commission finds this rule making action to be consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25,

2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are being held to receive oral and written comments from interested persons. Registration will begin one hour prior to each hearing, and interested persons may provide oral comments when called upon, in order of registration. A four-minute time limit will be set at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during the hearings; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239- 4808, or e-mailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 2000-011J-110-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Jeff Greif at (512) 239-1534 or Alan Henderson at (512) 239-1510.

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC or Code), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the Code, and under the Texas Health and Safety Code, TCAA, §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed under TCAA, §382.002, which states as the policy and purpose of the chapter the control or abatement of air pollution in the state; §382.011, which authorizes the commission to control the quality of the state's air; and §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air.

The proposed new sections implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; and §382.012, relating to State Air Control Plan.

*§110.10. Definitions.*

Unless specifically defined in the TCAA or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution regulation. In addition to the terms which are defined by the TCAA, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Covered air conditioning unit - Any air-cooled air conditioning unit (including split or packaged units) or heat pump unit.

(2) Inlet ozone concentration - The ozone concentration, measured in parts per billion, of the air entering a covered air conditioning unit prior to exposure to any ozone reduction technology.

(3) Outlet ozone concentration - The ozone concentration, measured in parts per billion, of air exiting a covered air conditioning unit.

(4) Ozone reduction efficiency - The difference between inlet ozone concentration and outlet ozone concentration, divided by the inlet ozone concentration, expressed in percent.

(5) Ozone reduction technology - A technology that converts ozone into oxygen or removes ozone from the outdoor forced air flow through a covered air conditioning unit without adding harmful air pollutants to the ambient air.

*§110.12. Performance Standards.*

(a) No person may supply or install a covered air conditioning unit for use unless it is equipped with a registered ozone reduction technology that has an initial ozone reduction efficiency equal to or greater than 70% averaged over any one-hour period, retains an efficiency equal to or greater than 50% averaged over any one-hour period for 15 years, and is properly labeled in accordance with §110.16 of this title (relating to Labeling Requirements).

(b) No person may tamper with, or knowingly disable, an ozone reduction technology incorporated in a covered air conditioning unit in the counties specified in §110.19 of this title (relating to Affected Counties and Compliance Schedules).

*§110.14. Technology Registration.*

(a) All persons supplying or manufacturing ozone reduction technology for use in the counties specified in §110.19 of this title (relating to Affected Counties and Compliance Schedules) must certify in writing to the executive director that their ozone reduction technology will meet the ozone reduction requirements of §110.12 of this title (relating to Performance Standards) for each make and model of covered air conditioning unit for which their technology is registered.

(b) Each make and model of covered air conditioning unit is registered when the ozone reduction technology manufacturer or supplier receives a written registration confirmation from the executive director providing a registration number for each covered air conditioning unit make and model.

(c) The executive director may revoke, in writing, any registration or part of a registration, if the executive director determines that the technology does not meet the performance standards of §110.12 of this title.

*§110.15. Testing Requirements.*

(a) Ozone reduction efficiency for covered air conditioning units shall be determined in accordance with the following test methods and procedures.

(1) Ozone concentrations shall be determined by selecting and using an appropriate EPA Reference Method from 40 Code of Federal Regulations Part 50, Appendix D.

(2) Ozone reduction technology must be demonstrated to meet the ozone reduction efficiency performance standards in §110.12 of this title (relating to Performance Standards), under all of the following conditions;

(A) inlet ozone concentration between 60 - 140 parts per billion;

(B) inlet air temperature between 75 - 110 degrees Fahrenheit;

(C) inlet dew points between 50 - 75 degrees Fahrenheit; and

(D) maximum and minimum air flow rates if applicable (fan on).

(3) Ozone reduction efficiency shall be measured using one or both of the following air sampling test methods:

(A) simultaneous air sampling of the inlet and outlet ozone concentration of a covered air conditioning unit for an hour where conditions in the bulk air stream entering the unit are created by artificial means, provided that:

*(i)* sampling locations are chosen so that sufficient mixing of the air enables sound ozone reduction measurements to be taken; and

*(ii)* ozone is introduced and dispersed sufficiently upstream of the covered air conditioning unit sampling location to insure complete mixing in the air prior to the sampling point;

(B) simultaneous air sampling of the inlet and outlet ozone concentration of a covered air conditioning unit where ambient conditions are within the ranges specified in paragraph (2) of this subsection for any one-hour test run, provided that:

*(i)* the probe locations are chosen in a manner which accurately demonstrates the average ozone reduction efficiency of the ozone reduction technology; and

*(ii)* the probe locations are sufficiently shrouded to insure the upstream and downstream measurements are taken from the same air mass and that no cross mixing has occurred.

(b) Alternate air sampling test methods may be used if the executive director determines that the proposed methods are equivalent to the methods listed in this section, and he approves the proposed method in writing.

(c) The ozone reduction technology manufacturer or supplier must test, at their expense, any covered air conditioner in use in the nonattainment area, within 90 days of being directed to conduct such testing by the executive director.

*§110.16. Labeling Requirements.*

Covered air conditioning units intended for use in the counties specified in §110.19 of this title (relating to Affected Counties and Compliance Schedules) shall be labeled with a permanent material that must be welded, riveted, or otherwise permanently attached to the unit. The label shall identify the unit's ozone reduction technology registration number (if applicable), the year and month of the unit's manufacture, and shall state whether the unit meets the performance standards of §110.12 of this title (relating to Performance Standards).

*§110.17. Exemptions.*

A covered air conditioning unit may be exempted from all or part of this chapter, by the executive director in writing, if the air conditioning unit manufacturer can demonstrate to the executive director's satisfaction that no ozone reduction technology compliant with §110.12 of this title (relating to Performance Standards) is available for, or adaptable to, any of the covered air conditioning manufacturer's units

*§110.19. Affected Counties and Compliance Schedules.*

Effective January 1, 2002, persons subject to this rule in the following counties shall be in compliance with §§110.12, 110.14 - 110.17 of this title (relating Performance Standards; Technology Registration; Testing Requirements; Labeling Requirements; and Exemptions):

(1) Beaumont/Port Arthur counties including Hardin, Jefferson, and Orange;

(2) Dallas/Fort Worth counties including Collin, Dallas, Denton, and Tarrant;

(3) Houston/Galveston counties including Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller; and

(4) East and Central Texas counties including Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005631
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §114.6, Low Emission Fuel Definitions; §114.312, Low Emission Diesel Standards; §114.313, Designated Alternate Limits; §114.314, Registration of Diesel Producers and Importers; §114.315, Approved Test Methods; §114.316, Monitoring, Recordkeeping, and Reporting Requirements; §114.317, Exemptions to Low Emission Diesel Requirements; and §114.319, Affected Counties and Compliance Dates. The commission proposes these amendments to Chapter 114, Control of Air Pollution From Motor Vehicles, and corresponding revisions to the state implementation plan (SIP) in order to control ground-level ozone in the Houston/Galveston (HGA), Dallas/Fort Worth (DFW), and Beaumont/Port Arthur (BPA) ozone nonattainment areas.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post- 1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base-case episodes, adopted rules

to achieve a 9% rate-of-progress (ROP) reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxide ($NO_x$) waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the $NO_x$ waiver were based on early base-case episodes which marginally exhibited model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, the EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revisions to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to the EPA on May 19, 1998 a revision to the HGA SIP which contained the following elements in response to EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid- course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approvable attainment demonstration, EPA has indicated that the state must adopt those

strategies modeled in the November submittal and then adopt sufficient controls to close the remaining gap in $NO_x$ emissions. The modeling included in this proposal indicates a gap of an additional 77.98 tons per day (tpd) of $NO_x$ reductions is necessary for an approvable attainment demonstration.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains Post- 1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The HGA ozone nonattainment area will need to ultimately reduce $NO_x$ more than 750 tpd to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of the Low Emission Diesel Fuel (LED) program will contribute to attainment and maintenance of the one-hour ozone standard in the HGA area. A LED program also should contribute to a successful demonstration of transportation conformity in the HGA area.

These proposed rules are one element of the control strategy for the HGA Attainment Demonstration SIP. The purpose of these proposed rules is to establish a LED air pollution control strategy that reduces $NO_x$ emissions necessary for the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS. Additional benefits will be achieved in the BPA and DFW ozone nonattainment areas, and the 95-county central and eastern Texas region.

The proposed revisions to the LED rules will require LED fuel statewide for on-road use. In addition, the proposed revisions to the LED rules will require LED fuel for both on-road and non-road use in the eight counties in the HGA ozone nonattainment area which includes Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties; the four counties of the DFW ozone nonattainment area which includes Collin, Dallas, Denton, and Tarrant Counties; the three counties of the BPA ozone nonattainment area which includes Hardin, Jefferson, and Orange Counties; and 95 additional central and eastern Texas counties including Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

The LED fuel will lower the emissions of $NO_x$ and other pollutants from fuel combustion. Because $NO_x$ is a precursor to ground-level ozone formation, reduced emissions of $NO_x$ will result in ground-level ozone reductions. To comply with the state LED regulations, diesel fuel producers and importers must ensure that diesel fuel distributed to the LED fuel zone meets the specifications stated in these proposed rules. The proposed rules require that, beginning May 1, 2002, diesel fuel produced for delivery and ultimate sale to the consumer in the affected area does not exceed 500 ppm sulfur, must contain less than 10% by volume of aromatic hydrocarbons, and must have a cetane number of 48 or greater. In addition, the proposed rules will require the sulfur content in the diesel fuel supplied to the DFW, BPA, and HGA ozone nonattainment areas and 95 central and eastern Texas counties, be reduced to 30 ppm sulfur beginning May 1, 2004, and reduced again beginning May 1, 2006, to 15 ppm sulfur. Also, the proposed rules require diesel fuel producers and importers who provide fuel to the affected areas to register with the commission and provide quarterly status reports.

The proposed rules will also revise definitions that will impact who is affected by the proposed state LED fuel program as well as who is impacted by the current requirements of the regional low Reid vapor pressure (RVP) gasoline program, specified in §§114.301, 114.304 - 114.307, and 114.309. The proposed rules will restrict the registration, reporting, and testing requirements of these programs to those persons who have direct control over changes in fuel content, i.e., those persons who produce fuel or import fuel into the state.

The commission is aware that the EPA is currently proposing revised nationwide diesel fuel sulfur controls. If a new federal diesel fuel sulfur rule is adopted that covers the areas in Texas impacted by this rule, and the federal rule is at least as stringent as these rules, then the commission may consider compliance with the national rule equally effective and may repeal the state sulfur requirements for diesel fuel.

The commission is proposing to expand the LED fuel ozone control strategy which was developed for the DFW area and requires diesel fuel content limits more restrictive than federal diesel fuel regulations. The current federal regulations governing diesel fuel quality in Title 40 Code of Federal Regulations (40 CFR) Part 80, Regulation of Fuels and Fuel Additives, §80.29, Controls and Prohibitions on Diesel Fuel Quality, establish limits for fuel content for diesel fuel used in on-road motor vehicle applications. These federal regulations limit sulfur in on-road diesel fuel to 500 ppm and allow the producer to choose between meeting a minimum cetane number of 40 or a maximum aromatic hydrocarbon content of 35% by volume. The state's proposed LED regulations limit on-road diesel to 500 ppm sulfur, 10% aromatic hydrocarbons, and a 48 cetane minimum, and with a more restrictive limit on sulfur being implemented on-road and non-road in the HGA, DFW, BPA ozone nonattainment areas and 95 central and eastern Texas counties in 2004 and then again in 2006. However, although the EPA regulates diesel fuel content for on-road use, it does not regulate the fuel content for non-road diesel fuel. Therefore, since there is currently no federal limit on the content of non-road diesel, the state has the authority to place controls

on the fuel content of non-road diesel fuel. As such, the commission is submitting, as part of the SIP, concurrent with this proposed rulemaking, a request for a waiver in accordance with the 42 USC, §7545(C)(4)(c), for the on-road portion of these rules. The commission does not believe that a waiver is needed for the non-road portion of these rules. This proposed SIP submittal is available to the public by contacting Heather Evans at (512) 239-1970.

Modeling performed for the commission assessing the benefits of this $NO_x$ emission reduction strategy demonstrated that significant emission reductions could be achieved from using a low aromatic hydrocarbon/high cetane diesel fuel as specified by the commission's LED fuel requirements. By the year 2007, the proposed LED fuel program will reduce $NO_x$ emissions from on-road vehicles and non-road equipment statewide by 30 tpd, of which 6.84 tpd of reductions will be achieved in the HGA ozone nonattainment area. The commission anticipates production cost will increase from $.04 to $.08 per gallon of diesel fuel to comply with rules.

The commission developed this $NO_x$ emission control strategy to cover the eight counties contained in the HGA ozone nonattainment area. The coverage area also includes all counties in the state for on-road diesel fuel use and the four DFW ozone nonattainment counties, the three BPA ozone nonattainment counties, as well as 95 central and eastern Texas counties for both on- road and non-road diesel fuel use. The involvement of the statewide counties as part of the $NO_x$ emission control strategy is necessary for the HGA and DFW areas to demonstrate attainment of the ozone NAAQS. The proposed rules are intended to help bring the ozone nonattainment areas into compliance and to help keep attainment and near nonattainment areas from going into nonattainment. The proposed statewide coverage will also provide a greater market for diesel fuel producers and importers to provide the fuel required by these regulations and should help alleviate concerns regarding out of area refueling practices.

The commission solicits comment regarding the possible benefits of reducing sulfur content to 15 ppm prior to the 2006 federal deadline as a possible alternative to controls on aromatics and cetane as described in this proposal.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION BY SECTION DISCUSSION

The proposed amendments to §114.6 contain revisions to the following definitions: bulk plant, imported, import facility, and importer. The proposed amendment to the definition of bulk plant is needed for clarification of the definition and will insert the word "fuel" that was inadvertently left out of the original rulemaking. The phrase "solely by truck" is also proposed to be amended to "by truck or pipeline" to account for those bulk plants that have pipeline delivery. The proposed amendments to the definitions of imported, import facility, and importer are necessary to clarify that only those persons who import fuel into the state are covered by these definitions. These proposed amendments will impact who is affected by the current requirements of the regional RVP gasoline program, specified in §§114.301, 114.304 - 114.307, and 114.309, as well as the proposed amendments to the LED fuel program and will restrict the registration, reporting, and testing requirements of these programs to those persons who have direct control over changes in fuel content, i.e., those persons who produce fuel or import fuel into the state. In addition, the proposed amendments to §114.6 contain new definitions for motor vehicle and non-road equipment. Also, as a result of the new definitions, the other existing definitions are to be renumbered accordingly.

The proposed amendments to §114.312 revise subsection (b) to modify the sulfur content standard for diesel fuel to provide for the phase down of sulfur content in certain affected areas from 500 ppm to 30 ppm and then again to 15 ppm. In addition, the proposed amendments to §114.312 revise subsection (g) to provide reference to the testing methods prescribed in the proposed amendments to §114.315.

The proposed amendments to §114.313 clarify the language of subsection (c) by adding commas in two locations.

The proposed amendments to §114.314 clarify language by adding the word "fuel" after the phrase "low emission diesel (LED)." The proposed amendments also change the word "chapter" to "division" to clarify that LED producers and importers shall comply with the requirements of the subchapter division regarding LED.

The proposed amendments to §114.315 revise subsection (a) to establish the American Society for Testing and Materials (ASTM) Test Method D287-92(1995) as the approved test method for determining the American Petroleum Institute (API) gravity, ASTM Test Method D445-97 as the approved test method for determining viscosity, ASTM Test Method D93-99c as the approved test method for determining the flash point, and ASTM Test Method D86-00 as the approved test method for determining the distillation temperatures of the diesel fuel. The proposed amendments to §114.315 also contain a new subsection (c) which establishes the test procedures and approval process for obtaining the executive director's approval of an alternative diesel fuel formulation.

The proposed amendments to §114.316 revise subsection (e) to require the California Air Resources Board (CARB) executive order number, or the approval notification number as issued by the executive director, to be included on the product transfer documents if the diesel fuel being transferred complies with one of those alternatives.

The proposed amendments to §114.319 contain a new subsection (a) which establishes the compliance date for statewide coverage of the LED program for on-road diesel fuel use, a new subsection (b) which establishes the compliance date and coverage area for the use of LED for both on- road and non-road use, a new subsection (c) which establishes the compliance date and coverage area for the sulfur content phase down to 30 ppm sulfur, and a new subsection (d) which establishes the compliance date and coverage area for the sulfur content phase down to 15 ppm sulfur.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed amendments are in effect there will be fiscal implications which are not anticipated to be significant for any single unit of

state and local government as a result of administration or enforcement of the proposed amendments. The total annual fiscal impact to statewide state and local government diesel vehicles is estimated to be approximately $177 per year per diesel vehicle following implementation of LED fuel standards on May 1, 2002 and an additional $177 per year per diesel vehicle in the DFW, BPA, and HGA ozone nonattainment areas and 95 additional central and eastern Texas counties, following the beginning of a desulfurization phase in period which requires the sulfur level per gallon of gasoline to be reduced from 30 ppm (May 1, 2004) to 15 ppm (May 1, 2006).

The proposed amendments to the current LED fuel rule will require LED fuel statewide for on- road use. In addition, the proposed amendments will require LED fuel for both on-road and non-road use in the eight-county HGA, four-county DFW, and three-county BPA nonattainment areas along with 95 additional counties in central and eastern Texas.

The HGA ozone nonattainment area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties; the DFW ozone nonattainment area consists of Collin, Dallas, Denton, and Tarrant Counties; the BPA ozone nonattainment area consists of Hardin, Jefferson, and Orange Counties; and the 95 additional central and eastern Texas counties are Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

In order to comply with the proposed amendments, beginning May 1, 2002, diesel fuel producers and importers must ensure diesel fuel distributed to affected areas shall not exceed 500 ppm sulfur, must contain less than 10% by volume of aromatic hydrocarbons, and must have a cetane number of 48 or greater. Additionally, the proposed amendments will require the sulfur content in the diesel fuel supplied to the DFW, BPA, and HGA nonattainment areas and 95 additional central and eastern Texas counties be reduced to 30 ppm sulfur beginning May 1, 2004, and reduced again beginning May 1, 2006, to 15 ppm.

It is anticipated that the cost of producing diesel fuel to the May 1, 2002 standard will result in an estimated increase, in the cost for this fuel at the pump, of $.04. Additionally, it is anticipated that owners and operators of diesel fueled vehicles in counties affected by the May 1, 2006 standard will have to pay an additional $.04 increase in diesel fuel prices, beginning May 1, 2004, when the phase in period to desulfurize diesel from 30 ppm to 15 ppm sulfur content per gallon of diesel begins. The increase in fuel cost for the May 1, 2002 standard was calculated in an analysis published by Northeast States for Coordinated Air Use Management (NESCAUM) comparing the cost of California diesel fuel to federal diesel. Federal diesel is the term used for diesel fuel which meets federal standards and is used to fuel diesel-powered, compression-ignition engines in on-road applications. The increase in fuel cost for the May 1, 2006 standard is based on the EPA's "Notice of Proposed Rulemaking on the Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements." In addition, the proposed amendments will require diesel fuel producers and importers who provide fuel to the affected areas to register with the commission, test their fuel for compliance, and provide quarterly status reports to the commission.

The following analysis in this fiscal note only considers on-road diesel vehicles. Vehicle counts for non-road diesel vehicles are not available.

Statewide units of state and local government will likely be required to pay an additional $.04 per gallon for diesel fuel that meets the proposed LED requirements following the May 1, 2002 deadline. Approximately 12,261 state and local government diesel vehicles statewide consumed approximately 54 million gallons of diesel fuel in 1999. Based on a 1.5% growth rate, an estimated 12,821 diesel vehicles would use approximately 57 million gallons of on-road diesel fuel in 2002. The total annual fiscal impact to units of state and local governments in 2002 would be approximately $1.5 million or approximately $117 per diesel vehicle for 2002 (May - December 2002) and then approximately $2.3 million or approximately $177 per year per diesel vehicle afterward.

Beginning May 1, 2004, a desulfurization phase in period will begin, which will eventually result in the reduction of sulfur content per gallon of diesel from 30 ppm (May 1, 2004) to 15 ppm (May 1, 2006). All diesel gas sold in the affected counties will have to meet the 15 ppm requirement by May 1, 2006. Units of state and local government in the affected counties will likely be required to pay an additional $.04 per gallon, for a total increase of $.08 beginning May 1, 2004, for diesel fuel that meets the stricter proposed LED requirements. It is anticipated there will be approximately 9,600 state and local government diesel vehicles operating in the affected areas by May 1, 2004. The additional fiscal impact for units of state and local government vehicles operating in the affected counties in 2004 will be approximately $1.1 million or approximately $117 per diesel vehicle for 2004 (May - December 2004) and then approximately $1.7 million or approximately $177 per diesel vehicle per year afterward. The combined annual cost increase to units of state and local governments which own or operate diesel vehicles in the affected areas, for the first full years following implementation of fuel standards associated with the May 1, 2002 and May 1, 2004 - 2006 phase-in period, is approximately $3.3 million or approximately $354 per diesel vehicle per year.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for the first five years the proposed amendments are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be the potential reduction of on-road and non-road mobile source emissions, potentially improved air quality, and contribution toward demonstration of attainment with the NAAQS for the HGA ozone nonattainment areas. However, additional benefits will be achieved in the BPA and DFW ozone nonattainment areas, and the 95-county central and eastern Texas region.

There are fiscal implications which are not anticipated to be significant for any single owner or operator of diesel equipment as a result of administration or enforcement of the proposed amendments. It is anticipated that LED diesel fuel producers that supply fuel to the affected counties will incur additional costs to produce

diesel fuel that meets the proposed May 1, 2002 LED standards. The cost of producing this LED fuel is estimated to be approximately $.04 per gallon more than for diesel fuel. Additionally, it is anticipated that owners and operators of diesel fueled vehicles in counties affected by the May 1, 2006 standard will be faced with an additional $.04 increase in diesel fuel prices, beginning May 1, 2004, when the phase in period to desulfurize diesel from 30 ppm to 15 ppm sulfur content per gallon of diesel begins.

The commission estimates that approximately 565,661 privately owned and operated diesel vehicles statewide consumed approximately 2.5 billion gallons of on-road diesel fuel in 1999. Based on a 1.5% growth rate, an estimated 591,499 privately owned and operated diesel vehicles would use approximately 2.6 billion gallons of on-road diesel fuel in 2002. The total fiscal impact to persons and businesses which own and operate diesel vehicles statewide in 2002 would be approximately $69 million or approximately $117 per diesel vehicle for 2002 (May - December 2002) and then approximately $105 million or approximately $177 per year per diesel vehicle afterward.

Beginning May 1, 2004, a desulfurization phase in period will begin, which will eventually result in the reduction of sulfur content per gallon of diesel from 30 ppm (May 1, 2004) to 15 ppm (May 1, 2006). All diesel gas sold in the affected counties will have to meet the 15 ppm requirement by May 1, 2006. Persons and businesses that own and operate diesel vehicles in the affected counties will likely be required to pay an additional $.04 per gallon, for a total increase of $.08 beginning May 1, 2004, for diesel fuel that meets the stricter proposed LED requirements. The commission anticipates there will be approximately 441,380 privately-owned diesel vehicles operating in the affected counties by May 1, 2004. The additional fiscal impact for persons and businesses that own and operate diesel vehicles operating in the affected counties in 2004 will be approximately $51 million or approximately $117 per diesel vehicle for 2004 (May - December 2004) and then approximately $78 million or approximately $177 per diesel vehicle per year afterward. The combined annual cost increase to persons and businesses which own or operate diesel vehicles in the affected counties, for the first full years following implementation of fuel standards associated with the May 1, 2002 and May 1, 2004 - 2006 phase in period, is approximately $153 million or approximately $354 per diesel vehicle per year.

There will be significant capital and operating costs to refineries to meet the proposed May 1, 2006 standard. According to EPA analysis found in the "Notice of Proposed Rulemaking on the Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements," the estimated capital costs for a typical refinery will be approximately $31 million and the average annual operating cost would be approximately $8 million. These increased costs will result in an anticipated $.04 per gallon increase in diesel fuel for consumers beginning May 1, 2004. There are no anticipated significant additional costs for diesel fuel producers and importers associated with registering with the commission or supplying monthly status reports. Likewise, there are no anticipated additional costs to producers for testing LED fuel because producers are already testing their fuel for compliance with federal regulations and industry standards.

SMALL AND MICRO-BUSINESS ASSESSMENT

There will be fiscal implications which are not anticipated to have an adverse impact on any small or micro-businesses as a result of administration or enforcement of the proposed amendments. There are no known diesel fuel producers or importers that would be considered small or micro- businesses. However, it is anticipated that many independent retailers of diesel fuel statewide are small or micro-businesses. Therefore, production costs of approximately $.04 per gallon for each standard (May 1, 2002 and May 1, 2004 - 2006) are not anticipated to affect small or micro-businesses except for passing increased costs of production through to consumers. The fiscal implications for small and micro-businesses would include additional costs of approximately $.04 per gallon for LED starting May 1, 2002 and then an additional $.04 per gallon for lower sulfur content diesel in counties affected by the May 1, 2004 - 2006 phase-in period standard. The additional costs would depend on the amount of fuel used by the business. On an average basis, the annual cost to businesses would be approximately $177 per diesel vehicle per year statewide and an additional $177 per diesel vehicle per year in the counties affected by the May 1, 2004 - 2006 phase-in period standard.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking is subject to §2001.0225 because it could 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 amendments to Chapter 114 are intended to protect the environment or reduce risks to human health from environmental exposure to ozone and could affect in a material way, a sector of the economy, competition, and the environment due to its impact on the fuel manufacturing and distribution network of the state. The amendments are intended to implement an LED air pollution control program as part of the strategy to reduce emissions of $NO_x$ necessary for the counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. Although the proposed amendments could meet the definition of a "major environmental rule" as defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law.

This proposed rulemaking action does not meet any of these four applicability requirements. Specifically, the LED fuel requirements within these proposed rules were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409, and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights),

as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633) during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulartory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that $NO_x$ emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain $NO_x$ emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, 382.017, 382.019, 382.037(g), and 382.039.

The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these proposed rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed rulemaking is to establish an LED fuel program which will act as an air pollution control strategy to reduce $NO_x$ emissions necessary for the eight counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. Promulgation and enforcement of the proposed rules may possibly burden private, real property because this proposed rulemaking action may result in investment in the permanent installation of new refinery processing equipment. Although the proposed rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within this proposal have been developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the proposed rules is to implement cleaner burning diesel fuel which is necessary for the HGA ozone nonattainment area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law; therefore, these proposed rules do not constitute a takings under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this

action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and $NO_x$ air emissions will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 51. Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087; faxed to (512) 239-4808; or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 2000-011D-114-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Morris Brown at (512) 239-1438 or Alan Henderson at (512) 239- 1510.

## SUBCHAPTER A. DEFINITIONS

### 30 TAC §114.6

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under the Texas Health and Safety Code, TCAA, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also proposed under TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.037(g), which authorizes the commission to regulate fuel content if it is demonstrated to be necessary for attainment of the NAAQS; and §382.039, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed amendment implements TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; §382.037(g), relating to Vehicle Emissions Inspection and Maintenance Program; and §382.039, relating to Attainment Program.

*§114.6. Low Emission Fuel Definitions.*

Unless specifically defined in the TCAA or in the rules of the commission, the terms used in this subchapter [~~by the commission~~] have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, §3.2 of this title (relating to Definitions), and §101.1 of this title (relating to Definitions), the following words and terms, when used in Subchapter H of this chapter (relating to Low Emission Fuels), shall have the following meanings, unless the context clearly indicates otherwise.[~~:~~]

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

(3) Bulk plant - An intermediate motor vehicle fuel distribution facility where delivery of motor vehicle fuel to and from the facility is solely by truck or pipeline.

(4)- (9) (No change.)

(10) Import [~~Imported~~] - The process by which motor vehicle fuel is transported into the State of Texas [~~counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates)~~] via pipeline, tank ship, rail car, tank truck, or trailer.

(11) Import facility - The stationary motor vehicle fuel transfer point wherein the importer takes delivery of imported motor vehicle fuel and from which imported motor vehicle fuel is transferred into the cargo tank truck, pipeline, or other delivery vessel from which the fuel will be delivered to a bulk plant or [~~the~~] retail fuel dispensing facility [~~, at which the fuel will be dispensed into motor vehicles~~].

(12) Importer - Any person who imports motor vehicle fuel [transports, stores, or causes the transportation or storage of motor vehicle fuel, produced by another person, at any point between any producer's facility and any retail fuel dispensing outlet or bulk purchaser/consumer's facility].

(13) (No change.)

(14) Motor vehicle - Any self-propelled device powered by a gasoline fueled spark-ignition engine or a diesel fueled compression-ignition engine in or by which a person or property is or may be transported, and is required to be registered under Texas Transportation Code (TTC), §502.002, excluding vehicles registered under TTC, §502.006(c).

(15) [(14)] Motor vehicle fuel - Any gasoline or diesel fuel used to power gasoline fueled spark-ignition or diesel fueled compression-ignition engines.

(16) Non-road equipment - Any device powered by a gasoline fueled spark-ignition engine or a diesel fueled compression-ignition engine which is not required to be registered under TTC, §502.002.

(17) [(15)] Produce - Perform the process to convert liquid compounds which are not motor vehicle fuel into motor vehicle fuel, except where a person supplies motor vehicle fuel to a refiner who agrees in writing to further process the motor vehicle fuel at the refiner's refinery and to be treated as a producer of the motor vehicle fuel, only the refiner shall be deemed for all purposes under Subchapter H of this chapter to be the producer of the motor vehicle fuel.

(18) [(16)] Producer - Any person who owns, leases, operates, controls, or supervises a production facility and/or produces motor vehicle fuel.

(19) [(17)] Production facility - A facility at which motor vehicle fuel is produced.

(20) [(18)] Refiner - Any person who owns, leases, operates, controls, or supervises a refinery.

(21) [(19)] Refinery - A facility that manufactures liquid fuels by distilling petroleum.

(22) [(20)] Retail fuel dispensing outlet - Any establishment at which gasoline and/or diesel fuel is sold or offered for sale for use in motor vehicles, and the fuel is directly dispensed into the fuel tanks of the motor vehicles using the fuel.

(23) [(21)] Supply - To provide or transfer fuel to a physically separate facility, vehicle, or transportation system.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005615
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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# SUBCHAPTER H. LOW EMISSION FUELS
## DIVISION 2. LOW EMISSION DIESEL

**30 TAC §§114.312 - 114.317, 114.319**

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also proposed under TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.037(g), which authorizes the commission to regulate fuel content if it is demonstrated to be necessary for attainment of the NAAQS; and §382.039, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed amendments implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; §382.037(g), relating to Vehicle Emissions Inspection and Maintenance Program; and §382.039, relating to Attainment Program.

*§114.312. Low Emission Diesel Standards.*

(a) (No change.)

(b) Sulfur content. [The maximum sulfur content of LED is 500 parts per million by weight per gallon.]

(1) The maximum sulfur content of LED shall not exceed 500 parts per million (ppm) by weight per gallon in the counties specified in §114.319(a) and (b) of this title.

(2) The maximum sulfur content of LED shall not exceed 30 ppm by weight per gallon in the counties specified in §114.319(c) of this title.

(3) The maximum sulfur content of LED shall not exceed 15 ppm by weight per gallon in the counties specified in §114.319(d) of this title.

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

(g) Alternative diesel fuel formulations which the producer has demonstrated to the satisfaction of the executive director and the EPA, through emissions and performance testing methods prescribed in §114.315(c) of this title (relating to Approved Test Methods) [programs with supporting data], as achieving comparable or better reductions in emissions of oxides of nitrogen, volatile organic compounds, and particulate matter may be used to satisfy the requirements of subsection (a) of this section. For alternative diesel fuel formulations that incorporate additive systems, the estimated emissions benefits of the alternative diesel fuel formulation may be determined by comparing the [in-use] emissions and performance characteristics of the alternative diesel fuel with the additive system versus the emissions and performance characteristics of a diesel fuel without the additive system, as determined by the testing methods prescribed in §114.315(c) of this title [approved by the executive director]. The commission recognizes that fuel content specifications, additive formulation, and testing technology often include factors that

can reasonably be considered proprietary or confidential. Therefore, proprietary or confidential information supplied by the producer for evaluation of an alternative diesel fuel formulation must be identified as such when submitted. Decisions regarding confidentiality will be made subject to the Texas Public Information Act, Texas Government Code, Chapter 552.

*§114.313. Designated Alternate Limits.*

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

(c) Whenever the final blend of a producer or importer includes volumes of diesel fuel the producer or importer has produced or imported, and volumes it has not produced or imported, the producer's or importer's DAL shall apply only to the volume of diesel fuel the producer or importer has produced or imported. In such a case, the producer or importer shall report to the executive director in accordance with subsection (a)(2) of this section, both the volume of diesel fuel produced or imported and the total volume of the final blend.

*§114.314. Registration of Diesel Producers and Importers.*

Each producer and importer that sells, offers for sale, supplies, or offers for supply from its production facility or import facility low emission diesel fuel (LED) which may ultimately be used in [ ~~to~~] counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates) shall register with the executive director by December 1, 2001; or after May 31, 2002, within 30 days after the first date that such person will produce or import LED. Registration shall be on forms prescribed by the executive director and shall include a statement of acceptance of the standards and enforcement provisions of this division [~~chapter~~]; and shall include a statement of consent by the registrant that the executive director shall be permitted to collect samples and access documentation and records. The executive director shall maintain a listing of all registered suppliers.

*§114.315. Approved Test Methods.*

(a) Compliance with the diesel fuel content requirements of §114.312 of this title (relating to Low Emission Diesel Standards) shall be determined by applying the following test methods and procedures, as appropriate.

(1)- (5) (No change.)

(6) The American Petroleum Institute (API) gravity index of LED shall be determined by ASTM Test Method D287-92 (Standard Test Method for API Gravity of Crude Petroleum and Petroleum Products (Hydrometer Method)), dated 1995.

(7) The viscosity of LED shall be determined by ASTM Test Method D445-97 (Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids (the Calculation of Dynamic Viscosity)), dated 1997.

(8) The flashpoint of LED shall be determined by ASTM Test Method D93-99c (Standard Test Methods for Flash-Point by Pensky-Martens Closed Cup Tester), dated 1999.

(9) The distillation temperatures of LED shall be determined by ASTM Test Method D86-00 (Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure), dated 2000.

(b) Alternatives to the test methods prescribed in subsection (a) of this section may be used if validated by Title 40 Code of Federal Regulations (CFR), Part 63, Appendix A (related to Test Methods), Method 301 (related to Field Validation of Pollutant Measurement Methods from Various Waste Media), dated December 29, 1992. For the purposes of this subsection, substitute "executive director" in each location that Test Method 301 references "administrator."

(c) The executive director, upon application of any producer or importer, may approve alternative diesel fuel formulations in accordance with the following procedures.

(1) The applicant shall initially submit a proposed test protocol to the executive director, which shall include:

(A) the identity of the entity which will conduct the tests described in paragraph (4) of this subsection;

(B) test procedures consistent with the requirements of paragraphs (2) and (4) of this subsection;

(C) test data showing that the candidate fuel meets the specifications for Number 1-D or 2-D diesel fuel as specified in ASTM D975-98b (Standard Specification for Diesel Fuel Oils), dated 1998, and identifying the characteristics of the candidate fuel identified in paragraph (2) of this subsection;

(D) test data showing that the fuel to be used as the reference fuel satisfies the specifications identified in paragraph (3) of this subsection;

(E) reasonable quality assurance and quality control procedures; and

(F) notification of any outlier identification and exclusion procedure that will be used, and a demonstration that any such procedure meets generally accepted statistical principles. The tests shall not be conducted until the protocol is approved by the executive director. Upon completion of the tests, the applicant may submit an application for certification to the executive director. The application shall include the approved test protocol, all of the test data, a copy of the complete test log prepared in accordance with paragraph (4)(D) of this subsection, a demonstration that the candidate fuel meets the requirements for certification specified in this subsection, and other information as the executive director may reasonably require. Upon review of the certification application, the executive director shall grant or deny the application. Any denial shall be accompanied by a written statement of the reasons for denial.

(2) The applicant shall supply the candidate fuel to be used in the comparative testing in accordance with subsection paragraph (4) of this subsection.

(A) The sulfur content, total aromatic hydrocarbon content, polycyclic aromatic hydrocarbon, nitrogen content, and cetane number of the candidate fuel shall be determined as the average of three tests conducted in accordance with the referenced test method specified in subsection (a) of this section.

(B) The identity and concentration of each additive in the candidate fuel shall be determined by a test method specified by the applicant and approved by the executive director to adequately determine the presence and concentration of the additive.

(C) The applicant may also specify any other parameters for the candidate fuel, along with the test method for determining the parameters. The applicant shall provide the chemical composition of each additive in the candidate fuel, except that if the chemical composition of an additive is not known to either the applicant or to the manufacturer of the additive (if other), the applicant may provide a full disclosure of the chemical process of manufacture of the additive in lieu of its chemical composition.

(3) The reference fuel used in the comparative testing described in paragraph (4) of this subsection shall be produced from straight-run diesel fuel by a hydrodearomatization process and shall have the following characteristics determined in accordance with the referenced test method specified in subsection (a) of this section:

(A) sulfur content - as specified in §114.312(b) of this title;

(B) total aromatic hydrocarbon content - 10% maximum, volume percent;

(C) polycyclic aromatic hydrocarbon content - 1.4%, maximum weight percent;

(D) nitrogen content - ten parts per million, maximum;

(E) cetane number - 48, minimum;

(F) API gravity index - 33 to 39 degrees;

(G) viscosity at 40 degrees Celsius - 2.0 to 4.1 centistokes;

(H) flash point - 130 degrees Fahrenheit, minimum; and

(I) distillation:

*(i)* initial boiling point - 340 to 420 degrees Fahrenheit;

*(ii)* 10% point - 400 to 490 degrees Fahrenheit;

*(iii)* 50% point - 470 to 560 degrees Fahrenheit;

*(iv)* 90% point - 550 to 610 degrees Fahrenheit; and

*(v)* end point - 580 to 660 degrees Fahrenheit.

(4) Exhaust emission tests using the candidate fuel and the reference fuel specified in paragraph (3) of this subsection shall be conducted in accordance with the federal test procedures as specified in Title 40 CFR, Part 86 (Control of Emissions from New and in-Use Highway Vehicles and Engines), Subpart N (Emission Regulations for New Otto-Cycle and Diesel Heavy-Duty Engines - Gaseous and Particulate Exhaust Test Procedures), dated 1998.

(A) The tests shall be performed using a Detroit Diesel Corporation Series-60 engine or an engine specified by the applicant and approved by the executive director to be equally representative of the post-1990 model year heavy-duty diesel engine fleet.

(B) The comparative testing shall be conducted by a third-party or third-parties that are mutually agreed upon by the executive director and the applicant. The applicant shall be responsible for all costs of the comparative testing.

(C) The applicant shall conduct a minimum of five exhaust emission tests on the engine with each fuel, using either of the following sequences, where "R" is the reference fuel and "C" is the candidate fuel:

*(i)* RC, RC, RC, RC, RC (and continuing in the same order); or

*(ii)* RC, CR, RC, CR, RC (and continuing in the same order).

(D) The applicant shall submit a test schedule to the executive director at least one week prior to commencement of the tests. The test schedule shall identify the days on which the tests will be conducted, and shall provide for conducting the test consecutively without substantial interruptions other than those resulting from the normal hours of operations at the test facility. The executive director or his designee shall be permitted to observe any tests. The party conducting the testing shall maintain a test log which identifies all tests conducted, all engine mapping procedures, all physical modifications to or operational tests of the engine, all re-calibrations or other changes to the test instruments, and all interruptions between tests and the reason for each such interruption. The party conducting the tests or the applicant shall notify the executive director by telephone and in writing of any unscheduled interruption resulting in a test delay of 48 hours or more, and of the reason for such delay. Prior to restarting the test, the applicant or person conducting the tests shall provide the executive director with a revised schedule for the remaining tests. All tests conducted in accordance with the test schedule, other than any tests rejected in accordance with an outlier identification and exclusion procedure included in the approved test protocol, shall be included in the comparison of emissions in accordance with paragraph (5) of this subsection.

(E) In each test of a fuel, exhaust emissions of oxides of nitrogen ($NO_x$), volatile organic compounds (VOC), and particulate matter (PM) shall be measured.

(5) The average emissions during testing with the candidate fuel shall be compared to the average emissions during testing with the reference fuel specified in paragraph (3) of this subsection, applying one-sided Student's t statistics as set forth in Snedecar and Cochran, *Statistical Methods* (7th edition), page 91, Iowa State University Press, 1980. The executive director shall issue a certification in accordance with this paragraph only if he or she makes all of the following determinations:

(A) the average individual emissions of $NO_x$, VOC, and PM, respectively, during testing with the candidate fuel do not exceed the average individual emissions of $NO_x$, VOC, and PM, respectively, during testing with the reference fuel; and

(B) use of any additive identified in accordance with paragraph (2)(B) of this subsection in diesel powered engines will not increase emissions of noxious or toxic substances which would not be emitted by such engines operating without the additive.

(6) If the executive director finds that a candidate fuel has been properly tested in accordance with this subsection, and makes the determinations specified in paragraph (5) of this subsection, then the executive director shall issue an approval notification certifying that the alternative diesel fuel formulation represented by the candidate fuel may be used to satisfy the requirements of §114.312(a) of this title. The approval notification shall identify all of the characteristics of the candidate fuel determined in accordance with paragraph (2) of this subsection.

(A) The approval notification shall provide that the approved alternative diesel fuel formulation has the following specifications:

*(i)* a sulfur content, total aromatic hydrocarbon content, polycyclic aromatic hydrocarbon content, and nitrogen content not exceeding that of the candidate fuel;

*(ii)* a cetane number not less than that of the candidate fuel; and

*(iii)* presence of all additives that were contained in the candidate fuel, in a concentration not less than in the candidate fuel.

(B) All such characteristics shall be determined in accordance with the test methods identified in subsection (a) of this section. The approval notification shall assign an identification number to the specific approved alternative diesel fuel formulation.

*§114.316. Monitoring, Recordkeeping, and Reporting Requirements.*

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

(e) All parties in the distribution chain (producer, importer, terminals, pipelines, truckers, rail carriers, and retail fuel dispensing outlets) subject to the provisions of §114.312 of this title must maintain copies or records of product transfer documents for a minimum of two years and shall upon request, make such copies or records available to

representatives of the commission, EPA, or local air pollution agency having [~~have~~] jurisdiction in the area. The product transfer documents must contain, at a minimum, the following information:

(1)- (5) (No change.)

(6) the location of the diesel fuel at the time of transfer; [~~and~~]

(7) the following certification statement: "This product complies with the requirements for low emission diesel fuel specified in Title 30 Texas Administrative Code, §114.312 and may be used in any Texas county requiring the use of low emission diesel fuel in compression-ignition engines."; and

(8) in the case of diesel fuel that was produced under the requirements of §114.312(f) or (g)of this title, the executive order number as issued by the CARB or the approval notification number as issued by the executive director in accordance with §114.315(c)(6) of this title.

(f)- (i) (No change.)

*§114.317. Exemptions to Low Emission Diesel Requirements.*

(a) (No change.)

(b) Diesel fuel that does not meet the requirements of §114.312 of this title (relating to Low Emission Diesel Standards) is not prohibited from being transferred, placed, stored, and/or held within the affected counties so long as it is not ultimately used:

(1) to power a diesel fueled compression-ignition engine in a motor vehicle in the counties listed in §114.319 of this title; or [~~the affected counties.~~]

(2) to power a diesel fueled compression-ignition engine in non-road equipment in the counties listed in §114.319(b) of this title.

*§114.319. Affected Counties and Compliance Dates.*

(a) Beginning May 1, 2002, affected persons in all [~~the following~~] counties of Texas shall be in compliance with §§114.312 - 114.317 of this title (relating to Low Emission Diesel Standards; Designated Alternate [~~Alternative~~] Limits; Registration of Diesel Producers and Importers; Approved Test Methods; Monitoring, Recordkeeping, and Reporting Requirements; and Exemptions to Low Emission Diesel Requirements) for that diesel fuel which may ultimately be used to power a diesel fueled compression-ignition engine in a motor vehicle [~~: Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant~~].

(b) Beginning May 1, 2002, affected persons in the following counties shall be in compliance with §§114.312 - 114.317 of this title for that diesel fuel which may ultimately be used to power a diesel fueled compression-ignition engine in a motor vehicle or in non-road equipment:

(1) Collin, Dallas, Denton, and Tarrant;

(2) Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller;

(3) Hardin, Jefferson, and Orange; and

(4) Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood.

(c) Beginning May 1, 2004, affected persons in the counties listed in subsection (b) of this section shall be in compliance with §114.312(b)(2) of this title for that diesel fuel which may ultimately be used to power a diesel fueled compression-ignition engine in a motor vehicle or in non- road equipment.

(d) Beginning May 1, 2006, affected persons in the counties listed in subsection (b) of this section shall be in compliance with §114.312(b)(3) of this title for that diesel fuel which may ultimately be used to power a diesel fueled compression-ignition engine in a motor vehicle or in non- road equipment.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005614
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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# CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES SUBCHAPTER C. VEHICLE INSPECTION AND MAINTENANCE

**30 TAC §§114.50 - 114.53**

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §114.50, Vehicle Emissions Inspection Requirements; §114.51, Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers; §114.52, Waivers and Extensions for Inspection Requirements; and §114.53, Inspection and Maintenance Fees. The commission proposes these amendments to Chapter 114 (Control of Air Pollution from Motor Vehicles), and to the state implementation plan (SIP) in order to control ground-level ozone in the Houston/Galveston (HGA) ozone nonattainment area. These amendments are one element of the control strategy for the proposed HGA Post-1999 Rate-of-Progress (ROP)/Attainment Demonstration SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post- 1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base-case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxides ($NO_x$) waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the $NO_x$ waiver were based on early base-case episodes which marginally exhibited model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revision to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to EPA on May 19, 1998, a revision to the HGA SIP which contained the following elements in response to EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to EPA in May 1998 became complete by operation of law. However, EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode (ASM-2) equivalent motor vehicle inspection and maintenance (I/M) program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid- course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approvable attainment demonstration, EPA has indicated that the state must adopt those strategies modeled in the November submittal and then adopt sufficient controls to close the remaining gap in $NO_x$ emissions. The modeling included in this proposal indicates a gap of an additional 77.98 tons per day (tpd) of $NO_x$ reductions is necessary for an approvable attainment demonstration.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains post- 1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The HGA ozone nonattainment area will need to ultimately reduce $NO_x$ more than 750 tpd to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of the I/M program will contribute to attainment and maintenance of the one-hour ozone standard in the HGA area. An I/M program should also contribute to a successful demonstration of transportation conformity in the HGA area.

The commission is proposing an air control strategy for $NO_x$ reductions which requires emissions testing of motor vehicles that are registered and primarily operated in the HGA ozone nonattainment area. The testing would utilize ASM-2 and on-board diagnostic (OBD) technologies. This proposed I/M program was modeled to cover the eight-county region comprising the HGA nonattainment area. The proposed I/M program will reduce $NO_x$ emissions from on-road vehicles in the HGA ozone nonattainment area by 42.03 tpd.

The proposed revisions will modify the vehicle emissions testing program by implementing ASM- 2 testing in the HGA ozone nonattainment area. Unlike the current two-speed idle (TSI) test, ASM-2 technology has the ability to detect $NO_x$ emissions. Because $NO_x$ is a precursor to ground-level ozone formation, reduced $NO_x$ and VOC emissions will result in ground-level ozone reduction.

The proposed amendments addressed in this rule change are: changing the testing technology in the HGA area to ASM-2 and OBD for Harris County beginning May 1, 2002; Brazoria, Fort Bend, Galveston, and Montgomery Counties beginning May 1, 2003; and Chambers, Liberty, and Waller Counties beginning May 1, 2004, and an increase to the emissions inspection fee. The commission is proposing a phase-in approach to make for a smoother implementation of the proposed I/M program while still providing significant air quality improvements. In addition, the proposed rules incorporate changes to the exhaust analyzer technical specifications which will apply in every I/M program area.

The commission will take comments on the option of Chambers, Liberty, and Waller Counties individually or collectively developing alternative air control strategies other than an I/M program to meet or exceed the $NO_x$ emission reductions that are anticipated from the proposed I/M program. The estimated I/M $NO_x$ emission reductions for Chambers County is .98 tpd, Liberty County .94 tpd, and Waller County is .77 tpd, for a combined estimated $NO_x$ emissions reduction of 2.69 tpd. The commission will consider proposed alternatives during the comment period and make a final determination. However, the remote sensing component implemented in Harris County will likely continue to cover vehicles registered in these counties even if an alternative control strategy is accepted by the commission.

It is expected that EPA will soon publish a notice of proposed rulemaking (NPRM) which will postpone the requirement to conduct OBD testing beginning January 1, 2001, in I/M program areas for one year or more. In addition, it is anticipated that EPA will propose dropping the tailpipe test for vehicles receiving an OBD test (model year 1996 and newer) with no credit loss. The commission may adjust OBD test requirements upon adoption of these rules, based on information contained in the NPRM.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION BY SECTION DISCUSSION

Proposed amendments to §114.50 establish revised program requirements for the state I/M program for vehicle testing and inspection. The proposed amendments to the program concern the applicability and control requirements. The result of these amendments would be to incorporate the entire HGA nonattainment area into the full I/M program in a phased manner.

Section 114.50(a)(4) is proposed to be amended by deleting "Harris County of" the HGA program area. Subsection (a)(4)(A) and (B) is amended by adding vehicles which are "registered and primarily operated in Harris County." Subsection (a) is proposed to be amended by adding new paragraphs (4)(C) - (H) providing clarification of program areas, model years to be tested, types of equipment to be utilized, and implementation dates. New paragraph (4)(C) defines model year vehicles to be tested using OBD in conjunction with ASM-2 in Harris County beginning May 1, 2002. Paragraph (4)(D) defines model year vehicles to be tested in Harris County using ASM-2, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by EPA beginning May 1, 2002, and clarifies that testing stations must offer both an OBD and an ASM-2 test. Paragraph (4) (E) defines model year vehicles to be tested using OBD in conjunction with ASM-2 in Brazoria, Fort Bend, Galveston, and Montgomery Counties beginning May 1, 2003. Paragraph (4)(F) defines model year vehicles to be tested in Brazoria, Fort Bend, Galveston, and Montgomery Counties using ASM-2, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by EPA beginning May 1, 2003. Paragraph (4)(G) defines model year vehicles to be tested using OBD in

conjunction with ASM-2 in Chambers, Liberty, and Waller Counties beginning May 1, 2004. Paragraph (4)(H) defines model year vehicles to be tested in Chamber, Liberty, and Waller Counties using ASM-2, or a vehicle emissions test that meets SIP emissions reductions requirements and is approved by EPA beginning May 1, 2004. Paragraph (4)(H) also clarifies that testing stations must offer both an OBD and an ASM-2 test.

Section 114.50(b)(3) is amended by adding "HGA" after EDFW to the program areas and deleting "or Harris County" concerning vehicle recall notification.

Section 114.51 is proposed to be amended to update the equipment evaluation procedures for vehicle emissions test equipment. This section currently specifies application, certification, maintenance, and service requirements for manufacturers or distributors of vehicle emissions testing equipment seeking approval of an exhaust gas analyzer or analyzer system for use in the Texas I/M program. Section 114.51(a) currently specifies a date of March 15, 2000, for the exhaust analyzer technical specifications known as "Specifications for Preconditioned Two Speed Idle Vehicle Exhaust Gas Analyzer Systems for use in the Texas Vehicle Emissions Testing Program." In order to incorporate new and updated specifications into the program, the proposed rule amendments specify a date of November 1, 2000, for both the TSI exhaust analyzer technical specifications, and the "Specifications for Acceleration Simulation Mode Vehicle Exhaust Gas Analyzer System for use in the Texas Vehicle Emissions Testing Program."

Proposed amendments to §114.52 establish the schedule for when motorists in specific counties become eligible for waivers and extensions. The schedule is consistent with the dates for the implementation of the emissions testing program in each county.

Proposed amendments to §114.53 establish fee schedules for the different counties which must be paid for the vehicle emissions inspection at an inspection station. Subsection (a)(3) and (4) is proposed to be amended by revising test methodology to ASM-2 and OBD and by adding counties to the I/M program beginning May 1, 2002, and May 1, 2003, respectively. New subsection (a)(5) is being proposed to provide for the collection of fees by those inspection stations conducting ASM-2 and OBD testing beginning May 1, 2004.

In addition to the proposed amendments, the proposed revisions to the SIP narrative clarify the new program elements such as applicability changes; new performance standards; emissions testing network type; emissions testing; affected vehicle populations; enforcement actions related to vehicles and service providers; on-road vehicle emissions testing; and the implementation schedule.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed rules are in effect, the fiscal implication for affected units of state and local government, as a result vehicle emission tests, is estimated to be an additional annual cost of approximately $75,000 in the eight-county area consisting of Harris, Brazoria, Fort Bend, Galveston, Montgomery, Chambers, Liberty, and Waller Counties.

The proposed amendments to Chapter 114 revise the vehicle emission testing program as part of the control strategy to reduce $NO_x$ emissions necessary for the counties included in the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The proposed amendments are one element of the proposed HGA Post-1999 ROP/Attainment Demonstration SIP. A SIP is a plan developed for any region where existing (measured and modeled) ambient levels of pollutant exceeds the levels specified in a national standard. The plan sets forth a control strategy that provides emission reductions necessary for attainment and maintenance of the national standard.

The proposed amendments revise the I/M program using ASM-2 vehicle emission testing equipment in the HGA ozone nonattainment area. Currently, only Harris County requires an Enhanced I/M program. Galveston, Brazoria, Fort Bend, Montgomery, Chambers, Liberty, and Waller Counties do not currently have an I/M program, but will be required to have an Enhanced I/M program similar to Harris County because they are in the HGA ozone nonattainment area. Harris County will use ASM-2 emissions testing technology beginning May 1, 2002; Brazoria, Fort Bend, Galveston, and Montgomery Counties will begin May 1, 2003; and Chambers, Liberty, and Waller Counties will begin May 1, 2004.

In accordance with EPA requirements, the proposed amendments will require an OBD check of all 1996 and newer model year vehicles subject to the I/M requirements starting January 1, 2001. It is anticipated that owners of over 2.8 million vehicles in the HGA ozone nonattainment area could be affected by vehicle emission inspections and other fee increases and the inspection requirements in the proposed amendments. In addition, owners of vehicle safety and emission inspection stations that choose to continue to perform emission testing will be required to upgrade existing equipment or purchase new equipment in order to comply with the proposed new emission test requirements incorporating ASM-2 and OBD technology. There are currently 1,058 emission inspection stations in Harris County. There are an additional 454 safety inspection stations in Galveston, Brazoria, Fort Bend, Montgomery, Chambers, Liberty, and Waller Counties where the Enhanced I/M program will now be mandatory that will have to purchase new analyzers. The cost to upgrade existing analyzers is $25,000 and the cost to purchase a new analyzer is $40,000.

A prior rulemaking increased the emission test fee in Harris County from $13 to $14, effective January 1, 2001. The proposed amendments increase the emission inspection fee in Harris County from $14 to $22.50 per inspection effective May 1, 2002. Motorists, state and local government agencies, and businesses owning registered vehicles in Harris County that are primarily operated in the HGA ozone nonattainment area will be required to pay an additional $8.50 for each emission inspection utilizing ASM-2 or OBD testing. Annual emission testing is not currently required in Galveston, Brazoria, Fort Bend, Montgomery, Chambers, Liberty, and Waller Counties. In the proposed amendments, motorists, state and local government agencies, and businesses in Galveston, Brazoria, Fort Bend, Montgomery, Chambers, Liberty, and Waller Counties owning registered vehicles that are primarily operated in the HGA ozone nonattainment area will be required to pay $22.50 for an emission inspection utilizing ASM-2 or OBD technology.

Units of state and local government that own or operate vehicles subject to I/M requirements in the HGA ozone nonattainment area will be required to have emission testing and will be required to pay the fees established in the proposed amendments. The fiscal impact on units of state and local government associated

with emission inspection costs are similar to the impacts on business in general. Units of state and local government that own or operate vehicles subject to I/M requirements in the HGA ozone nonattainment area will be able to apply for a minimum expenditure waiver. The minimum expenditure to receive a waiver in counties under the proposed I/M program will be $450. This is no change in Harris County and a new $450 cost in Galveston, Brazoria, Fort Bend, Montgomery, Chambers, Liberty, and Waller Counties. Based on the inspection fee increase in Harris County and the inspection fee in the other counties, the commission estimates that 6,300 state and local government vehicles in HGA ozone nonattainment area will be affected with a total increased annual cost of approximately $75,000.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be the potential reduction of on-road mobile source emissions, potential reduction in $NO_x$ emissions, potentially improved air quality, and contribution toward demonstration of attainment with the ozone NAAQS.

There are economic implications anticipated to individuals and businesses as a result of implementing the proposed amendments. Additional costs to affected persons and businesses associated with the proposed amendments include increased and additional costs associated with emission test fees, and additional costs for inspection stations that opt to perform emission testing associated with equipment upgrades or purchases. It is estimated that approximately 2.8 million vehicles in the HGA ozone nonattainment area could potentially be affected by the proposed amendments.

Individual motorists, state and local government agencies, and businesses with vehicles subject to I/M requirements that are registered and primarily operated in the HGA ozone nonattainment area will pay more to have their vehicle's emissions tested incorporating OBD testing on their 1996 and newer vehicles. Individual motorists, state and local government agencies, and businesses with pre-1996 vehicles subject to I/M requirements that are registered and primarily operated in the HGA ozone nonattainment area will pay more to have their vehicle's emissions tested incorporating ASM-2 testing.

In the proposed amendments, the annual emission inspection fee is increased from $14 to $22.50 in Harris County. Motorists, state and local government agencies, and businesses owning registered vehicles in Harris County that are primarily operated in the HGA ozone nonattainment area will pay $8.50 more for each emission inspection utilizing ASM-2 or OBD testing. Currently, emission inspections are not required in Galveston, Brazoria, Fort Bend, Montgomery, Chambers, Liberty, and Waller Counties. In the proposed amendments, motorists, state and local government agencies, and business owning registered vehicles in Galveston, Brazoria, Fort Bend, Montgomery, Chambers, Liberty, and Waller Counties that are primarily operated in the HGA ozone nonattainment area will pay $22.50 for an annual emission inspection utilizing ASM-2 or OBD.

The cost to any person or business to comply with an enhanced I/M program will vary depending upon the number of vehicles owned, the model year, and the condition of the vehicle.

Businesses or individuals that own or operate vehicles subject to I/M requirements in the HGA ozone nonattainment area will be able to apply for a minimum expenditure waiver. The minimum expenditure to receive a waiver in counties under the proposed I/M program will be $450. This is no change in Harris County and a new $450 cost in Galveston, Brazoria, Fort Bend, Montgomery, Chambers, Liberty, and Waller Counties.

Normally, the annual vehicle safety inspection and emission testing, where required, is accomplished at the same facility. The decision by each inspection facility to accomplish the proposed emission testing is voluntary and could have economic implications. Safety inspection stations in the HGA ozone nonattainment area that opt to perform emission testing for the I/M program would be required to upgrade existing equipment or may have to purchase new equipment in order to comply with the proposed new state emissions test requirements incorporating OBD and ASM-2 testing. Current emission inspection stations in Harris County that opt to continue to perform emission testing would be required to upgrade existing equipment or may have to purchase new equipment to comply with the proposed new state emissions test requirements incorporating ASM-2 and OBD testing technology. It is anticipated that the economic decision to upgrade or purchase the required equipment will include the economics of labor costs, potential alternative use of labor's time, the equipment capital costs, and volume of anticipated inspections, current equipment, and other anticipated costs associated with emission testing. It is anticipated that some inspection stations that must upgrade their equipment or purchase new equipment in order to comply with the proposed emission testing requirements in the proposed amendments will find it uneconomic to do so for various reasons and will be unable to accomplish emission inspections. It is anticipated that this business decision will be made by each inspection station.

According to Texas Department of Public Safety (DPS) records, there are currently 1,058 inspection stations in Harris County. If these inspection stations choose to perform emission testing, the commission staff estimated that 10% (approximately 106) of the current inspection stations in Harris County would have to purchase new ASM-2 equipment in order to conduct ASM-2 or OBD vehicle emission testing. Each new analyzer costs approximately $40,000. If this equipment cost is capitalized, the monthly cost for the new equipment is estimated to be approximately $900 per month for five years. The commission staff also estimated that the remaining 90% (approximately 952) of the inspection stations in Harris County could upgrade currently owned analyzers at a cost of approximately $25,000. If this equipment cost is capitalized, the monthly costs for the new equipment is estimated to be approximately $600 per month for five years.

According to DPS records, there are 454 safety inspection stations in Galveston, Brazoria, Fort Bend, Montgomery, Chambers, Liberty, and Waller Counties where the I/M program is proposed. All inspection stations in Galveston, Brazoria, Fort Bend, Montgomery, Chambers, Liberty, and Waller Counties will have to purchase new analyzers to comply with the Enhanced I/M program. Each new analyzer costs approximately $40,000. If this equipment cost is capitalized, the monthly costs for the new equipment is estimated to be approximately $900 per month for five years.

SMALL AND MICRO-BUSINESS ASSESSMENT

There are anticipated fiscal implications to small businesses and micro-businesses as a result of implementing the proposed amendments. The fiscal implications include increased minimum expenditure costs for waivers and increased costs for emission testing of business-owned vehicles.

In general, the costs indicated in the public benefit portion of this fiscal note for individuals, state and local government agencies, and businesses will apply to small and micro-businesses. The minimum expenditure to receive a waiver in counties under the proposed I/M program will be $450. This is no change in Harris County and a new $450 cost in Galveston, Brazoria, Fort Bend, Montgomery, Chambers, Liberty, and Waller Counties for the minimum expenditure waiver.

The annual emission inspection fee will be $22.50 for counties under the proposed I/M program in the HGA ozone nonattainment area. This is an increase of $8.50 Harris County and a new $22.50 fee for the emission test Galveston, Brazoria, Fort Bend, Montgomery, Chambers, Liberty, and Waller Counties.

The cost to small and micro-businesses will vary with the number of vehicles owned, model year, and condition of the vehicle(s).

In addition, it is anticipated that many of the inspection stations are small or micro-businesses that will be required to upgrade their current testing equipment or purchase new analyzers. New analyzer equipment required to conduct ASM-2 (with integrated OBD) vehicle emission testing costs approximately $40,000. The cost to upgrade currently owned analyzers to conduct ASM (with integrated OBD) testing costs approximately $25,000. It is anticipated that the economic decision to upgrade or purchase the required equipment will include the economics of labor costs, potential alternative use of labor's time, the equipment capital costs, and volume of anticipated inspections, current equipment, and other anticipated costs associated with emission testing. It is anticipated that some small or micro-business inspection stations that must upgrade their equipment or purchase new equipment in order to comply with the proposed emission testing requirements in the proposed amendments will find it uneconomic to do so for various reasons and will be unable to continue emission inspections. It is anticipated that this business decision will be made by each inspection station.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action 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, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 114 are intended to protect the environment or reduce risks to human health from environmental exposure to ozone. However, the inspection stations in and around nonattainment areas would not normally be considered a sector of the economy. In addition, the commission structured the fees in this program to ensure that most additional equipment costs can be recovered. Therefore, the proposed rules do not affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments are intended to establish a vehicle emissions testing program as part of the control strategy to reduce $NO_x$ emissions necessary for the counties included in the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The proposed amendments are one element of the proposed HGA Attainment Demonstration SIP. As defined in the Texas Government Code, §2001.0225 only applies 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 a "major environmental rule." Specifically, the emission testing program within this proposal was developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409, and therefore meets a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633) during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because

of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that $NO_x$ emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain $NO_x$ emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, 382.017, 382.019, 382.037 through 382.038, and 382.039.

The commission invites public comment on the draft regulatory impact assessment.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking is to implement a revised I/M program in the HGA ozone nonattainment area as part of the strategy to reduce emissions of ozone precursors necessary for the area to be able to demonstrate attainment with the ozone NAAQS.

Promulgation and enforcement of the rules will not burden private, real property because this rulemaking action does not require the installation of permanent equipment. Although the rule revisions do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emissions limitations and control requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rulemaking action is to implement a revised I/M program which is necessary for the ozone nonattainment areas to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this rulemaking action will not constitute a takings under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, Consistency with the CMP. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP policy applicable to this rulemaking action is the policy (31 TAC §501.14(q)) that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action will have a beneficial effect on SIP emissions reduction obligations relating to reasonable further progress and attainment demonstrations by making additional emissions reductions over those made by the existing I/M program. Further, no new air contaminants will be authorized by the rule revisions. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking is consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin.

The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearings, 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 2000-011A-114-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Bob Wierzowiecki, Technical Analysis Division, (512) 239-1769 or Alan Henderson, Policy and Regulations Division, (512) 239-1510.

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code, §5.103, which provides the commission the authority to propose rules necessary to carry out its powers and duties under the TWC. The amendments are also proposed under the Texas Health and Safety Code, TCAA, §382.011, which provides the commission the authority to control the quality of the state's air; §382.012, which provides the commission the authority to prepare and develop a general, comprehensive plan for the control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.037 through §382.038, which provide the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of the FCAA; and §382.039, which provides the commission the authority to coordinate with federal, state, and local transportation planning agencies to develop and implement transportation programs and other measures necessary to demonstrate and maintain attainment of NAAQS and to protect the public from exposure to hazardous air contaminants from motor vehicles.

The amendments implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; §382.037 through §382.038, relating to Vehicle Emissions Inspection and Maintenance Program; and §382.039, relating to Attainment Program.

*§114.50. Vehicle Emissions Inspection Requirements.*

(a) Applicability. The requirements of this section and those contained in the revised Texas Inspection and Maintenance (I/M) State Implementation Plan (SIP) shall be applied to all gasoline-powered motor vehicles 2-24 years old and subject to an annual emissions inspection, beginning with the first safety inspection. Currently, military tactical vehicles, motorcycles, diesel-powered vehicles, dual-fueled vehicles which cannot operate using gasoline, and antique vehicles registered with the Texas Department of Transportation are excluded from the program. Safety inspection facilities and inspectors certified by the Texas Department of Public Safety (DPS) shall inspect all subject vehicles, in the following program areas in accordance with the following schedule.

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

(4) This paragraph applies to all vehicles registered and primarily operated in [~~Harris County of~~] the Houston/Galveston (HGA) program area.

(A) Beginning January 1, 2001, all 1996 and newer model year vehicles registered and primarily operated in Harris County equipped with OBD systems shall be tested using EPA- approved OBD test procedures in conjunction with a TSI test.

(B) Beginning January 1, 2001, all pre-1996 and older vehicles registered and primarily operated in Harris County shall be tested using a TSI test. All vehicle emissions test stations must offer both TSI and OBD tests to the public.

(C) Beginning May 1, 2002, all 1996 and newer model year vehicles equipped with OBD systems and registered and primarily operated in Harris County shall be tested using EPA-approved OBD test procedures in conjunction with an ASM-2 test, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by the EPA.

(D) Beginning May 1, 2002, all pre-1996 model year vehicles registered and primarily operated in Harris County shall be tested using the ASM-2 test, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by the EPA. All vehicle emissions test stations must offer both an OBD test and ASM-2 test, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by EPA, to the public.

(E) Beginning May 1, 2003, all 1996 and newer model year vehicles equipped with OBD systems and registered and primarily operated in Brazoria, Fort Bend, Galveston, and Montgomery Counties shall be tested using EPA-approved OBD test procedures in conjunction with an ASM-2 test, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by the EPA.

(F) Beginning May 1, 2003, all pre-1996 and newer model year vehicles registered and primarily operated in Brazoria, Fort Bend, Galveston, and Montgomery Counties shall be tested using the ASM-2 test procedures, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by the EPA. All vehicle emissions test stations must offer both an OBD test and an ASM-2 test or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by the EPA, to the public.

(G) Beginning May 1, 2004, all 1996 and newer model year vehicles equipped with OBD systems and registered and primarily operated in Chambers, Liberty, and Waller Counties shall be tested using EPA-approved OBD test procedures in conjunction with an ASM-2 test, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by the EPA.

(H) Beginning May 1, 2004, all pre-1996 model year vehicles registered and primarily operated in Chambers, Liberty, and

Waller Counties shall be tested using an ASM-2 test, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by the EPA. All vehicle emissions test stations must offer both an OBD test and ASM-2 test, or a vehicle emissions test that meets SIP emissions reduction requirements and is approved by EPA, to the public.

(5) (No change.)

(b) Control requirements.

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

(3) Any motorist in the DFW, EDFW, HGA, or El Paso program areas [~~or Harris County~~] who has received a notice from an emissions inspection station that there are recall items unresolved on their motor vehicle, should furnish proof of compliance with the recall notice prior to the next vehicle emissions inspection. The motorist may present a written statement from the dealership or leasing agency indicating that emissions repairs have been completed as proof of compliance.

(4)- (7) (No change.)

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

*§114.51. Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers.*

(a) Any manufacturer or distributor of vehicle testing equipment may apply to the executive director of the Texas Natural Resource Conservation Commission (commission) or his appointee, for approval of an exhaust gas analyzer or analyzer system for use in the Texas Inspection and Maintenance (I/M) program administered by the Texas Department of Public Safety. Each manufacturer shall submit a formal certificate to the commission stating that any analyzer model sold or leased by the manufacturer or its authorized representative and any model currently in use in the I/M program will satisfy all design and performance criteria set forth in "Specifications for Preconditioned Two Speed Idle Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Vehicle Emissions Testing Program," dated November 1 [~~March 15~~], 2000, or in "Specifications for Acceleration Simulation Mode (ASM-2) Vehicle Exhaust Gas Analyzer Systems for use in the Texas Vehicle Emissions Testing Program," dated November 1 [~~March 15~~], 2000. Copies of these documents are available at the commission's Central Office, located at 12100 Park 35 Circle, Austin, Texas 78753. The manufacturer shall also provide sufficient documentation to demonstrate conformance with these criteria including a complete description of all hardware components, the results of appropriate performance testing, and a point-by-point response to each specific requirement.

(b)- (e) (No change.)

*§114.52. Waivers and Extensions for Inspection Requirements.*

(a) Applicability. The waivers and extensions apply to any motorist who can satisfy the conditions of a specific waiver or extension. Applications must be made to the Department of Public Safety (DPS). For the minimum expenditure waiver, individual vehicle waiver, and parts availability time extension, the motorist may apply only once during each testing cycle. For the low income time extension, the motorist may apply every other test cycle. Application for waivers and extensions may be made in the following inspection and maintenance program counties:

(1) Motorists in Dallas, El Paso, Harris, and Tarrant Counties are eligible for waivers and extensions.

(2) Beginning May 1, 2002, motorists in Collin and Denton Counties will be eligible for waivers and extensions.

(3) Beginning May 1, 2003, motorists in Brazoria, Ellis, Fort Bend, Galveston, Johnson, Kaufman, Montgomery, Parker, and Rockwall Counties will be eligible for waivers and extensions.

(4) Beginning May 1, 2004, motorists in Chambers, Liberty, and Waller Counties will be eligible for waivers and extensions.

(b)- (e) (No change.)

*§114.53. Inspection and Maintenance Fees.*

(a) The following fees must be paid for an emissions inspection of a vehicle at an inspection station. This fee shall include one free retest should the vehicle fail the emissions inspection, provided that the motorist has the retest performed at the same station where the vehicle originally failed and submits, prior to the retest, a properly completed Vehicle Repair Form showing that emissions-related repairs were performed and the retest is conducted within 15 days of the initial emissions test.

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

(3) Beginning May 1, 2002, any emissions inspection station required to conduct an acceleration simulation mode (ASM-2) test and test in accordance with §114.50(a)(2)(C) and (D) and (4)(C) and (D) of this title shall collect a fee of $22.50 and shall remit $2.00 to the DPS.

(4) Beginning May 1, 2003, any emissions inspection station required to conduct an ASM- 2 [~~acceleration simulation mode~~] test and OBD test in accordance with §114.50(a)(3) and (4)(E) and (F) of this title shall collect a fee of $22.50 and shall remit $2.00 to the DPS.

(5) Beginning May 1, 2004, any emissions inspection station required to conduct an ASM-2 test and OBD test in accordance with §114.50(a)(4)(G) and (H) of this title shall collect a fee of $22.50 and shall remit $2.00 to the DPS.

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

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005612
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## SUBCHAPTER H. LOW EMISSION FUELS
## DIVISION 3. LOW SULFUR GASOLINE

**30 TAC §114.322, 114.325 - 114.327, 114.329**

The Texas Natural Resource Conservation Commission (commission) proposes new §114.322, Control Requirements for Sulfur; §114.325, Approved Sulfur Test Methods; §114.326, Testing and Recordkeeping Requirements; §114.327, Exemptions; and §114.329, Affected Counties and Compliance Dates. The commission proposes these new sections in Chapter 114, Control of Air Pollution from Motor Vehicles; Subchapter H, Low Emission Fuels; new Division 3, Low Sulfur Gasoline; and revisions to the state implementation plan (SIP) in order to control ground-level

ozone in the Houston/Galveston (HGA), Beaumont/Port Arthur (BPA), and Dallas/Fort Worth (DFW) ozone nonattainment areas; and the 95-county central and eastern Texas region.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post-1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base-case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxides ($NO_x$) waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the $NO_x$ waiver were based on early base-case episodes which marginally exhibited model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revisions to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to the EPA on May 19, 1998 a revision to the HGA SIP which contained the following elements in response to the EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could

result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid-course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approvable attainment demonstration, EPA has indicated that the state must adopt those strategies modeled in the November submittal and then adopt sufficient controls to close the remaining gap in $NO_x$ emissions. The modeling included in this proposal indicates a gap of an additional 77.98 tons per day (tpd) of $NO_x$ reductions is necessary for an approvable attainment demonstration.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains Post-1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The HGA ozone nonattainment area will need to ultimately reduce $NO_x$ more than 750 tpd to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of the Low Sulfur Gasoline (LSG) program will contribute to attainment and maintenance of the one-hour ozone standard in the HGA, BPA, and DFW ozone nonattainment areas, as well as the 95-county central and eastern Texas area. An LSG program also should contribute to a successful demonstration of transportation conformity in the HGA, BPA, and DFW nonattainment areas.

These proposed rules are one element of the control strategy for the HGA Post-1999 ROP/Attainment Demonstration SIP. The purpose of these proposed rules is to establish a regional LSG air pollution control strategy in the counties located within the DFW, BPA, and HGA ozone nonattainment areas, and in an additional 95 central and eastern Texas counties, to reduce $NO_x$ necessary for the counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the one-hour ozone NAAQS.

These proposed rules will implement a regional LSG program requiring gasoline used for both on-road and off-road applications in the DFW, BPA, and HGA ozone nonattainment areas and the 95-county central and eastern Texas region to meet the LSG standards. The use of LSG will lower the emissions of $NO_x$ and other pollutants from fuel combustion. Because $NO_x$ is a precursor to ground-level ozone formation, reduced $NO_x$ emissions will result in ground-level ozone reductions. To comply with the state LSG regulations, gasoline producers and importers must ensure that gasoline distributed to areas required to participate in the LSG program meets the specifications stated in these proposed rules. The proposed rules require that beginning May 1, 2004 all gasoline produced for delivery and ultimate sale to the consumer in the affected area does not exceed 15 ppm sulfur.

The proposed new LSG rules will require LSG for the eight HGA ozone nonattainment area counties, which include Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties; the four DFW ozone nonattainment area counties, which include Collin, Dallas, Denton, and Tarrant Counties; the three BPA ozone nonattainment area counties, which include Hardin, Jefferson, and Hardin Counties; and the 95 central and eastern Texas region counties which include Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

The commission developed an LSG ozone control strategy which requires gasoline content limits more restrictive than federal gasoline regulations. Currently, the HGA and DFW ozone nonattainment areas are required to use federal reformulated gasoline (RFG). In these areas, federal rules prohibit the sale of gasoline which is not certified by the EPA as federal RFG. Consequently, gasoline in these areas will have to continue to meet the federal RFG requirements in addition to the proposed LSG rules. In addition to the federal RFG regulations, the current federal regulations governing gasoline quality in Title 40 Code of Federal Regulations (40 CFR) Part 80, Regulation of Fuels and Fuel Additives; Subpart H, Gasoline Sulfur; §80.195, What Are the Gasoline Sulfur Standards for Refiners and Importers?; establish limits for sulfur content in gasoline used in motor vehicle applications. These federal regulations limit sulfur in gasoline, beginning January 1, 2006, to a 30 ppm average and an 80 ppm cap.

The commission is concurrently submitting, as part of the SIP and with this proposed rulemaking, a waiver request in accordance with the 42 USC, §7545(c)(4)(C), to implement this proposed LSG rule which is more stringent than the federal sulfur control rules. This proposed waiver and SIP submittal is available to the public by contacting Heather Evans at (512) 239-1970.

Modeling assessing the benefits of this $NO_x$ emission reduction strategy demonstrated that significant emission reductions could be achieved from using an LSG as specified by the commission requirements. By the year 2007, the LSG program will reduce $NO_x$ emissions in the HGA ozone nonattainment area by 1.15 tpd, and in all affected areas by 4.98 tpd. The commission anticipates that production costs will increase from $.03 to $.07 per gallon of gasoline to comply with the rules.

The commission solicits comment regarding the possible benefits of controlling components of gasoline other than sulfur by which equivalent emission reductions could be achieved as a possible alternative to the controls on sulfur as described in this proposal.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION BY SECTION DISCUSSION

The proposed new §114.322 establishes the control requirement that the sulfur content in gasoline shall not exceed 15 ppm sulfur in the affected areas. This 15 ppm state sulfur cap is more stringent than the federal 30 ppm average and 80 ppm cap.

The proposed new §114.325 establishes the American Society for Testing and Materials (ASTM) Test Method D2622-98 (Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-ray Fluorescence Spectrometry), dated 1998, or ASTM D5453-00 (Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Motor Fuels and Oils by Ultraviolet Fluorescence), dated 2000, as the approved test methods to determine sulfur content in gasoline.

The proposed new §114.326 establishes the testing and recordkeeping requirements for the LSG program. These proposed requirements stipulate that producers and importers are required to test each batch of fuel for its sulfur content, maintain records of this testing for two years, and include a certification statement on the product transfer document that certifies that the fuel being transferred into the affected areas meets the 15 ppm sulfur standard.

The proposed new §114.327 provides exemptions to the LSG program regulations. These exemptions stipulate that gasoline solely intended for use as aviation gasoline is exempt from the proposed sulfur standard, the owner or operator of a retail fuel dispensing facility is exempt from the proposed testing requirements, and gasoline that does not meet the proposed sulfur standard is not prohibited from being transferred, placed, stored, and/or held within the affected counties so long as it is not ultimately used to power a gasoline-fueled spark-ignition engine in the affected counties.

The proposed new §114.329 establishes the compliance date and coverage area that is required to comply with the requirements of the LSG program. This section lists the affected counties for the DFW, BPA, and HGA ozone nonattainment areas, and the counties included in the 95-county region.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed new sections are in effect, the commission anticipates no significant fiscal implications for any single unit of state and local government as a result of administration or enforcement of the proposed new sections. The commission estimates the total annual fuel related fiscal impact to state and local governments in the counties affected by the new sections to be approximately $20 to $47 per vehicle per year following implementation of LSG fuel standards on May 1, 2004.

The proposed new sections will require LSG fuel for on-road and non-road use within the eight-county HGA, the three-county BPA, and the four-county DFW ozone nonattainment areas, along with 95 additional counties in the central and eastern Texas region. The HGA ozone nonattainment area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties; the BPA nonattainment area consists of Hardin, Jefferson, and Orange Counties; the DFW ozone nonattainment area consists of Collin, Dallas, Denton, and Tarrant Counties; and the 95 additional central and eastern Texas counties include Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadelupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somerville, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

The proposed new sections are one element of the proposed HGA Post-1999 ROP/Attainment Demonstration SIP. A SIP is a plan developed for any region where existing (measured and/or estimated) ambient pollutant levels exceed the level specified in a national standard. The plan establishes a control strategy that provides emission reductions necessary for attainment and maintenance of the national standards.

In order to comply with the proposed new sections, beginning May 1, 2004, gasoline fuel producers and importers must ensure that all gasoline distributed to affected areas shall not exceed 15 ppm sulfur.

The EPA analysis *Regulatory Impact Analysis: Control of Air Pollution from Motor Vehicles: Tier 2 Vehicle Emissions Standards and Gas Sulfur Control Requirements* and the responses to public comment from the California Air Resource Board (CARB) regarding adoption of federal Phase 3 gasoline standards, indicates that the anticipated cost of producing gasoline to the May 1, 2004 standard will range from $.03 to $.07 per gallon. The commission estimates that the increased production costs will

raise the cost for this fuel at the pump by $.03 to $.07 per gallon. In addition, the proposed new sections will require gasoline producers and importers who provide fuel to the affected areas to test their fuel for compliance with the standard, maintain records for two years, and include certification statements regarding sulfur content compliance on product transfer documents.

The proposed rules contain several exemptions to the LSG program regulations, which are: gasoline solely intended for use as aviation gasoline is exempt from the proposed LSG standards; the owner or operator of a retail fuel dispensing facility is exempt from the proposed testing requirements; and gasoline that does not meet the proposed LSG standard is not prohibited from being transferred, placed, stored, or held within the affected counties as long as it is not ultimately used to power a gasoline fueled spark-ignition engine in the affected counties.

The following analysis in this fiscal note only considers on-road gasoline powered vehicles. Vehicle counts for non-road gasoline powered vehicles is not available.

Units of state and local government that own or operate gasoline powered vehicles within the affected counties will likely be required to pay an additional $.03 to $.07 per gallon for gasoline that meets the proposed LSG requirements following the May 1, 2004 deadline. Approximately 48,992 state and local government vehicles within the affected areas consumed approximately 33 million gallons of gasoline in 1999. Based on a 1.5% growth rate, an estimated 52,778 gasoline fueled vehicles would use approximately 36 million gallons of fuel in 2004. The total annual fuel related fiscal impact to units of state and local governments in 2004 would range from approximately $705,000 to $1.6 million or approximately $13 to $31 per vehicle for 2004 (May -December 2004) and then approximately $1 million to $2.5 million or approximately $20 to $47 per year per vehicle afterward.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for the first five years the proposed new sections are in effect, the public benefit anticipated from enforcement of and compliance with the proposed new sections will be the potential reduction of on-road and off-road mobile source emissions, contribution toward demonstration of attainment and maintenance with the ozone NAAQS for the HGA, BPA, and DFW ozone nonattainment areas, and potentially improved air quality for all counties affected by the new sections.

The commission does not anticipate significant fiscal implications for any single owner or operator of gasoline fueled vehicles as a result of administration or enforcement of the proposed new sections. The commission anticipates that gasoline producers that supply fuel to the affected counties will incur additional costs to produce fuel that meets the proposed LSG standards. The cost of producing this LSG fuel is estimated to be approximately $.03 to $.07 per gallon more than for current gasoline. The commission estimates that gasoline prices will increase by an additional $.03 to $.07 per gallon following implementation of the proposed LSG standards.

The commission estimates that approximately 11,357,736 privately owned and operated gasoline fueled vehicles in the affected counties consumed approximately 7.6 billion gallons of gasoline in 1999. Based on a 1.5% growth rate, an estimated 12,235,507 privately owned and operated gasoline fueled vehicles would use approximately eight billion gallons of gasoline in 2004. The total annual fuel related fiscal impact to units of individuals and businesses in the affected areas in 2004 would range from approximately $163 million to $380 million or approximately $13 to $31 per vehicle for 2004 (May -December 2004) and then approximately $247 million to $578 million or approximately $20 to $47 per year per vehicle afterward.

The commission anticipates significant increases to capital and operating costs in order for refineries to meet the proposed May 1, 2004 standard. An estimated cost to refineries to decrease sulfur content in gasoline to 15 ppm is not available; however, an EPA cost study that shows the costs to refine gasoline to 30 ppm provides an indication of the overall cost to refineries to meet the May 1, 2004 15 ppm standard. According to EPA analysis found in the *Regulatory Impact Analysis: Control of Air Pollution from Motor Vehicles: Tier 2 Vehicle Emissions Standards and Gas Sulfur Control Requirements*, the estimated capital costs for a typical refinery to decrease the sulfur content in gasoline to 30 ppm would be approximately $44 million and the average annual operating cost would be approximately $16 million. The commission anticipates no significant additional costs for gasoline producers and importers associated with required records retention and certification statements. Likewise, the commission anticipates no additional costs to producers for testing LSG gasoline, because producers are already testing their fuel for compliance with federal regulations and industry standards.

SMALL AND MICRO-BUSINESS ASSESSMENT

The commission does not anticipate fiscal implications which have an adverse fiscal impact on any small business or micro-business as a result of administration or enforcement of the proposed new sections. There are no known gasoline producers or importers that would be considered small or micro-businesses. However, the commission anticipates that many independent gasoline retailers within the affected counties are small or micro-businesses. Therefore, production costs of approximately $.03 to $.07 per gallon are not anticipated to affect small or micro-business except to pass the increased costs of production through to consumers. The fiscal implications for small or micro-businesses within the affected areas would include additional costs of approximately $.03 to $.07 per gallon for LSG beginning May 1, 2004. The total annual fuel-related costs would depend on the amount of fuel used by the business. On an average basis, the annual fuel-related cost to small or micro-businesses within the affected areas would be approximately $20 to $47 per vehicle per year.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking is subject to §2001.0225 because it meets 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 new sections to Chapter 114 are intended to protect the environment or reduce risks to human health from environmental exposure to ozone and could affect in a material way, a sector of the economy, competition, and the environment due to its impact on the fuel manufacturing and distribution network of the state. The new sections are intended to implement a LSG air pollution control program as part of the strategy to reduce $NO_x$ emissions necessary for the counties included in the eight-county HGA, three-county BPA, and four-county DFW ozone nonattainment areas to be able to

demonstrate attainment and maintenance of the ozone NAAQS. The proposed new sections are one element of the proposed HGA Post-1999 ROP/Attainment Demonstration SIP. Although the proposed new sections meet the definition of a "major environmental rule" as defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

This proposed rulemaking action does not meet any of these four applicability requirements. Specifically, the LSG requirements within these proposed rules were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409, and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633) during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that $NO_x$ emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain $NO_x$ emission reductions which will result in reductions in ozone formation in the HGA, BPA, and DFW ozone nonattainment areas and the 95-county central and eastern Texas region, and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, 382.017, 382.019, 382.037(g), and 382.039.

The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these proposed rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed rulemaking is to establish an LSG program which will act as an air pollution control strategy to reduce $NO_x$ emissions necessary for the eight-county HGA and the four-county DFW ozone nonattainment areas, to be able to demonstrate attainment and maintenance of the ozone NAAQS. Promulgation and enforcement of the proposed rules may possibly burden private, real property because this proposed rulemaking action may result in investment in the permanent installation of new refinery processing equipment. Although the proposed rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within this proposal have been developed

in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the proposed rules is to implement cleaner burning gasoline which is necessary for the HGA and DFW ozone nonattainment areas to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law; therefore, these proposed rules do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and $NO_x$ air emissions will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 50, National Primary and Secondary Ambient Air Quality Standards, and 40 CFR 51, Requirements for Preparation, Adoption, and Submittal Of Implementation Plans. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, faxed to (512) 239-4808, or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 2000-011F-114-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Morris Brown at (512) 239-1438 or Alan Henderson at (512) 219-1510.

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under Texas Health and Safety Code, TCAA, §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed under TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.037(g), which authorizes the commission to regulate fuel content if it is demonstrated to be necessary for attainment of the NAAQS; and §382.039, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed new sections implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; and §382.039, relating to Attainment Program.

*§114.322. Control Requirements for Sulfur.*

No person shall sell, offer for sale, supply, or offer for supply, dispense, transfer, allow the transfer, place, store, or hold in any stationary tank, reservoir, or other container any gasoline containing more than 15 parts per million sulfur, on a per gallon basis, which may ultimately be used to power a gasoline-fueled spark-ignition engine in the counties listed

in §114.329 of this title (relating to Affected Counties and Compliance Dates).

*§114.325. Approved Sulfur Test Methods.*

(a) Compliance with the sulfur content requirements under §114.322 of this title (relating to Control Requirements for Sulfur) shall be determined by applying American Society for Testing and Materials (ASTM) Test Method D2622-98 (Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-ray Fluorescence Spectrometry), dated 1998, or ASTM D5453-00 (Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Motor Fuels and Oils by Ultraviolet Fluorescence), dated 2000.

(b) Alternatives to the test methods prescribed in subsection (a) of this section may be used if validated by 40 Code of Federal Regulations 63, Appendix A, Test Method 301 (effective December 29, 1992). For the purposes of this paragraph, substitute "executive director" each place that Test Method 301 references "administrator."

*§114.326. Testing and Recordkeeping Requirements.*

(a) Every producer or importer that has elected to sell, offer for sale, supply, or offer for supply gasoline in counties listed in §114.329 of this title (relating to Affected Counties and Compliance Dates) is subject to the requirements of this section.

(1) Each producer or importer shall sample and test for the sulfur content in each final blend of gasoline which the producer has produced or imported, by collecting and analyzing a representative sample of gasoline taken from the final blend, using the methodologies specified in §114.325 of this title (relating to Approved Sulfur Test Methods). If a producer or importer blends gasoline components directly to pipelines, tank ships, railway tank cars, or trucks and trailers, the loading(s) shall be sampled and tested for the sulfur content by the producer, importer, or authorized contractor. The producer or importer shall maintain, for two years from the date of each sampling, records showing the sample date, identity of blend sampled, container or other vessel sampled, final blend volume, and sulfur content. All gasoline produced or imported by the producer or importer and not tested for sulfur by the producer or importer as required by this section shall be deemed to have a sulfur content exceeding the requirements in §114.322 of this title (relating to Control Requirements for Sulfur), unless the producer or importer demonstrates that the gasoline meets those requirements.

(2) A producer or importer shall provide to the executive director any records required to be maintained by the producer or importer in accordance with this section within five days of a written request from the executive director if the request is received before expiration of the period during which the records are required to be maintained. Whenever a producer or importer fails to provide records regarding a final blend of gasoline in accordance with the requirements of this section, the final blend of gasoline shall be presumed to have been sold or supplied by the producer or importer in violation of the sulfur content requirements specified in §114.322 of this title.

(b) For each final blend which is sold or supplied by a producer or importer from their production or import facility, and which contains volumes of gasoline that they have produced or imported and volumes that they neither produced nor imported, the producer or importer shall establish, maintain, and retain adequately organized records containing the following information:

(1) the volume of gasoline in the final blend that was not produced or imported by the producer or importer, the identity of the persons(s) from whom such gasoline was acquired, the date(s) on which it was acquired, and the invoice representing the acquisition(s);

(2) the sulfur content of the volume of gasoline in the final blend that was not produced or imported by the producer or importer, determined either by:

(A) sampling and testing, by the producer or importer, of the acquired gasoline represented in the final blend; or

(B) written sampling results and gasoline testing supplied by the person(s) from whom the gasoline was acquired; and

(3) a producer or importer subject to subsection (b) of this section shall establish such records by the time the final blend triggering the requirements is sold or supplied from the production or import facility, and shall retain such records for two years from such date. During the period of required retention, the producer or importer shall make any of the records available to the executive director upon request.

(c) All parties in the distribution chain (producers, importers, terminals, pipelines, truckers, rail carriers, and retail fuel dispensing outlets) subject to the provisions of §114.322 of this title must maintain copies or records of product transfer documents for a minimum of two years, and shall upon request, make such copies or records available to representatives of the commission, the EPA, or local air pollution agency having jurisdiction in the area. The product transfer documents must contain, at a minimum, the following information:

(1) the date of transfer;

(2) the name and address of the transferor;

(3) the name and address of the transferee;

(4) the volume of gasoline being transferred;

(5) the location of the gasoline at the time of transfer; and

(6) the following certification statement: "This product complies with the control requirements for sulfur specified in Title 30 Texas Administrative Code §114.322, and may be used in any Texas county requiring gasoline with a maximum sulfur content of 15 parts per million."

*§114.327. Exemptions.*

(a) The following exemptions apply in the counties listed in §114.329 of this title (relating to Affected Counties and Compliance Dates).

(1) All gasoline solely intended for use as aviation gasoline is exempt from §114.322 and §114.326 of this title (relating to Control Requirements for Sulfur; and Testing and Recordkeeping Requirements).

(2) The owner or operator of a retail fuel dispensing facility is exempt from all requirements of §114.326 of this title except §114.326(c) of this title.

(b) Gasoline that does not meet the requirements of §114.322 of this title is not prohibited from being transferred, placed, stored, and/or held within the counties listed in §114.329 of this title so long as it is not ultimately used to power a gasoline-fueled spark-ignition engine in the affected counties.

*§114.329. Affected Counties and Compliance Dates.*

Beginning May 1, 2004, all affected persons in the counties listed in paragraphs (1) - (4) of this section shall be in compliance with §§114.322, 114.325 - 114.327 of this title (relating to Control Requirements for Sulfur; Approved Sulfur Test Methods; Testing and Recordkeeping Requirements; and Exemptions):

(1) Collin, Dallas, Denton, and Tarrant;

(2) Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller;

(3) Hardin, Jefferson, and Orange; and

(4) Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005646
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## DIVISION 4. DIESEL EMULSION FUEL

**30 TAC §§114.330 - 114.332, 114.336, 114.338, 114.339**

The Texas Natural Resource Conservation Commission (commission) proposes new §114.330, Definitions; §114.331, Applicability; §114.332, Diesel Emulsion Standards; §114.336, Recordkeeping and Labeling; §114.338, Registration; and §114.339, Affected Counties and Compliance Dates. The commission proposes these revisions to Chapter 114, Control of Air Pollution From Motor Vehicles; Subchapter H, Low Emission Fuels; new Division 4, Diesel Emulsion Fuel; and corresponding revisions to the state implementation plan (SIP) in order to control ground-level ozone in the Houston/Galveston (HGA) ozone nonattainment area. These rules are designed to require use of a low-emission diesel fuel formulation called diesel emulsion for both on- road and non-road vehicles.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post- 1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base-case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxides ($NO_x$) waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the $NO_x$ waiver were based on early base-case episodes which marginally exhibited model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revisions to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA area attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to EPA on May 19, 1998 a revision to the HGA SIP which contained the following elements in response to EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the

EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid- course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approvable attainment demonstration, EPA has indicated that the state must adopt those strategies modeled in the November submittal and then adopt sufficient controls to close the remaining gap in $NO_x$ emissions. The modeling included in this proposal indicates a gap of an additional 77.98 tons per day (tpd) of $NO_x$ reductions is necessary for an approvable attainment demonstration. The commission estimates that this measure will achieve a minimum of 10.70 tpd of $NO_x$ reductions and is therefore a necessary measure to consider for closing the gap and successfully demonstrating attainment.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains Post- 1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The HGA ozone nonattainment area will need to ultimately reduce $NO_x$ more than 750 tpd to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of the proposed diesel emulsion fuel (DEF) program will contribute to attainment and maintenance of the one-hour ozone standard in the HGA ozone nonattainment area. These proposed rules are one element of the control strategy for the HGA Attainment Demonstration SIP. The purpose of these proposed rules is to establish a diesel emulsion fuel air pollution control strategy for the HGA area that will provide $NO_x$ reductions to assist in demonstrating attainment with the ozone NAAQS. The proposed rules would require on- road heavy-duty diesel engines which are registered in HGA and nonroad heavy-duty diesel engines that are primarily operated in the HGA area and greater than 175 nominal horsepower (hp), to use diesel emulsions. Elsewhere in this edition of the *Texas Register*, the commission is proposing to amend 30 TAC Chapter 114, Control of Air Pollution from Motor Vehicles, Subchapter H, Low Emission Fuels, Division 2: Low Emission Diesel, to require the use of low emission diesel in the HGA nonattainment area. The proposed new Division 4: Diesel Emulsion Fuel, requires the addition of diesel emulsion additives to low emission diesel fuel for use in the HGA nonattainment area, thus, it should not conflict with the requirements of the low emission diesel fuel program.

Diesel emulsion fuel is an emergent fuel technology that relies on a water-in-fuel mixture to lower $NO_x$ emissions. The water content lowers flame temperature by absorbing latent heat in the combustion chamber, using the same principle of thermodynamics as injecting water into a turbine. There are three components to diesel emulsion fuels: 1.) diesel fuel; 2.) water, usually 10% to 20% by volume; and 3.) a diesel emulsion additive which suspends the fuel and water together. The diesel emulsion fuel can be blended by the diesel emulsion fuel distributor or blended on site using a fuel metering system. According to preliminary laboratory results, the diesel emulsion additive can lower exhaust

$NO_x$ by 5.0% to 30%, irrespective of the baseline fuel, depending on the engine configuration and operating mode. At least one diesel emulsion additive has been approved for use by the EPA.

Since the EPA does not require the addition of diesel emulsion additives to diesel fuel, as is required by this proposal, the commission does not believe that a waiver under 42 USC, §7445(c)(4)(C) is required.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION BY SECTION DISCUSSION

New §114.330 contains the following definitions. "Diesel Emulsion Additive" is defined as a type of diesel fuel additive which allows water and diesel to be blended so that it does not separate. The additive may also contain anti-freeze agents, cetane enhancers, and other ingredients as a water/fuel mixture containing a diesel fuel additive to emulsify the water with the fuel, usually in a mixture. "Diesel Emulsion Fuel" is defined as a water/fuel mixture containing a diesel fuel additive to emulsify the water with the low emission diesel fuel with the water. Typically, DEF contains 10% to 20% by volume water and achieves an emission reduction of 5.0% to 30% $NO_x$ relative to the baseline diesel fuel depending concentration of water in the fuel and engine design parameters. "Diesel Emulsion Fuel Distributor" is defined as any person, retailer, jobber, bulk fuel reseller, low emission diesel refiner who distributes diesel emulsion fuel to the ultimate user, diesel emulsion additive manufacturer, or other entity who distributes diesel fuel required to be mixed with a diesel emulsion additive. The proposed definition of "Non-Road Heavy-Duty Engine" includes any non-road engines which are rated over 175 nominal hp. This definition is intended to cover larger engines such as bulldozers, graders, and cranes as well as locomotives, tugs, tow-boats, and ferry boats. "On-road Heavy-duty Diesel Engine" is defined as a diesel engine in a on-road vehicle which is greater than 10,000 pounds gross vehicle weight rating (GVWR). The definition would exclude vehicles required to comply with the federal Tier 2 engine standards. "Primarily Operated" is defined as the use of a motor vehicle or engine more than 60 calendar days per year in an affected county; it is presumed that an on-road vehicle is primarily operated in the county in which it is registered.

Rule applicability is clarified in §114.331. The proposed new rule would apply to distributors of on-road diesel with a throughput of at least 25,000 gallons per month at a fuel dispensing facility, such as a truck stop, or vehicle fleet refueling station. It would apply to distributors of dyed and undyed, non-road diesel with a throughput of at least 500 gallons of diesel per month at one fuel dispensing facility, such as construction or agricultural refueling. The diesel emulsion fuel distributors would make the diesel emulsion fuel available to all on-road heavy-duty diesels, which are defined as being greater than 10,000 pounds GVWR and all non-road engines rated over 175 nominal hp. Any diesel fuel distributor who provides diesel fuel to owners or operators of affected engines and equipment without inclusion of the diesel emulsion fuel additive is considered in violation of this rule.

Diesel emulsion emission standards are specified in §114.332. The diesel component of the diesel emulsion fuel must first meet low emission diesel fuel requirements as required by §114.312, Low Emission Diesel Standards. The requirement to use low emission diesel fuel is being proposed elsewhere in this edition of the *Texas Register* for the HGA nonattainment area. Requiring use of low emission diesel fuel, consistent with proposed §114.312, will provide a common baseline for all users of the affected equipment and vehicles and will not require the production of an alternative low emission diesel fuel. The diesel emulsion additive must meet EPA requirements in 40 Code of Federal Regulations (CFR) Part 80, Registration of Fuels and Fuel Additives. The amount, concentration, or volume of water used in the diesel emulsion additive must be within the manufacturer specifications. The diesel emulsion must result in emissions that are 15% to 20% lower than the $NO_x$ emissions in the base line fuel, depending on the types and operating mode of the engine, and not result in a net increase in the other pollutant levels, as tested by the manufacturer and approved or recognized by the EPA. Typically, diesel emulsion fuel contains 10% to 20% by volume water and achieves an emission reduction of 5.0% to 30% $NO_x$ relative to the baseline diesel fuel, depending on the concentration of water in the fuel and engine design parameters. The 15% and 20% reduction are a reasonable requirement because significantly lower reductions would not be adequate to lower ozone production in the photochemical modeling.

Recordkeeping and labeling are addressed in §114.336. All diesel emulsion fuel distributors affected by this rule must retain some kind of proof of purchase such as a fuel contract, leased blending facility, or receipts which prove that the diesel emulsion fuel is actually being used. Also, any tanks which are used to blend and/or dispense diesel emulsion fuel must be labeled "DIESEL EMULSION FUEL ONLY," so as to differentiate between other fuel blends.

Registration is covered in §114.338. All diesel emulsion fuel distributors affected by this rule are required to register with the executive director. The registration must include a statement of acceptance of the requirements of this rule and consent to allow the collection of samples of diesel emulsion fuel and allow access to records. Registration will be on forms available from the executive director.

Affected counties are addressed in §114.339. The counties covered are in the HGA nonattainment area. The rules would be implemented on May 1, 2004.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed amendments are in effect, there will be fiscal implications which may be significant for units of state and local government located in the HGA area depending on the number of affected on-road heavy-duty diesel vehicles and non-road vehicles and equipment owned and operated as a result of administration or enforcement of the proposed amendments. There should be no fiscal implications to units of state and local government located outside of this nonattainment area as a result of this proposed rules.

The proposed amendments require diesel emulsion fuel use for engines installed in on-road heavy-duty diesel vehicles registered in HGA area with a GVWR greater than 10,000 pounds or

engines that are rated more than 175 hp installed in non-road vehicles/equipment primarily operated in the HGA area. The proposed amendments are limited to distributors of on-road diesel that dispense 25,000 or more gallons of diesel fuel per month at one fuel dispensing facility. Additionally, the proposed amendments are limited to distributors of dyed and undyed, non-road diesel that dispense 500 or more gallons of diesel fuel per month at one fuel dispensing facility, such as construction or agricultural refueling sites. The proposed rules would affect approximately 1,900 state and local government and 53,000 privately owned and operated on-road heavy duty diesel vehicles. Additionally, the proposed amendments would also affect approximately 10,000 non-road vehicles/equipment.

Diesel emulsion fuel is an emergent technology for fuels which relies on a water-in-fuel mixture to lower $NO_x$ emissions. Diesel emulsion fuel is produced by blending diesel fuel, with water, and a diesel emulsion additive which suspends the fuel and water together.

In order to achieve certain reductions, low emission diesel (LED) fuel will be required to be blended with diesel emulsion fuel in the HGA area by May 1, 2004. Standards for and results of using LED fuel are being presented in a concurrent rulemaking. The commission requires that diesel emulsion fuel used in on-road heavy-duty diesel engines has to result in a 15% decrease in $NO_x$ compared to emission benefits from the use of LED fuel alone. Additionally, the diesel emulsion fuel used in non-road engines has to result in a 20% decrease in $NO_x$ compared to emission benefits from the use of LED fuel alone. Both uses should not result in a net increase in any other pollutant. The diesel emulsion fuel manufacturers have to provide the EPA with data that corroborates required emission reductions.

Based on comments from a nationwide producer, diesel emulsion fuel will cost the same per gallon as the diesel fuel component used to make the product, because the increased cost of the additive is offset by the displacement of fuel due to the inclusion of water in the overall mixture. By May 1, 2004, the use of LED fuel in the HGA area will increase diesel fuel costs in the HGA area by approximately $.08 more per gallon compared to today's current regular diesel prices. The increased cost for LED fuel is based on analysis published by Northeast States for Coordinated Air Use Management (NESCAUM) and EPA's *Notice of Proposed Rulemaking on the Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements*. In addition to the fuel-related cost, there may be an approximate 13% reduction in fuel economy as a result of using the fuel. Testing conducted by one nationwide producer shows that fuel economy can decrease by as much as 13%, but it can also stay the same depending on the vehicle and equipment use.

If a unit of state or local government wants to dispense diesel emulsion fuel, a special blending unit may be required. According to one nationwide diesel emulsion fuel producer, a typical unit, which is capable of processing over 5 million gallons a year, is used at major fuel distribution centers. The cost for this type of unit is approximately $400,000 installed ($350,000 for the unit and $50,000 for installation). Final costs would depend on the level of infrastructure at the proposed site (availability of water, electricity, diesel fuel, platform, piping, etc.). The commission does not anticipate additional costs to state and local government diesel emulsion fuel providers due to required records retention, diesel emulsion fuel tank labeling, and registration with the agency.

Units of state and local government will pay more to fuel affected vehicles due to the increased cost of diesel emulsion fuel compared with current diesel prices and the potential reduced gas mileage. Additionally, if a unit of state or local government decides to dispense the fuel, a special blending unit may have to be purchased or leased. The commission estimates that approximately 1,900 heavy-duty on-road diesel vehicles and a portion of the affected 10,000 non-road vehicles/equipment are owned and operated by state and local governments. These vehicles would be required to use diesel emulsion fuel beginning May 1, 2004. Based on a 25,000 vehicle miles traveled (VMT) per year the total annual cost for units of state and local government affected by the proposed amendments would increase by $775 per diesel vehicle per year. There will be a cost increase associated with using diesel emulsion fuel in non-road vehicles/equipment; however, the total amount cannot be determined at this time. Total costs to units of state and local government in affected counties, not including blending unit and related infrastructure costs and non-road vehicles/equipment, would be approximately $1.4 million.

PUBLIC BENEFIT AND COSTS

Mr. Davis also has determined that for the first five years the proposed amendments are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be the potential reduction of on-road and non-road mobile source emissions, potentially improved air quality, and contribution toward demonstration of attainment with the NAAQS for the HGA area.

The commission estimates there may be significant fiscal impacts for owners and operators of on- road heavy-duty diesel vehicles and non-road diesel vehicles/equipment affected by the proposed amendments. The proposed rules require diesel emulsion fuel use in engines installed in on-road heavy-duty diesel vehicles registered in the HGA area with a GVWR greater than 10,000 pounds and in engines rated greater than 175 hp installed in non-road vehicles/equipment primarily operated in the HGA area. The proposed rules would affect approximately 53,000 privately owned and operated on- road heavy-duty diesel vehicles and a portion of the 10,000 affected non-road vehicles/equipment that are privately owned and operated.

Diesel emulsion fuel is an emergent technology for fuels which relies on a water-in-fuel mixture to lower $NO_x$ emissions. Diesel emulsion fuel is produced by blending diesel fuel, with water, and a diesel emulsion additive which suspends the fuel and water together.

In order to achieve certain reductions, LED fuel will be required to be blended with diesel emulsion fuel in the HGA area by May 1, 2004. Standards for and results of using LED fuel are being presented in a concurrent rulemaking. The commission requires that diesel emulsion fuel used in on- road heavy-duty diesel engines has to result in a 15% decrease in $NO_x$ compared to emission benefits from the use of LED fuel alone. Additionally, the diesel emulsion fuel used in non- road engines has to result in a 20% decrease in $NO_x$ compared to emission benefits from the use of LED fuel alone. Both uses should not result in a net increase in any other pollutant. The diesel emulsion fuel manufacturers must provide the EPA with data that corroborates required emission reductions.

Based on comments from potential producers, diesel emulsion fuel will cost the same per gallon as the diesel fuel component,

because the increased cost of the additive is offset by the displacement of fuel due to the inclusion of water in the overall mixture. By May 1, 2004, the use of LED fuel in the HGA area will increase diesel fuel costs by approximately $.08 more per gallon compared to today's current regular diesel prices. Therefore, diesel emulsion fuel sold after May 1, 2004 should cost approximately $.08 more per gallon. In addition to the fuel-related cost increases, there may be an approximate 13% reduction in fuel economy as a result of using diesel emulsion fuel. Testing conducted by one producer shows that fuel economy can decrease by as much as 13%, but it can also stay the same. The overall fuel economy effect is dependent on vehicle/equipment use.

The proposed amendments will probably directly affect major fuel distribution centers that serve the affected counties and individuals and businesses that want to dispense diesel emulsion fuel to affected vehicles and equipment in the affected counties, because a special blending unit will probably have to be used in order to mix the diesel emulsion fuel. According to one nationwide diesel emulsion fuel producer, a typical unit, which is capable of processing over five million gallons a year, is used at major fuel distribution centers. The cost for this type of unit is approximately $400,000 installed ($350,000 for the unit and $50,000 for installation). Final costs would depend on the level of infrastructure at the proposed site (availability of water, electricity, diesel fuel, platform, piping, etc.). The commission does not anticipate additional costs to individuals and businesses that are diesel emulsion fuel providers due to required records retention, diesel emulsion fuel tank labeling, and registration with the agency.

Individuals and businesses will probably pay more to fuel affected vehicles due to the increased cost of diesel emulsion fuel compared with current diesel prices and the potential reduced gas mileage. Additionally, if an individual or business decides to dispense diesel emulsion fuel, a special blending unit will probably have to be purchased or leased. The commission estimates that approximately 53,000 heavy-duty diesel vehicles and a portion of the 10,000 affected non-road vehicles/equipment are owned and operated by individuals and businesses in the affected counties. These vehicles would be required to use diesel emulsion fuel beginning May 1, 2004. Based on a 25,000 to 50,000 VMT per year the total annual cost to individuals and businesses affected by the proposed amendments would increase by $775 to $1,550 per diesel vehicle per year. The higher VMT was used in order to reflect the increased miles that some privately-owned heavy-duty diesels (such as long haul semi-trucks) accrue compared with state and local government vehicles. There will be a cost increase associated with using diesel emulsion fuel in non-road vehicles/equipment; however the total amount cannot be determined at this time. Total annual costs to individuals and businesses in the affected counties, not including blending unit and related infrastructure costs and non-road vehicles/equipment, would be approximately $41 million to $82 million.

SMALL AND MICRO-BUSINESS ASSESSMENT

The commission determined that fiscal implications are possible as a result of administration or enforcement of the proposed amendments, for small and micro-businesses that own a fleet of vehicles or that dispense diesel fuel in the HGA area. There are no known diesel fuel producers or importers that would be considered small or micro-businesses. The commission estimates that many independent retailers of diesel fuel, which are potential diesel emulsion fuel retailers in the affected counties, are small or micro-businesses that will probably not choose to mix diesel emulsion fuel on-site. The commission anticipates that small or micro-businesses that choose to dispense diesel emulsion fuel will purchase the mixed fuel from larger fuel distributors and store the fuel on-site. However, if a small or micro-businesses chooses to mix and dispense diesel emulsion fuel, a special blending unit will have to be purchased or leased. A typical blending unit would cost approximately $400,000 installed ($350,000 for the unit and $50,000 for installation). Production costs to produce diesel emulsion fuel, which incorporates the estimated $.08 per gallon increase based on the use of LED fuel as the baseline, are not anticipated to affect small or micro-business except for passing increased costs of production through to consumers. Of the 53,000 heavy-duty on-road diesel vehicles and the 10,000 non-road vehicles/equipment affected by the proposed amendments, some will be owned and operated by small or micro-businesses. The total annual cost to small or micro-businesses, not including blending unit and related infrastructure costs and non-road vehicles/equipment, would increase by $775 to $1,550 per heavy-duty diesel vehicle per year. There will be a cost increase associated with using diesel emulsion fuel in non-road vehicles/equipment; however, the total amount cannot be determined at this time. Total fiscal impact to small or micro-businesses will depend on the total number of vehicles affected by the proposed amendments that are owned and operated by individual small and micro-businesses.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis (RIA) 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 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 new sections to Chapter 114 are one element of the HGA Attainment SIP and will require the use of diesel emulsions in the HGA nonattainment area. While the new rules are intended to protect the environment, based on the analysis provided in the preamble, including the discussion in the Public Benefit and Costs section, the commission does not believe the rules will adversely affect, in a material way, the operation of on-road or non-road heavy- duty diesel engines or diesel emulsion fuel distributors. The commission does not believe these entities comprise a sector of the economy, or that these rules will 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.

Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention

and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633) during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that $NO_x$ emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain $NO_x$ emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, 382.017, 382.019, 382.037(g), and 382.039. The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. These proposed new rules are one element of the control strategy for the HGA Post-1999 ROP/Attainment Demonstration SIP. The specific purpose of the rulemaking is to require on-road or non-road heavy- duty diesel engines which are registered or primarily operated in the HGA nonattainment area to use diesel emulsion fuel. Adoption of these requirements to reduce $NO_x$ can contribute to attainment and maintenance of the one-hour ozone standard in the HGA nonattainment area. Promulgation and enforcement of the rules may burden private real property because the requirement to use diesel emulsion fuel could require a diesel emulsion fuel distributor to install a blending station or other equipment, that could be attached to private real property. Although the rule revisions do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and fulfill federal mandates under the 42 USC, §7410. Specifically, control requirements have been developed to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of this rulemaking is to implement restrictions on the use of heavy-duty on-road and non-road engines in the HGA ozone nonattainment area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these rules is that of an action reasonably taken to fulfill an obligation mandated by federal law; therefore, these proposed rules do not constitute a takings under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable

CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and $NO_x$ air emissions will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 50, National Primary and Secondary Ambient Air Quality Standards, and 40 CFR 51, Requirements for Preparation, Adoption, and Submittal Of Implementation Plans. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be mailed to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 2000-011K-114-AI. Comments must be received by 5:00 p.m., September 25 2000. For further information, please contact Sam Wells at (512) 239-1441 or Alan Henderson at (512) 239-1510.

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under the Texas Health and Safety Code, TCAA, §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed under TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.037(g), which authorizes the commission to regulate fuel content if it is demonstrated to be necessary for attainment of the NAAQS; and §382.039, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed new sections implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; §382.037(g), relating to Vehicle Emissions Inspection and Maintenance Program, and §382.039, relating to Attainment Program.

*§114.330. Definitions.*

Unless specifically defined in the TCAA or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following words and terms, when used in Subchapter H of this chapter (relating to Low Emission Fuels), shall have the following meanings, unless the context clearly indicates otherwise.

(1) Diesel emulsion additive - A type of diesel fuel additive which allows water and diesel to be blended so that it does not separate. The additive may also contain, but is not limited to, anti-freeze agents, cetane enhancers, and other ingredients.

(2) Diesel emulsion fuel - A water/fuel mixture containing a diesel fuel additive to emulsify the water with the fuel.

(3) Diesel emulsion fuel distributor - Any person, retailer, jobber, bulk fuel reseller, low emission diesel refiner who distributes diesel emulsion fuel to the ultimate user, diesel emulsion additive manufacturer, or other entity who distributes diesel emulsion fuel required to be mixed with a diesel emulsion additive.

(4) Non-road heavy-duty engine - A non-road engine that is greater than 175 nominal horsepower as rated by the manufacturer on the vehicle nameplate and is fueled by gasoline, diesel, diesel emulsion, or any alternate fuel, including, but not limited to, locomotives, tugs, tow-boats, construction equipment, and ferry boats.

(5) On-road heavy-duty diesel engine - An engine installed in an on-road vehicle which is greater than 10,000 pounds gross vehicle weight rating.

(6) Primarily operated - Use of a motor vehicle or engine more than 60 calendar days per year in an affected county. It is presumed that an on-road vehicle is primarily operated in the county in which it is registered.

*§114.331. Applicability.*

The requirements of this division apply to:

(1) diesel emulsion fuel distributors that supply fuel for on-road heavy-duty diesel engines which are registered in the counties listed under §114.339 (relating to Affected Counties and Compliance Dates) with a total throughput of at least 25,000 gallons per month at one fuel dispensing facility; and

(2) diesel emulsion fuel distributors who supply dyed and undyed diesel fuel for non-road heavy-duty engines primarily operated in the counties listed under §114.339 of this title with a total throughput of at least 500 gallons per month at one fuel dispensing facility.

*§114.332. Diesel Emulsion Standards.*

No diesel fuel shall be used in the counties listed in §114.329 of this title (relating to Affected Counties and Compliance Dates) unless it meets the following.

(1) The low emission diesel fuel used to blend diesel emulsion fuel must meet all the performance standards contained in §114.312 of this title (regarding Low Emission Diesel Standards).

(2) The diesel emulsion additive must be registered with the EPA in accordance with 40 Code of Federal Regulations (CFR), Subpart 80 (concerning Registration of Fuels and Fuel Additives, as amended on February 28, 2000).

(3) The amount, concentration, or volume of water must be within the diesel emulsion additive manufacturer specifications.

(4) The diesel emulsion must:

(A) result in emissions that are lower than the emissions of oxides of nitrogen in the low emission diesel as follows:

*(i)* on-road heavy-duty diesel engines - 15%; and

*(ii)* non-road heavy-duty diesel engine - 20%; and

(B) not result in a net increase in the other pollutant levels, as tested in accordance with 40 CFR, Subpart 80 as amended on February 28, 2000, or Title 13, California Code of Regulations, §2281 and §2282, as amended on June 4, 1997.

*§114.336. Recordkeeping and Labeling.*

(a) All diesel emulsion fuel distributors affected by this division shall maintain complete and accurate records for at least two years and, upon request, shall make such records available to representatives of the commission, EPA, or local air pollution control agency having jurisdiction in the area. The information in the records shall include, but shall not be limited to, proof of purchase of diesel emulsion fuel such as by bulk fuel contract, bills of lading, purchase orders, fuel analysis, or other records sufficient to demonstrate compliance.

(b) All tanks in service or blending units in which diesel emulsion fuel is stored must be clearly labeled with a sign which reads "DIESEL EMULSION FUEL ONLY" in at least four-inch letters, and each tank must have a visible, unique identification number which corresponds to a plot plan which shows the location of the tank or blending unit.

*§114.338. Registration.*

Diesel emulsion fuel distributors must register with the executive director. Registration will be on forms provided by the executive director and shall include a statement of acceptance of the requirements of this division and shall include a statement of consent by the registrant that the executive director shall be permitted to collect samples and have access to all documentation and records. The executive director shall maintain a listing of all registered diesel emulsion fuel distributors.

*§114.339. Affected Counties and Compliance Dates.*

Beginning on May 1, 2004, the requirements of this division shall be enforced in the counties of: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005630
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## SUBCHAPTER I. NON-ROAD ENGINES
## DIVISION 3. NON-ROAD LARGE SPARK-IGNITION ENGINES

**30 TAC §114.421, §114.429**

The commission proposes amendments to §114.421, Emission Specifications, and §114.429, Affected Counties and Compliance Schedules. These amendments to Chapter 114, Control of Air Pollution from Motor Vehicles; Subchapter I, Non-road Engines; Division 3: Non-road Large Spark-ignition Engines; and corresponding revisions to the associated state implementation plan (SIP) are being proposed in order to extend the existing requirements for non-road, large spark-ignition engines to all counties in the state thus controlling ground-level ozone in the state.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The Houston/Galveston (HGA) ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post-1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base-case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxides ($NO_x$) waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the $NO_x$ waiver were based on early base-case episodes which marginally exhibited

model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revisions to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to the EPA on May 19, 1998 a revision to the HGA SIP which contained the following elements in response to EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by the Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid- course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approveable attainment demonstration, the EPA has indicated that the state must adopt those strategies modeled in the November submittal and then adopt sufficient controls to close the remaining gap in $NO_x$ emissions. The modeling included in this proposal indicates a gap of an additional 77.98 tons per day (tpd) of $NO_x$ reductions is necessary for an approveable attainment demonstration. The commission estimates that this measure will achieve a minimum of 2.8 tpd of $NO_x$ equivalent reductions and is therefore a necessary measure

to consider for closing the gap and successfully demonstrating attainment.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains Post- 1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The HGA ozone nonattainment area will need to ultimately reduce $NO_x$ more than 750 tpd to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Extension of the large spark-ignition nonroad engine rules will contribute to attainment and maintenance of the one-hour ozone standard in the HGA area. The extension of these rules to all counties in the state should also contribute to maintenance of the one-hour ozone standard in the rest of the state.

The EPA has been regulating highway (on-road) cars and trucks since the early 1970s and continues to set increasingly stringent emissions standards for such vehicles. After considerable progress has been made in controlling emissions from on-road vehicles, the EPA has turned its attention to non-road (also called off-road) engines, which also contribute significantly to air pollution. Although emissions from non-road, large spark-ignition (LSI) engines have not yet been regulated by the EPA, the California Air Resources Board (CARB) has adopted exhaust emission standards for these engines. Non-road, LSI engines are primarily used to power industrial equipment such as forklifts, generators, pumps, compressors, aerial lifts, sweepers, and large lawn tractors. The engines are similar to automotive engines and can use similar automotive technology, such as closed-loop engine control and three-way catalysts, to reduce emissions.

The CARB has determined the exhaust emission standards for non-road, LSI engines to be technologically feasible and a cost effective strategy at $.25 per pound ($500 per ton) of $NO_x$ and hydrocarbons (HC) reduced, that will move the state toward reducing $NO_x$ and HC from non-road, LSI engines. HC, also called VOC, and $NO_x$ are precursor chemicals that contribute to the formation of ground-level ozone. The HGA area alone will contain 23% of the state's LSI engines by 2007, or approximately 88,374 engines. Statewide, there will be approximately 371,096 LSI engines by 2007. Adoption and implementation of California standards for non-road, LSI engines throughout the state should reduce the amount of VOC and $NO_x$ emissions from these sources and, therefore, help control ground-level ozone in nonattainment areas. For the HGA ozone nonattainment area, emission reductions by 2007 will be approximately 2.8 tpd. The program is estimated to cost about $500 per ton of $NO_x$ reduced, which compares very favorably with the cost per ton of other emission control strategies.

These amendments are proposed in order to control ground-level ozone in the state by restricting the sale and use of non-road, LSI engines 25 horsepower (hp) and larger produced in model year 2004, and all equipment and vehicles produced on or after January 1, 2004 that use such engines; to LSI engines that are certified under Title 13, California Code of Regulations, Chapter 9, concerning Off- Road Vehicles and Engines Pollution Control Devices (13 CCR 9), as adopted by the CARB on October 19, 1999 and effective November 18, 1999. The commission is incorporating the non-road, LSI engine rules by reference including all future revisions due to the need for the Texas program to remain identical to the program in California. For any state program that differs from the federal standards, the 42 USC, §7543(e)(2)(B), requires the state programs to be identical. The rules are proposed to be effective throughout the State of Texas. The proposed amendments are necessary in order to attain and maintain the ozone standard in nonattainment areas, and to establish a single equipment design standard for the state. A single equipment design standard will help to prevent incompatibility and expense which may arise from the distribution of equipment with different emission standards.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION-BY-SECTION DISCUSSION

The intent of these proposed amendments is to extend to all counties in the State of Texas the existing non-road, LSI standards in the Dallas/Fort Worth (DFW) area. These existing standards are identical to the non-road, LSI standards in place in California.

The following sections of Division 3 were adopted during the DFW rule promulgation and cannot be reopened for public comment in this proposal because no changes are being proposed to these sections: §114.420, Definitions; §114.422, Control Requirements; and §114.427, Exemptions. The two sections of the rules being opened for comment will be §114.421 and 114.429. Section 114.421 is proposed to be amended to reflect the statewide applicability of the LSI rules, and §114.429 is proposed to be amended to reflect the compliance dates for the new portions of the state being affected by this rulemaking action.

Additionally, §§114.420, 114.422, and 114.427 may not be reopened because they incorporate by reference the California non-road, LSI rules and all future revisions as those rules are set out in 13 CCR 9, concerning Off-Road Vehicles and Engines Pollution Control Devices, as adopted by the CARB on October 19, 1999 and effective November 18, 1999. The Texas program must remain identical to the California program, so the sections already incorporated by reference in the DFW rulemaking may not be changed to be different from the California 13 CCR 9 rules.

Existing §114.421 (Emission Specifications) incorporated by reference the 42 definitions found in 13 CCR 9, §2431 (Definitions). This proposal makes no changes to these definitions.

Existing §114.429 applied the control requirements to nine counties in the DFW area which include Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties. These proposed amendments extend the control requirements to all counties within the state. Proposed §114.429 also specifies the compliance schedule for engine manufacturers.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed amendments to Chapter 114 are in effect there will be no significant fiscal implications for any single unit of state and local government as a result of administration or enforcement of the proposed amendments unless that unit of government replaces between 200 and 1,000 of these engines annually. The proposed amendments to Chapter 114 would require units of state and local government, businesses, and individuals statewide that own or operate non-road LSI engines of 25 hp and larger produced on or after January 1, 2004, and all equipment and vehicles produced on or after January 1, 2004 that use such engines, to use LSI engines certified under 13 CCR 9 as adopted by the CARB on October 19, 1999.

Non-road LSI engines are primarily used to power industrial equipment such as forklifts, generators, pumps, compressors, aerial lifts, sweepers, and large lawn tractors. The engines are similar to automotive engines and can use similar automotive technologies to reduce emissions. The CARB has determined the proposed standards are technologically feasible and has adopted exhaust emission standards for these engines designed to reduce $NO_x$ and VOC emissions. Oxides of nitrogen and VOC are precursor chemicals that contribute to the production of ground-level ozone.

The proposed amendments include exemptions for: 1.) Engines less than 175 hp used in construction and agriculture; 2.) Engines operated on or in any device used exclusively upon stationary rails or tracks; 3.) Engines used to propel marine vessels; 4.) Internal combustion engines attached to a foundation at a location for at least 12 consecutive months; 5.) Recreational vehicles and snowmobiles; and 6.) Stationary or transportable gas turbines for power generation.

The commission is required to submit a new SIP revision by the end of 2000 which will bring the HGA nonattainment area into attainment with the ozone NAAQS by 2007. The rule proposed for the HGA nonattainment area in this notice is one element of the HGA Post-1999 ROP/Attainment Demonstration SIP. A SIP is a plan developed for any region where existing (measured and/or modeled) ambient levels of pollutants exceed the levels specified in a national standard. The plan sets forth a control strategy that provides emission reductions necessary for attainment and maintenance of the national standards. The proposed set of rules are necessary for the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS.

The cost of the technology needed to reduce emissions from these engines to comply with the standards is projected by an environmental consultant (Environ) to be approximately $100 to $500 per engine depending upon the engine size and typical engine type. Engines that currently apply closed- loop control would require less additional equipment reducing the overall cost of meeting the new standard. The commission estimated that the total cost impact of reducing emissions from the 176,522 engines to be purchased during calendar years 2004 through 2007 will be in the range of $18 million to $88 million or an average of approximately $4 million to $22 million per year from 2004 through 2007. A breakdown of the total number of engines bought by owner (i.e. state and local government, individuals or businesses) is not available at this time. However, the costs are not anticipated to be significant to any single unit of state or local government, unless that unit of government replaces between 200 and 1,000 of these engines annually.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed amendments to Chapter 114 are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be the potential reduction of $NO_x$ and VOC emissions, potentially improved air quality, and contribution toward demonstration of attainment with the ozone NAAQS.

There are no significant fiscal implications anticipated to individuals, state and local government agencies, and businesses statewide that own or operate affected equipment powered by LSI engines as a result of implementing the proposed amendments unless an entity replaces between 200 and 1,000 of these engines annually. The proposed amendments to Chapter 114 would require units of state and local government, businesses, and individuals statewide that own or operate non-road LSI engines of 25 hp and larger produced on or after January 1, 2004, and all equipment and vehicles produced on or after January 1, 2004 that use such engines to use LSI engines certified under 13 CCR 9 as adopted by the CARB on October 19, 1999. Affected owners and operators of this equipment will not be required to retrofit or purchase new engines for their existing inventory. However, if equipment is replaced with equipment produced after January 1, 2004, the new equipment must meet the proposed standards.

The proposed amendments allow manufacturers to continue to sell in-stock equipment that predates the proposed amendments in a phase-down manner. The phase-down requires that 25% of the equipment sold in year 2004 must have CARB-certified engines; 50% in year 2005; and 100% in year 2006 and thereafter. It is estimated that 25% of the engines sold in year 2004 will be CARB-certified engines that meet the proposed standards. The commission also estimated that 50% of the engines sold in year 2005 will be CARB-certified engines. In years 2006 and thereafter, the commission estimated that all engines sold will be CARB-certified engines. The commission estimated that 12,089 CARB- certified engines will be purchased statewide during year 2004; 27,098 certified engines in year 2005; 65,189 certified engines in 2006; and 72,146 certified engines in 2007, for a total of 176,522 CARB- certified engines during calendar years 2004 through 2007.

The cost of the technology needed to reduce emissions from these engines to comply with the standards is projected by an environmental consultant (Environ) to be approximately $100 to $500 per engine depending upon the engine size and typical engine type. Engines that currently apply closed- loop control would require less additional equipment reducing the overall cost of meeting the new standard. It is estimated that the total cost impact of reducing emissions from the 176,522 engines projected to be purchased during calendar years 2004 through 2007 will be in the range of $18 million to $88 million or an average of approximately $4 million to $22 million per year from 2004 through 2007.

These costs may be mitigated by improved performance of these types of engines. The following is quoted from an EPA Engine Programs and Compliance Division Memorandum dated January 29, 1999, titled *California Requirements for Large SI Engines and Possible EPA Approaches*: "Upgrading to modern engine technologies greatly improves the capability of these engines to control emissions and will generally improve engine performance. Electronically-controlled closed-loop operation also provides the potential for great improvement in engine operation. For example, improving control of combustion may allow a fuel economy improvement of 15% to 20%. Also, feedback control of air-fuel ratios eliminates much of the need to maintain and adjust a large number of fuel system calibrations, resulting in reduced product inventories and, more importantly, less downtime and maintenance for equipment in the field. Finally, improved control of the upgraded engines should lead to significantly longer engine lifetimes. The net present value of these benefits would likely be considerably greater than the incremental cost of improving the engines."

SMALL AND MICRO-BUSINESS ASSESSMENT

There are no significant fiscal implications anticipated to small and micro-businesses as a result of implementing the proposed amendments because there are no known small or micro-businesses that would need to replace from 200 to 1,000 of these engines annually. Estimates of the number of small and micro-businesses statewide that own and operate non-road equipment powered by LSI engines of 25 hp and larger are not available at this time; however, it is anticipated that costs would be similar to those for business in general as indicated in the Public Benefit and Costs Section of this preamble. The cost of the technology needed to reduce emissions from these engines to comply with the standards is projected by an environmental consultant (Environ) to be approximately $100 to $500 per engine depending upon the engine size and typical engine type. Engines that currently apply closed-loop control would require less additional equipment reducing the overall cost of meeting the new standard. The costs will depend less on the relative size of the company, and more on the size and number of non-road equipment powered by LSI engines that they own and operate.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. "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 new sections to Chapter 114 are one element of the HGA attainment SIP. While the new rules are intended to protect the environment, based on the analysis provided in the preamble, including the discussion in the Public Benefit and Costs section of this preamble, the commission does not believe the rules will adversely affect, in a material way, the sale or use of non-road large spark-ignition (LSI) engines. The commission does not believe these entities comprise a sector of the economy, or that these rules will 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.

Provisions of 42 USC, §7410 require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633) during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact

is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The proposed amendments to Chapter 114 are intended to protect the environment or reduce risks to human health from environmental exposure to ozone but are not anticipated to affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments would require units of state and local government, businesses, and individuals statewide that own or operate model year 2004 and subsequent non-road LSI engines of 25 hp and larger, and all equipment and vehicles that use such engines to use LSI engines certified under 13 CCR 9 as adopted by the CARB on October 19, 1999. The increased cost of $100 to $500 per engine would not cause material impact given the high total cost of this type of equipment. This air pollution control program is part of the strategy to reduce emissions of $NO_x$ necessary for the counties included in the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The commission is required to submit a new SIP revision by the end of 2000 which will bring the HGA nonattainment area into attainment by 2007. The rules proposed for HGA nonattainment area in this notice is one element of the ozone attainment demonstration SIP for HGA. The proposed set of rules are necessary for the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS. In addition, §2001.0225 only applies 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 proposal is not an express requirement of state law. This proposal is intended to help bring ozone nonattainment areas into compliance, and to help keep attainment and near nonattainment areas from becoming nonattainment areas. The proposed amendments do not exceed a standard set by federal law, exceed an express requirement of state law unless specifically required by federal law, nor exceed a requirement of a delegation agreement. The proposed amendments were not developed solely under the general powers of the agency but were specifically developed to meet the air quality standards established under federal law as NAAQS, as authorized under Texas Clean Air Act (TCAA), §§382.012, 382.017, 382.019, and 382.039.

The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking is to establish emission requirements on model year 2004 and subsequent non-road, LSI engines 25 hp and larger and all equipment and vehicles that use such engines by requiring these engines to be certified under 13 CCR 9 throughout the state. This proposed rulemaking will act as an air pollution control strategy to reduce $NO_x$ emissions in the ozone nonattainment areas so that they may demonstrate attainment with the ozone NAAQS and maintain air quality in near nonattainment areas across the state. Promulgation and enforcement of the proposed rules will not burden private, real property. Although the proposed rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emissions limitations and delays within this proposal were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rule proposal is to implement a cleaner-burning, non-road, LSI engine program necessary for the entire state to meet air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these proposed revisions will not constitute a taking under the Texas Government Code, Chapter 2007.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and $NO_x$ air emissions will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 50, National Primary and Secondary Ambient Air Quality Standards, and 40 CFR 51, Requirements for Preparation, Adoption, and Submittal Of Implementation Plans. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic

Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 2000-011G-114-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Roland Castaneda, II at (512) 239-0774, or Alan Henderson at (512) 239-1510.

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under the Texas Health and Safety Code, TCAA, §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also proposed under TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §382.039, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed amendments implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; and §382.039, relating to Attainment Program.

*§114.421. Emission Specifications.*

(a) (No change.)

(b) Exhaust emissions from new non-road, LSI engines manufactured for sale, sold, or offered for sale, or that are introduced, delivered or imported for introduction into commerce in the State of Texas [~~counties listed in §114.429 of this title (relating to Affected Counties and Compliance Schedules)~~] shall not exceed the requirements of Title 13, California Code of Regulations, Chapter 9 (13 CCR 9), §2433(b), concerning Exhaust Emission Standards and Test Procedures -- Off-Road Large Spark-Ignition Engines, as effective on November 18, 1999.

(c) New non-road, LSI engines operated in the State of Texas [~~counties listed in §114.429 of this title~~] shall not exceed the requirements of 13 CCR 9, §2433(b).

(d) (No change.)

*§114.429. Affected Counties and Compliance Schedules.*

~~[(a) The provisions of this division shall apply in the following counties: Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.]~~

(a) [~~(b)~~] Beginning with model year 2004, but no later than January 1, 2004, all sales of new non-road, large spark-ignition (LSI) engines in the State of Texas [~~affected counties~~] shall comply with §114.421(b) of this title (relating to Emissions Specifications) and §114.422 of this title (relating to Control Requirements).

(b) [~~(c)~~] Beginning January 1, 2004, new non-road, LSI engines as defined in §114.420 of this title (relating to Definitions) which are used in the State of Texas [~~affected counties~~] shall comply with §114.421(c) of this title.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005645
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## DIVISION 5. NITROGEN OXIDES REDUCTION SYSTEMS

**30 TAC §§114.440 - 114.442, 114.445, 114.446, 114.448, 114.449**

The Texas Natural Resource Conservation Commission (commission) proposes new §114.440, Definitions; §114.441, Applicability; §114.442, Control Requirements; §114.445, Emission Reduction Credits; §114.446, Recordkeeping and Labeling; §114.448; Registration; and §114.449; Affected

Counties and Compliance Dates. The commission proposes these amendments to Chapter 114, Control of Air Pollution From Motor Vehicles; Subchapter I, Non-road Engines; new Division 5, Nitrogen Oxides Reduction Systems; and corresponding revisions to the state implementation plan (SIP) in order to control ground-level ozone in the Houston/Galveston (HGA) ozone nonattainment area.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post- 1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base-case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxides ($NO_x$) waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the $NO_x$ waiver were based on early base-case episodes which marginally exhibited model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revisions to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to the EPA on May 19, 1998 a revision to the HGA SIP which contained the following elements in response to EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could

result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid- course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approvable attainment demonstration, the EPA has indicated that the state must adopt those strategies modeled in the November submittal and then adopt sufficient controls to close the remaining gap in $NO_x$ emissions. The modeling included in this proposal indicates a gap of an additional 77.98 tons per day (tpd) of $NO_x$ reductions is necessary for an approvable attainment demonstration. The commission estimates that this measure will achieve a minimum of 16.25 tpd of $NO_x$ reductions and is therefore a necessary measure to consider for closing the gap and successfully demonstrating attainment.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains Post- 1999 ROP plans for the milestone years 2002, 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The HGA ozone nonattainment area will need to ultimately reduce $NO_x$ more than 750 tpd to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of the $NO_x$ reduction systems program will contribute to attainment and maintenance of the one-hour ozone standard in the HGA area.

These proposed amendments are one element of the control strategy for the HGA Post-1999 ROP/Attainment Demonstration SIP. The proposed amendments would require owners or operators of on-road or non-road vehicles or equipment manufactured prior to model year 1997 having a heavy-duty on-road or non-road engine and fueled by gasoline, diesel, diesel emulsion fuel or any alternate fuel located in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties to use exhaust systems that will achieve a 80% reduction in $NO_x$ emissions from what the engine would emit without the exhaust system. Examples of exhaust systems that could be used to meet the proposed rule are $NO_x$ adsorbers, methane catalysts, diesel oxidation catalysts, selective catalyst reduction, lean $NO_x$ catalysts, and other exhaust after-treatment systems. Adoption of these requirements to reduce $NO_x$ can contribute to attainment and maintenance of the one-hour ozone standard in the HGA area.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging systems which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION BY SECTION DISCUSSION

The proposed §114.440 has the following definitions: "$NO_x$ Reduction System" is defined as an exhaust or engine-related control device designed for gasoline or diesel engine exhaust systems to achieve $NO_x$ emissions reductions. For example, a $NO_x$ Reduction System could include exhaust systems which use catalysts such as $NO_x$ adsorbers, methane catalysts, diesel oxidation catalysts, selective catalyst reduction, lean $NO_x$ catalysts, and other exhaust after-treatment systems. A "Heavy- Duty On-Road Engine" is defined as an on-road engine installed in an on-road vehicle that is greater than 10,000 pounds gross vehicle weight rating (GVWR) and is fueled by gasoline, diesel, diesel emulsion fuel, or any alternate fuel. This would exclude vehicles regulated under the federal Tier 2 engine standards. A "Heavy-Duty Non-Road Engine" is defined as a non-road engine used in locomotives, tugs, tow-boats, and ferry boats, that is greater than 175 nominal horsepower (hp) as rated by the manufacturer on the vehicle nameplate and is fueled by gasoline, diesel, diesel emulsion fuel, or any alternate fuel. The proposal focuses on the use of both heavy-duty on-road and non-road engines; because, as seen in the EPA MOBILE and NONROAD models, heavy-duty engines have $NO_x$ emissions which are six to 12 times higher than their light-duty counterparts. "Primarily Operated" is defined as the use of a motor vehicle or engine more than 60 calendar days per year in an affected county; it is presumed that an on-road vehicle is primarily operated in the county in which it is registered.

Proposed §114.441 provides that owners or operators of on-road or non-road vehicles or equipment manufactured prior to model year 1997 having a heavy-duty on-road or non-road engine and fueled by gasoline, diesel, diesel emulsion fuel, or any alternate fuel primarily operated in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties must comply with the requirements of Subchapter I, Division 5. The commission believes these model years are appropriate because newer vehicles and engines have generally much lower

$NO_x$ emissions. Thus, the commission believes the regulatory focus should be on the older heavy-duty engines with higher emissions.

Proposed §114.442 provide the criteria for use of heavy-duty on-road and non-road engines in the affected counties. $NO_x$ reduction systems used by any heavy-duty on-road and non-road engines in the affected counties must, at a minimum, comply with the emissions testing and emission standards required by applicable EPA or California Air Resources Board (CARB) regulations. The $NO_x$ reduction system installed on the vehicle or engine must be able to reduce $NO_x$ emissions by at least 80%. Initial laboratory tests show that the use of $NO_x$ reduction systems can reduce $NO_x$ emissions from 65% to in excess of 99%. Based on the emissions modeling for HGA, the commission believes the 80% reduction is necessary to achieve attainment. Further, the $NO_x$ reduction system must not result in a net increase in other primary pollutants.

The commission anticipates that $NO_x$ reduction systems currently under development will be available by May 1, 2004, the proposed compliance date for the proposed rules. The commission believes this is true because $NO_x$ reduction systems are being developed. However, the commission acknowledges that no $NO_x$ reduction systems have been certified for use by the EPA in on-road and non-road applications. This is because most of these systems are used in large, stationary, industrial diesels which have steady-state loads. Nevertheless, the commission believes that these systems will be developed and that they are critical towards obtaining necessary reductions in $NO_x$ emissions in the HGA nonattainment area. Further, to provide consistency in the development process and for implementation, it is important that these systems be able to meet applicable EPA and CARB standards. However, heavy- duty on-road and non-road engines are often subjected to harsh, transient loads which cause variation in catalyst performance. For these reasons, the commission is specifically soliciting comments about alternatives to the use of $NO_x$ reduction systems as means of control which could achieve the same emission reductions.

Proposed §114.445 provides the incentive for owners or operators of affected heavy-duty on-road and non-road engines to install $NO_x$ reduction systems that result in reductions in excess of the required 80% $NO_x$ emissions reduction. If a $NO_x$ reduction system is used that will achieve greater than 80% $NO_x$ reductions, the owner or operator may obtain mobile emissions reduction credits in accordance with §101.29 of this title (relating to Emission Credit Banking and Trading.) In addition to demonstrating that the $NO_x$ reduction system will achieve $NO_x$ emission reductions of greater than 80%, the owner or operator must demonstrate that all applicable sections of Chapter 114 are met, including Subchapter B, §114.20 and §114.21, relating to Motor Vehicle Anti-Tampering Requirements; Subchapter E, §§114.150 - 114.157, relating to Low Emission Vehicle Fleet Requirements; and Subchapter I, §§114.400 - 114.439, relating to Non-Road Engines. This will ensure that the emissions from $NO_x$ reduction systems comply with Chapter 114 and that additional reductions are surplus to reductions required by other rule requirements.

Recordkeeping and labeling requirements are addressed in proposed §114.446. The owner or operator of heavy-duty on-road and non-road engines in the affected counties must follow manufacturer installation, maintenance, and labeling requirements as required for the $NO_x$ reduction system and by the EPA in 40 Code of Federal Regulations (CFR) Part 86, Control of Emissions from New and In-Use Highway Vehicles and Engines as amended on February 28, 2000; or 40 CFR Part 89, Control of Emissions from New and In-Use Nonroad Compression-Ignition Engines; or by CARB in Title 13, California Code of Regulations, §1976, as amended on February 26, 1999.

Registration of on-road and non-road engines is specified in §114.448. Owners and operators of affected engines must register using a form available from the executive director which proves that a $NO_x$ reduction system that meets the requirements of Chapter 114 was properly installed.

Affected counties are addressed in §114.449. The affected counties in the HGA ozone nonattainment area are Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller. If adopted, compliance with the rules would be required on May 1, 2004.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed amendments are in effect, there will be fiscal implications which may be significant for units of state and local government located in the HGA ozone nonattainment area as a result of administration or enforcement of the proposed amendments.

The proposed amendments require the use of $NO_x$ reduction systems, that will achieve a 80% reduction in $NO_x$, from all engines manufactured prior to model year 1997 installed in on-road vehicles with a GVWR greater than 10,000 pounds and on engines rated at 175 nominal hp or greater used in non-road locomotives and commercial marine vessels primarily operated in the HGA ozone nonattainment area by May 1, 2004. The $NO_x$ reductions must be accomplished without increasing other pollutants. The HGA area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller counties. The proposed rules would affect approximately 340 state and local government and 64,000 privately owned and operated on-road heavy-duty vehicles and an unknown number of locomotives and commercial marine vessels.

Examples of $NO_x$ reduction systems that could be used to meet the proposed rules are $NO_x$ absorbers, methane catalysts, diesel oxidation catalyst, selective catalyst reduction, lean $NO_x$ catalysts, and other exhaust after-treatment systems.

The commission anticipates that approximately 340 heavy-duty on-road vehicles are owned and operated by state and local governments. Based on a report from the Manufacturers of Emission Controls Association (MECA) titled *Emission Control Retrofit of Diesel-Fueled Vehicles*, the cost to state and local governments to purchase emission control devices that would meet the emission requirements of the proposed amendments would range from $500 to $2,000 per heavy-duty on-road and non-road vehicles/equipment.

The total costs to state and local governments within the HGA area would be approximately $170,000 to $680,000 for heavy-duty on-road vehicles/equipment as a result of implementing the proposed amendments. The total costs do not factor in non-road locomotives and commercial marine vessels because the total number owned and operated by state and local governments in the HGA area is unknown. The commission anticipates the operating costs associated with the proposed amendments will not

be significant unless 50 - 200 or more affected vehicles/equipment are owned and operated by a single unit of state or local government.

PUBLIC BENEFIT AND COSTS

Mr. Davis also has determined that for the first five years the proposed amendments are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be the potential reduction of on-road and non-road mobile source emissions, potentially improved air quality, and contribution toward demonstration of attainment with the NAAQS for the HGA ozone nonattainment areas.

The proposed amendments require the use of $NO_x$ reduction systems that will achieve an 80% reduction in $NO_x$, from all engines manufactured prior to model year 1997 installed in on-road vehicles with a GVWR greater than 10,000 pounds and engines rated at 175 nominal hp or greater installed in non-road locomotives and commercial marine vessels primarily operated in the HGA area by May 1, 2004. The $NO_x$ reductions must be accomplished without increasing other pollutants.

The commission estimates that approximately 64,000 heavy-duty on-road vehicles affected by the proposed amendments are owned and operated by individuals and businesses. Based on a report from the MECA titled *Emission Control Retrofit of Diesel-Fueled Vehicles*, the cost to state and local governments to purchase emission control devices that would meet the emission requirements of the proposed amendments would range from $500 to $2,000.

The total costs to individuals and businesses within the HGA area as a result of the proposed amendments would be approximately $32 million to $128 million as a result of implementing the proposed amendments. The total costs does not factor in non-road locomotives or commercial marine vessels because the total number owned and operated by individuals and businesses in the HGA area is unknown. The total fiscal impact to individuals and businesses would depend on the number of vehicles that would be required to have the $NO_x$ reducing systems installed.

SMALL AND MICRO-BUSINESS ASSESSMENT

There may be adverse fiscal implications for small or micro-businesses located in the HGA area as a result of administration or enforcement of the proposed amendments. The proposed amendments require the use of $NO_x$ reduction systems that will achieve a 80% reduction in $NO_x$, on all engines manufactured prior to model year 1997 installed in on-road heavy-duty vehicles with a GVWR greater than 10,000 pounds or higher, and engines with a hp rating greater than 175 installed in non-road locomotives and commercial marine vessels primarily operated in the HGA area by May 1, 2004. The $NO_x$ reductions must be accomplished without increasing other pollutants. Of the approximately 64,000 privately owned and operated on-road heavy- duty vehicles and the unknown number of non-road locomotives and commercial marine vessels affected by the proposed amendments, some are anticipated to be owned and operated by small and/or micro-businesses in an amount that cannot be determined. The cost to small or micro-businesses to purchase emission control devices that would meet the emission requirements of the proposed amendments would range from $500 to $2,000 per vehicle affected by the proposed amendment. The total fiscal impact to small or micro-businesses would depend on the number of vehicles that would be required to have the $NO_x$ reduction systems installed.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking action 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, 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 amendments to Chapter 114 are one element of the HGA Post- 1999 ROP/Attainment Demonstration SIP and will require $NO_x$ emission reductions from owners or operators of heavy-duty on-road and non-road engines in the HGA ozone nonattainment area. The commission does not believe the rules will have an adverse, material affect or will impact a sector of the economy. While the new rules are intended to protect the environment, based on the analysis provided in the preamble including the discussion in the Public Benefit and Costs section, the commission does not believe the rules will adversely affect, in a material way, the use of heavy-duty engines greater than 10,000 pounds GVWR or heavy-duty non-road engines that are greater than 175 nominal hp as rated by the manufacturer on the nameplate, both of which are fueled by gasoline, diesel, diesel emulsion fuel, or any alternative fuel. The commission does not believe that the owners or operators of these entities comprise a sector of the economy, or that these rules will 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.

Title 42 USC, §7410, requires states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the 42 USC SIP structure. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislative Session. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified

in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission has performed photochemical grid modeling which predicts that $NO_x$ emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking action does not exceed an express requirement of state law. This rulemaking action is intended to obtain $NO_x$ emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA) §§382.002, 382.011, 382.012, 382.019, and 382.039.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. These proposed new sections are one element of the control strategy for the HGA Post-1999 ROP/Attainment Demonstration SIP. The specific purpose of the rulemaking is to require owners or operators of on- road or non-road vehicles or equipment manufactured prior to model year 1997 having a heavy-duty on-road or non-road engine and fueled by gasoline, diesel, diesel emulsion fuel, or any alternate fuel located in the HGA nonattainment area to use exhaust systems that will achieve a 80% reduction in $NO_x$ emissions from what the engine would emit without the exhaust technology. Adoption of these requirements to reduce $NO_x$ can contribute to attainment and maintenance of the one-hour ozone standard in the HGA area.

Promulgation and enforcement of the rule amendments will not burden private real property because the $NO_x$ reduction system requirement applies to heavy-duty on-road and non-road engines, which are not attached to, or considered to be, private real property. Although the rule revisions do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and fulfill federal mandates under the 42 USC, §7410. Specifically, control requirements have been developed to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of this rulemaking action is to implement restrictions on the use of heavy-duty on-road and non-road engines in the HGA ozone nonattainment area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these rules is that of an action reasonably taken to fulfill an obligation mandated by federal law; therefore, these proposed rules do not constitute a takings under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council. For this rulemaking, the commission determined that the rules are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. This rulemaking will require owners or operators of on-road or non-road vehicles or equipment manufactured prior to model year 1997 having a heavy-duty on-road or non-road engine and fueled by gasoline, diesel, diesel emulsion fuel, or any alternate fuel located in the HGA nonattainment area to use exhaust systems that will achieve a 80% reduction in $NO_x$ emissions from what the engine would emit without the exhaust system. Adoption of these requirements to reduce $NO_x$ can contribute to attainment and maintenance of the one-hour ozone standard in the HGA area. This action is consistent with the CMP because it does not

authorize any new emissions and will reduce existing emissions of $NO_x$.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, faxed to (512) 239-4808, or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 2000- 011M-114-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Sam Wells at (512) 239-1441 or Alan Henderson at (512) 239-1510.

STATUTORY AUTHORITY

The new sections are proposed under the Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under the Texas Health and Safety Code, TCAA, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed under TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §382.039, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed new sections implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; and §382.039, relating to Attainment Program.

*§114.440. Definitions.*

Unless specifically defined in the TCAA or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Heavy-duty on-road engine - An on-road engine installed in an on-road vehicle that is greater than 10,000 pounds gross vehicle weight rating, and is fueled by gasoline, diesel, diesel emulsion fuel, or any alternate fuel.

(2) Heavy-duty non-road engine - A non-road engine used in locomotives, tugs, tow-boats, and ferry boats that is greater than 175 nominal horsepower as rated by the manufacturer on the vehicle nameplate and is fueled by gasoline, diesel, diesel emulsion, or any alternate fuel.

(3) Nitrogen oxides ($NO_x$) reduction system - An exhaust or engine-related control device designed for gasoline or diesel engine exhaust systems to achieve $NO_x$ emissions reductions;

(4) Primarily operated - Use of a motor vehicle or engine more than 60 calendar days per year in an affected county. It is presumed that an on-road vehicle is primarily operated in the county in which it is registered.

*§114.441. Applicability.*

(a) Owners or operators of non-road vehicles or equipment manufactured prior to model year 1997 having a heavy-duty non-road engine primarily operated in the counties listed in §114.449 of this title (relating to Affected Counties and Compliance Dates) must comply with the requirements of this division.

(b) Owners or operators of on-road vehicles or equipment manufactured prior to model year 1997 having a heavy-duty on-road engine primarily operated in the counties listed in §114.449 of this title must comply with the requirements of this division.

*§114.442. Control Requirements.*

(a) Non-road vehicles or equipment manufactured prior to model year 1997 using heavy-duty on-road and non-road engines primarily operated in the counties listed in §114.449 of this title (relating to Affected Counties and Compliance Dates) must use nitrogen oxides ($NO_x$) emission reduction systems that are approved:

(1) by the EPA as to their emissions as tested by the applicable Federal Test Procedure in 40 Code of Federal Regulations (CFR) Part 86, Control of Emissions from New and In-Use Highway Vehicles and Engines as amended on February 28, 2000; or 40 CFR Part 89,

Control of Emissions from New and In-Use Nonroad Compression-Ignition Engines as amended on October 23, 1998; or

(2) by the California Air Resources Board as tested by the applicable emissions test in Title 13, California Code of Regulations, §1976, as amended on February 26, 1999.

(b) Owners or operators of heavy-duty engines subject to §114.441 of this title (relating to Applicability) shall ensure that the $NO_x$ reduction system has a minimum control efficiency of 80% for $NO_x$ emissions.

(c) The installation of the $NO_x$ reduction system cannot result in an increase in any pollutant.

*§114.445. Emission Reduction Credits.*

(a) Owners or operators of heavy-duty engines subject to §114.441 of this title (relating to Applicability) that install nitrogen oxides ($NO_x$) reduction systems that achieve greater than 80% reductions as required by §114.442 of this title (relating to Control Requirements) may obtain mobile emissions reduction credits in accordance with §101.29 of this title (relating to Emission Credit Banking and Trading.)

(b) In order to demonstrate that the $NO_x$ reduction system will achieve emission reductions of greater than 80%, the owner or operator of the on-road heavy-duty engine or non-road heavy-duty engine must demonstrate that all applicable sections of this chapter are met, including the following provisions:

(1) §114.20 of this title (relating to Maintenance and Operation of Air Pollution Control Systems or Devices Used to Control Emissions from Motor Vehicles);

(2) §§114.150-157 of this title (relating to Requirements for Mass Transit Authorities, Requirements for Local Governments and Private Entities, Exceptions, Exceptions for Certain Mass Transit Authorities, Reporting, Record Keeping, and Low Emission Vehicle Fleet Program Compliance Credits); and

(3) the requirements of Chapter 114, Control of Air Pollution from Motor Vehicles, Subchapter I, Non-Road Engines, Division 5: Airport Ground Support Equipment; Division 2: Heavy Equipment Fleets - Compression-Ignition Engines; Division 3: Non-Road Large Spark-Ignition Engines; and Division 4: Construction Equipment Operating Restrictions.

*§114.446. Recordkeeping and Labeling.*

Owners or operators of heavy-duty on-road and non-road engines subject to §114.441 of this title (relating to Applicability) that install nitrogen oxides ($NO_x$) reduction systems must follow all:

(1) written procedures by the manufacturer of the $NO_x$ reduction systems, as to engine maintenance and recordkeeping; and

(2) written labeling requirements set by the EPA in 40 Code of Federal Regulations (CFR), Part 86, as amended on February 28, 2000 or the California Air Resources Board in Title 13, California Code of Regulations, §1976, as amended on February 26, 1999.

*§114.448. Registration.*

Owners or operators of heavy-duty on-road and non-road engines subject to §114.441 of this title (relating to Applicability) that install nitrogen oxides ($NO_x$) reduction systems must submit registration on an appropriate form available from the executive director which will require information that demonstrates compliance with the requirements of this division.

*§114.449. Affected Counties and Compliance Dates.*

Beginning on May 1, 2004, the requirements of this division shall be enforced in the following counties: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005629
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## DIVISION 6. LAWN SERVICE EQUIPMENT OPERATING RESTRICTIONS

**30 TAC §114.452, §114.459**

The Texas Natural Resource Conservation Commission (commission) proposes new §114.452, Control Requirements, and §114.459, Affected Counties and Compliance Dates. The commission proposes these revisions to add new Division 6, Lawn Service Equipment Operating Restrictions, to Subchapter I, Nonroad Engines; Chapter 114, Control of Air Pollution from Motor Vehicles; and to the associated state implementation plan (SIP). The commission proposes these amendments to Chapter 114 and corresponding revisions to the SIP in order to control ground-level ozone in the Houston/Galveston (HGA) ozone nonattainment area. The proposed revisions are one element of the control strategy for the proposed HGA Post-1996 Rate-of-Progress (ROP)/Attainment Demonstration SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post-1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base-case episodes, adopted rules to achieve a 9% ROP reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxides ($NO_x$) waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the $NO_x$ waiver were based on early base-case episodes which marginally exhibited model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had

a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995, memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revisions to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997, changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998, and submitted to the EPA on May 19, 1998, a revision to the HGA SIP which contained the following elements in response to EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required the Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999, for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000, SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid-course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approvable attainment demonstration, EPA has indicated that the state must adopt those strategies modeled in the November submittal and then adopt sufficient controls to close the remaining gap in $NO_x$ emissions. The modeling included in this proposal indicates a gap of an additional 77.98 tons per day (tpd) of $NO_x$ reductions is necessary for an approvable attainment demonstration. The commission estimates that this measure will achieve a minimum of 0.58 tpd delay of $NO_x$ until after noon. There will also be a 20.6 tpd delay in VOC emissions until after noon. Because the

emission of $NO_x$ and VOC, both precursors to the formation of ozone, will be delayed until after noon, this delay will lead to a reduction in ozone that is equal to 7.7 tpd $NO_x$ reduced. These reductions are a necessary measure to consider for closing the gap and successfully demonstrating attainment.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains Post-1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The HGA ozone nonattainment area will need to ultimately reduce $NO_x$ more than 750 tpd to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of the lawn and garden service equipment operating restriction program will contribute to attainment and maintenance of the one-hour ozone standard in the HGA area.

The purpose of these proposed rules is to establish a restriction on the use of handheld and non-handheld spark-ignition lawn and garden service equipment that operate at or below 25 horsepower (hp), 19 kilowatts. This air pollution control strategy would delay the emissions of $NO_x$ from these engines until later in the day, thus limiting ozone production. This control strategy is necessary for the counties included in the HGA nonattainment area to be able to demonstrate attainment with the NAAQS for ozone.

The proposed revisions would implement an operating-use restriction program requiring that the handheld and non-handheld spark-ignition lawn and garden service equipment, rated at 25-hp and below, be restricted from use between the hours of 6:00 a.m. and noon, April 1 through October 31. The affected handheld equipment includes, but is not limited to, trimmers, edgers, chainsaws, leaf blowers/vacuums, and shredders. Non-handheld lawn and garden equipment includes such devices as walk-behind lawnmowers, lawn tractors, tillers, and small generators. The affected area would include the eight-county HGA nonattainment area of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. The effective date would be April 1, 2005.

The intent of these proposed rules is to limit the use of handheld and non-handheld spark-ignition lawn and garden service equipment that operate at or below 25 hp between the hours of 6:00 a.m. and noon. Between these hours this equipment is restricted from operating. Other lawn and garden service work not requiring the use of handheld and non-handheld spark-ignition lawn and garden service equipment remains unrestricted under these proposed rules. That is, electric or man-powered lawn equipment may be utilized. It should be noted however that the regulated types of lawn and garden service equipment are banned from use during the hours specified regardless of how they are being used.

The amount of $NO_x$ shifted will total 0.58 tpd. The non-road mobile source category is one of the few sources of ozone-causing emissions that are not currently regulated. Federal controls on handheld lawn and garden service equipment such as cleaner-burning engines have been adopted, and will be phased in beginning with the 2002 model year.

The California Air Resources Board (CARB) has stated that "using a commercial chain saw-powered by a two-stroke engine-for two hours produces the same amount of smog-forming hydrocarbon emissions as driving ten 1996 cars about 250 miles each." By shifting the hours of use for handheld and non-handheld spark-ignition lawn and garden service equipment until after noon, $NO_x$ emissions from such lawn and garden equipment will not mix in the atmosphere with other ozone-causing compounds until later in the day. Ozone is formed through chemical reactions between natural and man-made emissions of VOC and $NO_x$ in the presence of sunlight. Higher ozone levels occur most frequently on hot summer afternoons. The critical time for the mixing of $NO_x$ and VOC is early in the day. By delaying the release of $NO_x$ emissions from lawn and garden service equipment until later in the day, production of ozone will be stalled until optimum conditions no longer exist, thus avoiding the production of higher levels of ozone.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

The commission is soliciting comments on alternative applications of this rule including: innovative uses of technology, such as incentives to use ultra low emission engines; alternative use restrictions, such as restricting use to every 10th day; and alternative restrictions on commercial use versus residential use, such as limiting the application of the rule to commercial services (which could be at residential property) or activities at commercial (versus residential) properties.

SECTION BY SECTION DISCUSSION

The new Division 6 is proposed regarding lawn and garden service equipment operating restrictions.

The proposed new §114.452 establishes control requirements for lawn and garden service equipment operating-use limitations. The proposal restricts the operation by all persons of all handheld or non-handheld lawn and garden service spark-ignition equipment 25 hp and below, between the hours of 6:00 a.m. and noon, during the time period between April 1 and October 31.

The proposed new §114.459 specifies the counties which are subject to the new requirements. The affected counties include all counties in the HGA nonattainment area, including Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

FISCAL NOTE AND COSTS TO STATE AND LOCAL GOVERNMENTS

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed rules are in effect, there will be fiscal implications which are not anticipated to be significant for units of state and local government as a result of administration or enforcement of the proposed rules.

The proposed rules would restrict the use of handheld and nonhandheld spark-ignition lawn and garden equipment, rated at 25 hp or less, from use between the hours of 6:00 a.m. and noon, from April 1 through October 31. The restriction would apply to lawn and garden equipment in the eight-county HGA ozone nonattainment area. The proposed rules would become effective April 1, 2005. The proposed rules do not require additional control equipment or new emission control technologies to be applied to the affected lawn and garden equipment.

The commission is required to submit a new SIP revision by the end of 2000 which will bring the HGA into attainment by 2007. The rules proposed for HGA in this notice comprise one element of the ozone Attainment Demonstration SIP for HGA. The purpose of the proposed rules is for the HGA nonattainment area to demonstrate attainment with the ozone NAAQS. The plan sets forth a control strategy that provides emission reductions necessary for attainment and maintenance of the national standards.

The commission estimates that units of state and local government within the HGA ozone nonattainment area may have to pay more to contract for landscape services if landscape businesses charge more for their services due to the proposed time restrictions. Although the extent of the fiscal implications are not known at this time, the commission anticipates that the potential increased costs to units of state and local government as a result of the proposed rules will not be significant.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed rules will be a potential reduction in the formation of ozone by delaying $NO_x$ emissions from lawn and garden equipment until later in the day when optimum conditions for the formation of ozone no longer exist, potentially improved air quality, and contribution toward demonstration of attainment with the NAAQS for ozone.

The proposed rules would restrict the use of handheld and nonhandheld spark-ignition lawn and garden equipment, rated at 25 hp or less, from use between the hours of 6:00 a.m. and noon, from April 1 through October 31. The restriction would apply to lawn and garden equipment in the HGA ozone nonattainment area. The proposed rules would become effective April 1, 2005. The proposed rules do not require additional control equipment or new emission control technologies to be applied to the affected lawn and garden equipment.

Persons within the HGA ozone nonattainment area that utilize equipment affected by the proposed rules may experience adverse fiscal implications in an amount that cannot be determined at this time. Because the proposed rules do not require additional control equipment or new technology, the commission does not anticipate significant economic impacts to commercial operators beyond the shift in work schedule and possible implications caused by potential work delays attributable to the proposed rules. Delaying use of lawn and garden equipment until after noon may require commercial operators to adjust their work schedules and could cause extensions of projects or the need to hire more employees and procure additional equipment to meet business requirements. Private operators that utilize commercial operators to perform lawn and garden related work may have to pay more for the services.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be fiscal implications, in an amount which cannot be determined, which may have an adverse fiscal impact on small or micro-businesses as a result of administration or enforcement of the proposed rules.

The proposed rules would restrict the use of handheld and nonhandheld spark-ignition lawn and garden equipment, rated at 25 hp or less, from use between the hours of 6:00 a.m. and noon, from April 1 through October 31. The restriction would apply to lawn and garden equipment in the HGA ozone nonattainment area. The proposed rules would become effective April 1, 2005. The proposed rules do not require additional control equipment or new emission control technologies to be applied to the affected lawn and garden equipment.

Small or micro-businesses within the HGA ozone nonattainment area that utilize equipment affected by the proposed rules may experience adverse fiscal implications in an amount that cannot be determined at this time. Because the proposed rules do not require additional control equipment or new technology, the commission does not anticipate significant economic impacts to affected individuals and businesses beyond the shift in work schedule and possible implications caused by potential work delays attributable to the proposed amendments. Delaying use of lawn and garden equipment until after noon may require affected small or micro-businesses to adjust their work schedules and could cause extensions of projects or the need to hire more employees and procure additional equipment to meet business requirements. Small or micro-businesses that utilize businesses to perform lawn and garden related work may have to pay more for the services.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rules to Chapter 114 are intended to protect the environment or reduce risks to human health from environmental exposure to ozone and, although no estimates of cost are available at this time, the commission does not believe work delays could affect a sector of the economy in a material way. The proposed rules are intended to implement an operating-use restriction program requiring that certain lawn and garden equipment be restricted from use between the hours of 6:00 a.m. and noon, April 1 through October 31. This program is part of the strategy to reduce the formation of ozone by delaying $NO_x$ emissions from lawn and garden equipment until later in the day when optimum conditions for the formation of ozone no longer exist. The program was developed for the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The commission does not believe that the businesses that provide lawn and garden services comprise a sector of the economy, nor

does the commission believe that the rules will 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.

Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633) during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that $NO_x$ emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain $NO_x$ emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, 382.017, 382.019, and 382.039.

The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking action is to establish a lawn and garden service equipment operating-use limitation to delay $NO_x$ emissions that lead to high levels of ground-level ozone production. This proposed rulemaking will act as an air pollution control strategy to reduce $NO_x$ emissions necessary for the eight counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The proposed affected area consists of the eight counties contained in the HGA CMSA. Promulgation and enforcement of the proposed rules will not burden private, real property as it only regulates handheld and non-handheld spark-ignition lawn and garden equipment rated at 25 hp or less. Although the proposed rules do not directly prevent a nuisance, prevent an immediate threat to life or property, or prevent a real and substantial threat to public health and safety, the proposed rules partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emissions limitations and delays within this proposal were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS, once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rule proposal is to implement a lawn and garden service equipment operating-use limitation necessary for the HGA nonattainment area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which also applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. For the reasons

stated, these proposed rules will not constitute a takings under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and $NO_x$ air emissions will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 50, National Primary and Secondary Ambient Air Quality Standards, and 40 CFR 51, Requirements for Preparation, Adoption, and Submittal Of Implementation Plans. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 2000-011O-114-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Roland Castaneda at (512) 239-0774, or Alan Henderson at (512) 239-1510.

STATUTORY AUTHORITY

The new sections are proposed under the Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under the Texas Health and Safety Code, TCAA, §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed under TCAA, §382.011, which authorizes the commission to control the quality of the state's air;§382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §382.039, which authorizes the commission to develop and implement programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed new sections implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; and §382.039, relating to Attainment Program.

*§114.452. Control Requirements.*

No person shall start or operate any handheld or non-handheld, spark-ignition lawn and garden service equipment, of 25 horsepower and below, between the hours of 6:00 a.m. and noon, during the time period between April 1 through October 31, in the counties listed in §114.459 of this title (relating to Affected Counties and Compliance Dates).

*§114.459. Affected Counties and Compliance Dates.*

Effective April 1, 2005, persons in the following counties shall be in compliance with §114.452 of this title (relating to Control Requirements). These include Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties in the Houston/Galveston ozone nonattainment area.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005627
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## DIVISION 7. HOUSTON/GALVESTON AIRPORT GROUND SUPPORT EQUIPMENT

### 30 TAC §§114.460, 114.462, 114.466, 114.469

The Texas Natural Resource Conservation Commission (commission) proposes new §114.460, Definitions; §114.462, Control Requirements; §114.466, Reporting and Recordkeeping Requirements; and §114.469, Affected Counties and Compliance Schedules. The commission proposes these new sections in Chapter 114, Control of Air Pollution from Motor Vehicles; Subchapter I, Non-Road Engines; new Division 7, Houston/Galveston Airport Ground Support Equipment; and corresponding revisions to the state implementation plan (SIP) in order to control ground-level ozone in the Houston/Galveston (HGA) ozone nonattainment area through the reduction of nitrogen oxide ($NO_x$) emissions from airport ground support equipment (GSE).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post-1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base-case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary $NO_x$ waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the $NO_x$ waiver were based on early base-case episodes which marginally exhibited model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995, memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revisions to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997, changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998, and submitted to the EPA on May 19, 1998, a revision to the HGA SIP which contained the following elements in response to the EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999, for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program.

Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000, SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid-course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approvable attainment demonstration, EPA has indicated that the state must adopt those strategies modeled in the November submittal and then adopt sufficient controls to close the remaining gap in $NO_x$ emissions. The modeling included in this proposal indicates a gap of an additional 77.98 tons per day (tpd) of $NO_x$ reductions is necessary for an approvable attainment demonstration. The commission estimates that this measure will achieve a minimum of 5.09 tpd of $NO_x$ equivalent reductions and is therefore a necessary measure to consider for closing the gap and successfully demonstrating attainment.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains Post-1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The HGA ozone nonattainment area will need to ultimately reduce $NO_x$ more than 750 tpd to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of these airport GSE rules will contribute to the attainment and maintenance of the one-hour ozone standard in the HGA area. An airport GSE program should also contribute to a successful demonstration of transportation conformity in the HGA area.

Airport GSE rules were adopted by the commission for the Dallas/Fort Worth (DFW) nonattainment area on April 19, 2000. This rulemaking action proposes identical requirements applied to the eight-county HGA ozone nonattainment area and are necessary for the area to be able to demonstrate attainment with the ozone NAAQS.

Airport GSE is used from the moment an aircraft lands, until the aircraft takes off. Airport GSE is comprised of a variety of vehicles and equipment necessary to service aircraft during ground-based operations, including cargo loading and unloading, passenger loading and unloading, potable water storage, lavatory waste tank drainage, aircraft refueling, engine and fuselage examination and maintenance, and food and beverage catering. Airlines employ specially designed GSE to support all these operations. Moreover, electrical power and conditioned air are generally required during aircraft operations at the terminal gate to provide comfort and safety for the passengers and crew. These services are often provided by the terminal facility, however many times these services are provided by GSE. Airport GSE includes, but is not limited to, aircraft pushback tugs, baggage and cargo tugs, carts, forklifts, lifts, ground power units, air conditioning units, air start units, and belt loaders. Electric-powered versions of baggage tugs and belt loaders, which represent about a third of all GSE, are available and in use. Electric-powered versions of aircraft pushback tugs, air start units, air conditioning units, forklifts, lifts, ground power units, and other specialty GSE are also available in the marketplace.

The initial purchase cost of electric-powered GSE is typically higher than diesel-powered and gasoline-powered GSE. A recent report by the EPA, *Technical Support for Development of Airport Ground Support Equipment Emission Reductions* (EPA 420-R-99-007, May 1999), estimated that the cost of an electric baggage tractor would be $30,000, while the gasoline-powered version would be $17,000, and the diesel-powered version would be $22,000. However, electricity is such a less expensive power source than fossil fuels, that the savings in the cost of fuel will offset the increased electric GSE purchase price in two to three years. Additionally, the existing rules allow the GSE owner or

operator to reduce emissions from the GSE fleet or in the nonattainment area by any means available. The owners and operators may also use the commission emission banking program to meet their emission reduction requirements. That is, an owner or operator may meet emission control requirements of this chapter, in whole or in part, by obtaining emission reduction credits (ERCs), mobile emission reduction credits (MERCs), discrete emission reduction credit (DERCs), or mobile discrete emission reduction credit (MDERCs) in accordance with this section and 30 TAC Chapter 101 (General Air Rules), §101.29 (Emission Credit Banking and Trading). In a concurrent rulemaking (rule log number 1998-089-101-AI), the emission credit banking and trading rules are being moved to Chapter 101, Subchapter H (Emissions Banking and Trading), Division 1 (Emission Credit Banking and Trading) and Division 4 (Discrete Emission Credit Banking and Trading).

The majority of GSE engines are "uncontrolled" from an emission perspective, because they have not been designed for low emissions. Therefore, GSE emits significant amounts of VOC and $NO_x$. The EPA report (420-R-99-007) states that GSE is responsible for 15%-20% of airport-related $NO_x$ and 10%-15% of airport-related VOC. The replacement of internal combustion engine-powered GSE with low-or zero-emission GSE at the airports where this equipment is used will reduce the VOC and $NO_x$ emissions from this source category. These $NO_x$ emissions will be reduced by at least 90%, thus leading to 5.09 tpd of $NO_x$ emission reductions.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION-BY-SECTION DISCUSSION

Rules regarding airport GSE were adopted for the DFW ozone nonattainment area on April 19, 2000. These rules were adopted in Chapter 114, Subchapter I, Division 1, §114.400, Definitions; §114.402, Control Requirements; §114.406, Reporting and Recordkeeping Requirements; and §114.409, Affected Counties. This rulemaking action proposes identical requirements in Subchapter I, Division 7 which would apply to the eight-county HGA ozone nonattainment area.

The proposed new §114.460 includes definitions for air carrier, air carrier operations, ground support equipment, ground support equipment fleet, GSE average emission factor, and subject airport.

The proposed new §114.462(a), explains that affected owners and operators of GSE must demonstrate a $NO_x$ emissions reduction which is equal to or greater than the percentages of $NO_x$ emissions attributable to the GSE fleet during the 1996 calender year. These reductions must be made in accordance with the following schedule: 20% reduction by December 31, 2003; 50% reduction by December 31 2004; and 90% reduction by December 31, 2005. Subsection (b) pertains to those fleets which were not in operation in 1996. Using the emission factors from §114.460(6), the owner and/or operator of the fleet must demonstrate the following $NO_x$ emission reductions: 20% reduction by December 31, 2003, or December 31 of the first year of operation, whichever is later; 50% reduction by December 31, 2004, or December 31 of the third year of operation, whichever is later; and 90% reduction by December 31, 2005, or December 31 of the third year of operation, whichever is later instead of electrifying the fleet. This demonstration will be accomplished by multiplying the appropriate emission factor by the number of non-electric GSE units on hand at the end of one year of operation. The new §114.462(c) applies to airports which become subject to the rule after the effective date. Owners or operators of GSE at these airports must comply with the emission reduction requirements of §114.462(a) or (b), whichever is applicable. However, the owner or operator of GSE may comply with the 20% reduction on December 31, 2003, or December 31 of the year an airport becomes a subject airport; with the 50% reduction on December 31, 2004, or the year after the airport becomes a subject airport; and with the 90% reduction on 2005, or the second year after the airport becomes a subject airport. Because it takes a three-year average to become a subject airport, these fleet operators will have at least a three-year lead time before reductions are required. The commission required 90% instead of 100% reduction for these alternative compliance measures, because availability of electric equipment cannot be considered as it can in subsection (g) of this section. The commission anticipates that fleets complying with subsection (g) will be able to demonstrate that some of their equipment is not available in electric power and so they would not actually achieve a 100% reduction in emissions. The 90% is intended to approximate this difference.

The proposed new §114.462(d) allows the commission to better enforce the rule by providing that each entity that chooses not to fully electrify its fleet shall submit a plan to the commission by May 1, 2003, or the first May 1st following operation at a subject airport. This plan shall list each GSE unit, its horsepower rating, its emission factor, the total actual annual emissions for each unit in existence in 1996, and provide for the implementation of emission reduction measures to achieve $NO_x$ emissions in the amount required by §114.462(a), (b), (c), and (e). To provide alternate means of compliance while still achieving emission reductions, the plan may include emission reductions measures which are applied to the GSE fleet itself, and measures which have been achieved elsewhere in the nonattainment area if those measures would be creditable under the commission emissions banking program as defined in 30 TAC §101.29. This plan must be approved by the executive director and the EPA, and should be revised as needed to accurately reflect the compliance plan. New subsection (e) ensures emission reductions for growth after 1996, specifying that beginning December 31, 2004, owners and operators of GSE subject to §114.462(a), (b), or (c) must demonstrate that their non-electric GSE units added to the fleet after December 31, 1996, or after the first year of being subject to the rule, are offset by 90%. Subsection (f) states that the requirements of any enforceable agreement between the EPA, the United States Department of Transportation, and the GSE owners/operators may be included in a plan submitted under §114.462(d).

The proposed new §114.462(g) states that in lieu of compliance with §114.462(a)-(e) an owner or operator of GSE at a subject airport may ensure that the fleet is 100% electric powered by May 1, 2005, or three years after the airport becomes a subject airport. Additionally, §114.462(g) states that for any GSE unit not available for purchase or conversion to electric power, an owner or operator of GSE may meet the requirements of this subsection

if it can be shown that the lowest emitting equipment is being used, subject to approval by the executive director and the EPA.

The proposed new §114.466(a) requires that owners or operators subject to §114.462 submit annual GSE fleet reports to be submitted to the executive director. Subsection (b) requires them to maintain copies of the submitted reports for a minimum of three years. For convenience, the commission will permit these reports to be kept in hard-copy or electronic form.

The proposed new §114.469 identifies the counties subject to these rules as being Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. These counties make up the HGA ozone nonattainment area.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period these proposed rules 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 rules. The airlines and businesses that serve the George Bush Intercontinental, William P. Hobby, and Ellington Airports in Harris County will probably incur relatively high costs for the first five-year period of the proposed rules due to the purchase/lease of cleaner operating GSE needed to meet reduced emission requirements at subject airports; however, those initial costs will be offset by reduced maintenance and fuel costs over time (especially in the case of electric-powered GSE).

The proposed rules will require airports in the eight-county HGA nonattainment area to comply with requirements identical to the existing GSE emission reduction requirements operated at airports in the DFW area. Affected airports are those with 100 or greater air carrier operations per year (excluding general aviation operations, non-fixed wing operations, and military operations), averaged over a three-year period. Owners or operators of GSE subject to this section at the time of the effective date must demonstrate the following emission reductions based on 1996 $NO_x$ emissions levels: 20% reduction by December 31, 2003; 50% reduction by December 31, 2004; and 90% reduction by December 31, 2005. Owners or operators of GSE not in operation in 1996 at an airport which is a subject airport by the effective date of this rule must demonstrate a reduction of $NO_x$ emissions which is equal to or greater than the following percentages: 20% reduction by December 31, 2003, or December 31 of the first year of operation, whichever is later; 50% reduction by December 31, 2004, or December 31 of the second year of operation, whichever is later; and 90% reduction by December 31, 2005, or December 31 of the third year of operation, whichever is later. Owners and operators of affected GSE will also be required to submit annual GSE fleet reports to the commission. The reporting is designed to demonstrate compliance with the implementation schedule. This air pollution control program is part of the strategy to reduce $NO_x$ emissions necessary for the counties included in the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS.

The City of Houston, which owns and operates the three affected airports, will be affected if they own or operate GSE. Additionally, there may be costs to the city related to the possible addition or retrofitting of infrastructure which accommodate alternative-fueled GSE at the affected airports. Infrastructure costs for full electrification of GSE at the four affected airports in the DFW area have been estimated by the Air Transport Association to be approximately $70 million. Presumably estimates for Houston could be similar. Actual infrastructure costs are expected to be lower depending upon the compliance options chosen. The City of Houston could pass some or all of these costs on to its tenants at the airports. The local air pollution control agency having jurisdiction in the area may request reports relating to §114.406 as well. There are no significant fiscal implications anticipated for the City of Houston or other units of state and local government as a result of administration of the proposed rules, except as mentioned in the previous paragraphs.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed rules will be the potential reduction in $NO_x$ emissions from affected airports, potentially improved air quality, and contribution toward demonstration of attainment with the ozone NAAQS within the HGA nonattainment area.

Although GSE owners and operators have a number of options to reduce $NO_x$ emission levels, because 100% electrification of the GSE fleets provides the greatest degree of emissions reductions and long-term cost effectiveness, this portion of the preamble analyzes the potential cost of GSE electrification at the George Bush Intercontinental, William P. Hobby, and Ellington Airports. The commission anticipates that GSE owners or operators subject to the proposed rules will incur relatively significant costs in the short term to purchase or lease electric-powered GSE due to the fact that electric-powered GSE is more expensive to purchase relative to fossil-fueled GSE. However, with electric-powered GSE the avoided cost of purchasing fossil fuels and lower maintenance costs are expected to offset the additional purchase/lease costs over time. The commission estimates that the savings achieved from the avoided cost for fossil fuels over the life cycle of the equipment will offset the incremental purchase cost of the electric-powered GSE.

At George Bush Intercontinental Airport, the following airlines will be affected: AeroMexico, American, America West, British Airways, Canadian Airlines, Continental, Delta, Northwest, TWA, United, US Airways, Atlantic Southeast, Lufthansa, Sun Country, KLM Royal Dutch, Comair, Air France, Air Canada, TACA, Federal Express, BAX Global, Aeromexpress, American International, and Trans World Airlines. At William P. Hobby Airport, AirTran, American, Atlantic Southeast, Continental, Delta, Northwest, and Comair will be affected. At Ellington Airport, United Postal Service will be affected. Other businesses at the three affected airports that support airline operations and use GSE will also be required to adhere to the GSE $NO_x$ emission reduction requirements found in these rules. Tenant entities at the affected airports could be affected by infrastructure costs detailed in the Fiscal Note: Cost to State and Local Government section of this preamble.

The EPA report (420-R-99-007), indicates the cost savings for electric-powered GSE, initial purchase costs for electric GSE are high relative to their fossil-fueled counterparts. The cost premium is almost entirely associated with the required battery pack and recharger. Table I, Life Cycle Costs for Baggage Tractors, presents a comparison of electric baggage tractor initial costs relative to those of fossil-fueled GSE. As indicated, the cost premium ranges from about $8,000 relative to a diesel-powered tractor, to about $13,000 relative to a gasoline-powered tractor. These purchase price premiums are augmented by periodic battery replacement requirements (at about $4,500 every five to six

years) that are two to four times higher on a life cycle basis than corresponding fossil fuel engine rebuild or replacement costs. However, these cost premiums are counterbalanced by a substantial reduction in fuel costs. Electric GSE use no fuel during idle periods and such periods can comprise as much as 50% of typical GSE operation. Using an estimated electricity cost of $.045 per kilowatt-hour, the overall fuel savings associated with high-use GSE operations, such as baggage tractors, can range from $2,500 per year relative to diesel equipment to over $6,000 per year relative to gasoline and compressed natural gas equipment. While lower-use GSE fuel cost savings will be smaller, it is clear that fuel savings alone can offset the entire electric GSE purchase price premium in two to three years. Moreover, electric GSE fuel cost savings will increase as more efficient electric motors and motor controllers continue to evolve.

In addition to reduced fuel costs, the latest generation of electric GSE have demonstrated significantly reduced maintenance requirements. Costs have been estimated to be reduced by as much as two-thirds relative to gasoline-and diesel-powered GSE. The table presents the results of a life cycle cost comparison for a baggage tractor under a high-use operating scenario (i.e., generally used to service aircraft continuously throughout an operating day such as occurs at high traffic airports). The tabulated costs represent the net present value of the various expenditures required over the 16-year useful life of the tractor. Regardless of whether maintenance costs are assumed to be reduced, the electric-powered tractor consistently exhibits the lowest life cycle costs. Life cycle costs for the electric baggage tractor are estimated to be over 40% lower than the next lowest cost diesel option under a reduced maintenance scenario, and still 10% lower even if maintenance costs are assumed to be identical to conventional gasoline-and diesel-powered GSE maintenance costs.

Precise cost effectiveness estimates for electric GSE are difficult to quantify because the impact of such equipment varies across the pollutants examined and relative to the fossil fuel equipment being replaced, and the emissions performance of local utilities. However, it is clear from the data presented in the table that electric GSE represent the lowest cost option relative to all fossil fuel GSE. Therefore, if an appropriate battery recharging schedule and infrastructure can be established, all derived emission reductions accrue for free. Assuming local utility emissions performance is not too different from average United States utility emission levels, electric GSE are cost effective from an economic standpoint alone.

Figure: 30 TAC Chapter 114E-Preamble

The EPA report also stated that " . . . generally, there are no technical limitations to the size or type of GSE that can be converted to or replaced with electrically powered equipment. Electrically powered versions of baggage tugs and belt loaders, which together account for over a third of all GSE, are available and in use (although current usage constitutes only a minor fraction of total activity). Additionally, electric powered versions of aircraft pushback tractors, air start units, conditioned air units, forklifts, ground power units, lifts, general purpose vehicles (cars, trucks, and vans), and other specialty GSE are currently available in the marketplace. Electric carts are already fulfilling about half of overall GSE cart demand."

The following is an excerpt from a study titled *Assessment of Airport Ground Support Equipment Using Electric Power or Low-Emitting Fuels* (Arcadis, Geraghty and Miller, July 20, 1999) that indicates the costs for electric-powered GSE. The study estimated the purchase cost for an electric baggage tractor to be $24,250; an electric belt loader to be $30,000; and an electric aircraft tug to be $85,000. Their gasoline-powered equivalents are $16,000, $27,000, and $72,000, respectively. The diesel-powered equivalents are $19,000, $29,000, and $72,000, respectively. The study also estimated the GSE population in California. If airport GSE population within the HGA area is similar, then the baggage tractors make up 44%; belt loaders make up 20%; and aircraft tugs make up 6% of the total GSE. If the estimated 3,154 pieces of GSE at the affected airports are equally proportioned and assuming none of the current GSE is electric-powered, the commission estimates that there are 1,388 baggage tractors, 631 belt loaders, and 189 aircraft tugs. Applying the cost from the Geraghty and Miller study, the estimated total cost for 70% of the equipment at the affected airports is $68.6 million. Assuming that the remaining 30% of the equipment, or 946 units, are lower cost equipment in the $10,000 to $20,000 range, the total cost should not be in excess of $87.5 million less trade-in, transfer, or sale of current equipment. As stated previously, the commission also anticipates that additional costs associated with replacing current GSE with electric-powered GSE will be offset with fuel and maintenance savings over time. The commission estimates that the cost of the reporting requirements in the proposed rules will not be significant.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSES

The commission anticipates no adverse fiscal implications to small businesses and micro-businesses as a result of implementing the proposed rules, because there are no known small or micro-businesses that own and operate GSE at the George Bush Intercontinental, William P. Hobby, or Ellington Airports. If there are small or micro-businesses that own GSE for the purpose of delivering their products to the aircraft; providing maintenance support for aircraft at affected airports; or renting/leasing GSE to airlines or related companies which provide services to the airlines; their costs will be similar to those specified for businesses in general in the PUBLIC BENEFITS AND COSTS section of this preamble.

The Geraghty and Miller study estimated the costs for electric-powered GSE. The study estimated the purchase cost for an electric baggage tractor to be $24,250; an electric belt loader to be $30,000; and an electric aircraft tug to be $85,000. The commission anticipates that some of the equipment used by affected small or micro-businesses may be lower cost units in the $10,000 to $30,000 range. Actual total costs would be dependent on the amount and types of GSE used by the business. The commission also anticipates that costs will be mitigated by the trade-in, transfer, or sale of current equipment. As stated previously, the commission anticipates that additional costs associated with replacing current GSE with electric-powered GSE will be offset with fuel and maintenance savings over time, and that the cost of the reporting requirements in the proposed rules will not be significant.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking meets 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 proposed rules are intended to protect the environment or reduce risks to human health from environmental exposure to ozone and could affect in a material way, a sector of the economy, competition, and the environment. The proposed rules regarding airports operating in the HGA ozone nonattainment area, impose requirements to reduce the $NO_x$ emission levels at the airports through the conversion of fossil-fueled GSE to electric-powered GSE, or equivalent conversion measures which meet the required emission reduction levels, over a three-to four-year period. This air pollution control program is part of the strategy to reduce $NO_x$ emissions necessary for the counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. Although the proposed rulemaking meets the definition of a "major environmental rule" as defined in the Texas Government Code, and is considered a major environmental rule, §2001.0225 only applies to a major environmental rule, the result of which is to: 1. exceed a standard set by federal law, unless the rule is specifically required by state law; 2. exceed an express requirement of state law, unless the rule is specifically required by federal law; 3. exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4. adopt a rule solely under the general powers of the agency instead of under a specific state law.

This rulemaking does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed rules regarding airports operating in the HGA ozone nonattainment area, impose requirements to reduce the $NO_x$ emission levels at the airports through the conversion of fossil-fueled GSE to electric-powered GSE, or equivalent conversion measures which meet the required emission reduction levels. These requirements are necessary to meet the ozone NAAQS set by the EPA under 42 USC, §7409, and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633) during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that $NO_x$ emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain $NO_x$ emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, 382.017, 382.019, and 382.039.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for this rulemaking action in accordance with Texas Government Code,

§2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking is to require airport GSE to be electric-powered or to lower emissions by any means available which will act as an air pollution control strategy to reduce $NO_x$ emissions necessary for the eight counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The proposed affected area consists of the eight-county HGA ozone nonattainment area, which includes Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. Promulgation and enforcement of the rules may burden private real property, because this proposed rulemaking action may result in investment in the permanent installation of supplied utilities at the major airports in the HGA area. Although the proposed rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rule proposal is to implement a GSE emissions reduction program in the HGA ozone nonattainment area which is necessary for the area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to this rulemaking action is that of an action reasonably taken to fulfill an obligation mandated by federal law; therefore, these proposed rules will not constitute a takings under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resource Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and $NO_x$ air emissions will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 50, National Primary and Secondary Ambient Air Quality Standards, and 40 CFR 51, Requirements for Preparation, Adoption, and Submittal Of Implementation Plans. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 2000-011E-114-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Roland Castaneda at (512) 239-0774, or Alan Henderson at (512) 239-1510.

STATUTORY AUTHORITY

The new sections are proposed under the Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC,

and under the Texas Health and Safety Code, TCAA, §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed under TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §382.039, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed new sections implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; and §382.039, relating to Attainment Program.

*§114.460. Definitions.*

Unless specifically defined in the TCAA or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Air carrier--An entity providing air transportation of persons or goods for remuneration.

(2) Air carrier operation--Landings and takeoffs of air carriers (excluding general aviation, non-fixed wing aircraft operations, and military operations) at airports for the purpose of transportation of persons and/or goods, or for the purpose of maintenance.

(3) Ground support equipment (GSE)--Equipment that is used to service aircraft during passenger and/or cargo loading and unloading, maintenance, and other ground-based operations (excluding the servicing of general aviation aircraft, non-fixed wing aircraft, and military aircraft). This includes, but is not limited to, aircraft pushback tugs, baggage and cargo tugs, carts, forklifts, lifts, ground power units, air conditioning units, air start units, and belt loaders. Equipment that is used during freezing weather only is excluded from this definition (including, but not limited to, ground heaters and deicing vehicles).

(4) Ground support equipment fleet--A group of ground support equipment controlled by the owner or operator at the same location. For purposes of compliance with the requirements of this division, a unit of GSE which is leased on a long-term basis (12 months or more) shall be considered part of the fleet of the lessee while a unit of GSE which is leased on a short-term basis (less than 12 months) shall be considered part of the fleet of the lessor.

(5) GSE average emission factor--For purposes of calculating emission reductions needed for compliance with §114.462(b) of this title (relating to Control Requirements), the following factor should be used depending on engine size.

Figure: 30 TAC §114.460(5)

(6) Subject airport--For purposes of compliance with this division, airports which have more than or equal to 100 air carrier operations per year, averaged over a three-year period. For airports which do not meet this average operating level on the effective date of this rule, the date which the airport becomes a subject airport is the January 1st following three years at or above that average operating level.

*§114.462. Control Requirements.*

(a) In the counties listed in §114.469 of this title (relating to Affected Counties and Compliance Schedules), owners or operators of a ground support equipment (GSE) fleet at an airport which was a subject airport by the effective date of this rule must demonstrate a reduction of oxides of nitrogen ($NO_x$) emissions which is equal to or greater than the following percentage of $NO_x$ emissions attributable to the GSE fleet during the 1996 calendar year in accordance with the following schedule:

(1) 20% reduction by December 31, 2003;

(2) 50% reduction by December 31, 2004; and

(3) 90% reduction by December 31, 2005.

(b) For a GSE fleet which was not in operation in 1996, owners or operators of the GSE fleet at an airport which was a subject airport by the effective date of this rule must demonstrate a reduction of $NO_x$ emissions which is equal to or greater than the following percentages of the amount obtained by multiplying the number of non-electric GSE units at the end of one year of operation by the GSE average emission factor as defined in §114.460 of this title (relating to Definitions) in accordance with the following schedule:

(1) 20% reduction by December 31, 2003 or December 31 of the first year of operation, whichever is later;

(2) 50% reduction by December 31, 2004 or December 31 of the second year of operation, whichever is later; and

(3) 90% reduction by December 31, 2005 or December 31 of the third year of operation, whichever is later.

(c) At an airport which becomes a subject airport after the effective date of this rule, owners or operators of a GSE fleet shall meet the emission reduction requirements of subsection (a) or (b) of this section in accordance with the following schedule:

(1) 20% reduction by December 31, 2003 or December 31 of the year the airport becomes a subject airport, whichever is later;

(2) 50% reduction by December 31, 2004 or December 31 of the year after the airport becomes a subject airport, whichever is later; and

(3) 90% reduction by December 31, 2005 or December 31 of the second year after the airport becomes a subject airport, whichever is later.

(d) Each GSE fleet subject to this subsection shall submit a plan to the executive director by May 1, 2003, or the first May 1st following operation at a subject airport, which lists each GSE unit, an emission factor for each unit, and the total actual annual emissions for each unit in existence in calendar year 1996. The plan shall provide for the implementation of emission reduction measures to achieve $NO_x$ emissions in the amount required by subsections (a), (b), or (c) of this section. The plan may include emission reductions measures which are applied to the GSE fleet itself and measures which have been achieved elsewhere within the nonattainment area as long as those measures would be creditable in accordance with the commission's emissions banking program as defined in §101.29 of this title (relating to Emission Credit Banking and Trading). The plan shall be revised as necessary and is subject to the approval of the executive director and the EPA.

(e) Beginning in December 31, 2004, all owners or operators of GSE fleets subject to subsections (a), (b), or (c) of this section must demonstrate that emissions from any non-electric GSE added to the GSE fleet after December 31, 1996, or after the first year of operation at a subject airport, is offset by 90%. This subsection does not apply to GSE which is added to the fleet to replace existing GSE.

(f) In the event that the EPA, the United States Department of Transportation, and the GSE owners/operators adopt an enforceable agreement, the measures defined within that agreement may be used in a plan submitted in accordance with subsection (d) of this section.

(g) In lieu of compliance with subsections (a)-(e) of this section, an owner or operator of a GSE fleet at a subject airport may ensure that the fleet is 100% electric powered by May 1, 2005, or three years after the airport became a subject airport, whichever is later. For any GSE unit which is not available for purchase or conversion to electric power, an owner or operator may meet the requirement of this subsection if the owner or operator demonstrates that the lowest emitting equipment is used, subject to the approval of the executive director and the EPA.

*§114.466. Reporting and Recordkeeping Requirements.*

(a) Owners or operators affected by §114.462 of this title (relating to Control Requirements) must submit annual ground support equipment (GSE) fleet reports for the previous year starting on February 1, 2004, and every February 1 thereafter. The report shall be submitted to the executive director and must contain, at a minimum:

(1) the GSE fleet identification number when assigned by the commission;

(2) area in which the affected GSE primarily operate;

(3) the purchase date, make, model, model year, horsepower rating, and fuel type for each unit of GSE;

(4) a demonstration of compliance with the applicable control requirements under §114.462 of this title; and

(5) any other information requested in writing by the executive director necessary to demonstrate compliance with this division.

(b) The owner or operator of GSE shall maintain copies of submitted reports required by subsection (a) of this section on-site either in hard copy or electronically at the reported fleet address for a minimum of three years, and upon request shall make such reports immediately available to the executive director or local air pollution control agencies having jurisdiction in the area.

*§114.469. Affected Counties and Compliance Schedules.*

Owners or operators of ground equipment at subject airports in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties shall be in compliance with §114.462 of this title (relating to Control Requirements) and §114.466 of this title (relating to Reporting and Recordkeeping Requirements) no later than the dates specified therein.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005647
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## DIVISION 8. HOUSTON/GALVESTON HEAVY EQUIPMENT FLEETS--COMPRESSION--IGNITION ENGINES

**30 TAC §§114.470, 114.472, 114.476, 114.477, 114.479**

The Texas Natural Resource Conservation Commission (commission) proposes new §114.470, Definitions; §114.472, Control Requirements; §114.476, Reporting and Recordkeeping Requirements; §114.477, Exemptions; and §114.479, Affected Counties. The commission proposes these revisions to new Division 8, Houston/Galveston Heavy Equipment Fleets--Compression-Ignition Engines; Subchapter I, Non-road Engines; Chapter 114, Control of Air Pollution from Motor Vehicles, and to the state implementation plan (SIP) in order to reduce ambient concentrations of ground-level ozone in the Houston/Galveston (HGA) ozone nonattainment area through the accelerated purchase of United States Environmental Protection Agency (EPA) certified Tier 2 and Tier 3 non-road equipment 50 horsepower (hp) and larger.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post-1996 SIP revisions for HGA.

The January 1995, SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base-case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxides ($NO_x$) waiver allowed by 42 USC, §7511a(f). The January 1995, SIP and the $NO_x$ waiver were based on early base-case episodes which marginally exhibited model performance in accordance with EPA modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995, memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that

Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revisions to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997, changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998, and submitted to the EPA on May 19, 1998, a revision to the HGA SIP which contained the following elements in response to the EPA guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999, for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs, as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000, SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid-course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approvable attainment demonstration, EPA has indicated that the state must adopt those strategies modeled in the November submittal and then adopt sufficient controls to close the remaining gap in $NO_x$ emissions. The modeling included in this proposal indicates a gap of an additional 77.98 tons per day (tpd) of $NO_x$ reductions is necessary for an approvable attainment demonstration. The commission estimates that this measure will achieve a minimum of 12.2 tpd of $NO_x$ equivalent reductions and is therefore a necessary measure to consider for closing the gap and successfully demonstrating attainment.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains post-1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The HGA ozone nonattainment area will need to ultimately reduce $NO_x$ more than 750 tpd to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of the accelerated purchase of federal Tier 2/Tier 3 non-road diesel equipment program will contribute to attainment and maintenance of the one-hour ozone standard in the HGA area. This program also should contribute to a successful demonstration of transportation conformity in the HGA area.

The commission proposes these amendments to Chapter 114 and revisions to the SIP in order to control ground-level ozone in the HGA ozone nonattainment area, and the proposed rules are one element of the control strategy for the HGA Post-1999 ROP/Attainment Demonstration SIP. The purpose of these proposed rules is to establish the accelerated purchase and operation of non-road, compression-ignition fleet equipment within the HGA nonattainment area which will reduce $NO_x$ and VOC emissions that are necessary for the counties included in the HGA nonattainment area to be able to demonstrate attainment with NAAQS.

The EPA has been regulating highway (on-road) cars and trucks since the early 1970s and continues to set increasingly stringent emissions standards for such vehicles. After making considerable progress in controlling the emissions from on-road vehicles, the EPA turned its attention to non-road engines, which also contribute significantly to air pollution.

Diesel engines, also referred to as compression-ignition engines, dominate the large non-road engine market. Examples of non-road equipment that use diesel engines include: agricultural equipment such as tractors, balers, and combines; construction equipment such as backhoes, graders, and bulldozers; general industrial equipment such as concrete/industrial saws, crushing equipment, and scrubber/sweepers; lawn and garden equipment such as garden tractors, rear engine mowers, and chipper/grinders; material handling equipment such as heavy forklifts; and utility equipment such as generators, compressors, and pumps.

The EPA adopted regulations in 40 Code of Federal Regulations Part 89 (40 CFR 89), Control of Emissions from New and In-use Nonroad Engines, as effective June 17, 1994. Under 40 CFR 89, compression-ignition engines greater than 50 hp must comply with Tier 1 emissions standards that are being phased in between calendar years 1996 and 2000, depending on the size of the engine. Under the Tier 1 standards, the EPA projects that $NO_x$ emissions from new non-road, compression-ignition equipment will be reduced by over 30% from uncontrolled levels of unregulated engines. The Tier 1 standards do not apply to engines used in underground mining equipment, locomotives, and marine vessels. The Mine Safety and Health Administration is responsible for setting requirements for underground mining equipment. Locomotives and marine vessels are covered by separate EPA programs.

On October 23, 1998, the EPA revised 40 CFR 89 and adopted more stringent emission standards for $NO_x$, hydrocarbons (HC, which are also called VOC), and particulate matter (PM) for new non-road, compression-ignition engines, to be phased in over several years beginning in model year 1999. Engines used in underground mining equipment, locomotives, and marine vessels over 50 hp are not included. This comprehensive new program phases in more stringent Tier 2 standards for all engine sizes from the model years 2001 to 2006, and yet more stringent Tier 3 standards from the model years 2006 to 2008. The following figure, which was extracted from the Table 1-1 of the "Final Regulatory Impact Analysis: Control of Emissions from Non-road Diesel Engines," (EPA 420-R-98-016, dated August 1998) shows the emission standards adopted by EPA in 40 CFR, §89.112. Also, the new program includes a voluntary program called the "Blue Sky Series" engine program to encourage the production of advanced, very low-emitting engines. Under these new standards, the EPA projects that emissions from new non-road, compression-ignition equipment will be further reduced by 60% for $NO_x$ and 40% for PM compared to the emission levels of engines meeting the Tier 1 standards.

Figure 1: 30 TAC Chapter 114C-Preamble

As part of the attainment demonstration SIP for the Dallas/Fort Worth (DFW) ozone nonattainment area, the commission adopted accelerated non-road, compression-ignition fleet rules (§§114.410, 114.412, 114.416, 114.417, and 114.419). The proposed new rules would apply requirements identical to the existing DFW rules in the eight-county HGA ozone nonattainment counties.

Non-road equipment covered by these rules only includes equipment that is used exclusively for non-road purposes. In other words, non-road equipment does not have a license plate and cannot be used on roads. Dump trucks and other equipment that are used both on-road and off-road are not subject to the requirements of these rules.

The proposed rules will require persons in the HGA nonattainment area which own or operate non-road equipment powered by compression-ignition engines 50 hp and up to meet the following requirements. For the portion of the fleet that is 50 hp up to 100 hp, the owner or operator must ensure that such equipment will consist of 100% Tier 2 non-road equipment by the end of the calendar year 2007. For the portion of the fleet that is 100 hp up to 750 hp, the owner or operator must ensure that such equipment consist of a minimum of 50% Tier 3 non-road equipment and the remainder Tier 2 non-road equipment by the end of the calendar year 2007. Finally, for the portion of the fleet that is greater than 750 hp, the owner or operator must ensure that such equipment consist of 100% Tier 2 engines by the end of calendar year 2007. This will accelerate the turnover rate of compression-ignition, engine-powered, non-road equipment that would occur as a result of the federal Tier 2/Tier 3 program. Alternatively, an affected person may be exempted from these requirements if an emission reduction plan is developed that will achieve emissions reductions equivalent to the full implementation of these rules. As part of this plan an owner or operator may achieve these reductions, in whole or in part, by obtaining emission reduction credits (ERC), mobile emission reduction credits (MERC), discrete emission reduction credit (DERC), or mobile discrete emission reduction credit (MDERC) in accordance with proposed new §114.477 and 30 TAC Chapter 101, General Air Rules, §101.29, Emission Credit Banking and Trading. In concurrent rulemaking (rule log number 1998-089-101-AI), the emission credit banking and trading rules are being moved to Chapter 101, Subchapter H, Emissions Banking and Trading, Division 1, Emission Credit Banking and Trading and Division 4, Discrete Emission Credit Banking and Trading.

The HGA area needs emissions reductions earlier than what the natural turnover would allow; therefore, these proposed rules will require that Tier 2 and Tier 3 equipment be purchased at an accelerated rate once they become available under the EPA schedule outlined in 40 CFR 89. The proposed rules exempt non-road

engines used in locomotives, underground mining equipment, marine application, aircraft, airport ground support equipment (GSE), equipment used solely for agricultural purposes, emergency equipment, and freezing weather equipment.

Generally, the rules will affect equipment 50 hp and larger used in construction, general industrial, lawn and garden, utility, and material handling applications. Examples of equipment used in construction applications include backhoes, bore/drill rigs, cement mixers, crawler tractors, excavators, graders, off-highway trucks, pavers, paving equipment, plate compactors, rollers, rubber-tire dozers, rubber-tire loaders, scrapers, signal boards, skid-steer loaders, trenchers, and feller/bunchers. Examples of equipment used in general industrial applications include concrete/industrial saws, crushing equipment, oil field equipment, refrigeration/air conditioning units, scrubber/sweepers, and rail maintenance equipment. Examples of equipment used in lawn and garden applications include garden tractors, rear engine mowers, and chipper/grinders. Examples of equipment used in utility applications include air compressors, hydro-power units, pressure washers, pumps, generator sets, irrigation sets, and welders. Examples of equipment used in material handling applications include aerial lifts, cranes, forklifts, and rough-terrain forklifts.

The costs of meeting the new federal emission standards are expected to add about 1.0% to the purchase price of typical new non-road, compression-ignition equipment, although for some equipment the standards may cause price increases on the order of 2.0% to 3.0%. However, the cost of this program is the cost of having to replace the non-road, compression-ignition fleet on an accelerated schedule, not the cost of Tier 2 and Tier 3 engines. The cost of Tier 2 and Tier 3 engines is already accounted for in the EPA regulations, not as a result of these rules. The program is expected to cost between $30 million to $42 million average annual cost.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION-BY-SECTION DISCUSSION

Rules regarding an accelerated purchase of federal Tier 2 and Tier 3 non-road diesel equipment were adopted for the DFW ozone nonattainment area on April 19, 2000. These rules were adopted in Chapter 114, Subchapter I, Division 2, §114.410, Definitions; §114.412, Control Requirements; §114.416, Reporting and Recordkeeping Requirements; §114.417, Exemptions; and §114.419, Affected Counties. This rulemaking action proposes identical requirements which would apply to the eight-county HGA ozone nonattainment area.

The proposed new §114.470 adds definitions for Blue Sky Series engine, compression-ignition engine, fleet, non-road engine, non-road equipment, Tier 2 engine, and Tier 3 engine.

The proposed new §114.472 would require persons in the affected counties listed in §114.479, which own or operate non-road equipment powered by compression-ignition engines to use non-road equipment powered by Tier 2 and Tier 3 compression engines. The phase-in schedule specified in these rules accelerates the natural turnover of non-road equipment. To ensure the equipment is available, the phase-in schedule specified in these rules is set up so that compliance dates come after the implementation dates of the new federal standard as specified in the schedule specified in the federal rules in 40 CFR 89.112, as amended on October 23, 1998. For the portion of the non-road fleets powered by compression-ignition engines greater than or equal to 100 hp, but less than or equal to 750 hp, the rule proposes a gradually increased percentage of Tier 2 and Tier 3 equipment required, so that by the end of calendar year 2007, at least 50% of the affected portion of the fleet shall meet Tier 3 standards and the remainder of the affected fleet shall meet Tier 2 standards. For the portion of the fleet greater than or equal to 50 hp, but less than 100 hp, the proposed rule requires that 100% of the equipment meet Tier 2 standards by the end of calendar year 2007. For engines greater than 750 hp, the proposed rule requires that 100% of the affected fleet be Tier 2 engines by the end of calendar year 2007. The rule also allows the non-road engines designated as "Blue Sky Series" engines be counted toward the percentage requirements as either Tier 2 or Tier 3 engines. The "Blue Sky Series" engine program is a voluntary EPA program that allows for earlier introduction of cleaner engines. The emission standards for the Blue Sky Series program are the same as Tier 3 emission standards. Finally, the proposed rule will allow that an EPA-certified retrofit of newly purchased engines, in order to meet the Tier 2 or Tier 3 emission standards, be allowed to meet the percentage requirements. This retrofit allowance is proposed because some newly purchased engines may be able to meet the Tier 2 and Tier 3 emission standards by being retrofitted. Therefore, for an affected entity to meet the percentage requirements, they may purchase new equipment or retrofit existing engines if there is an EPA-certified retrofit available.

The proposed new §114.476 requires persons subject to §114.472 to submit annual fleet reports. The proposed rule also requires them to maintain copies of the submitted reports for a minimum of three years.

The proposed new §114.477 exempts locomotives, underground mining equipment, marine engines, aircraft engines, airport GSE, and agricultural equipment. Locomotives, underground mining equipment, marine engines, and aircraft engines are exempt from this proposed rule because they are not regulated by the EPA non-road rule. Airport GSE is exempt from this rule because it is being regulated by another strategy being proposed concurrently. Agricultural equipment is exempt from the proposed rule because of its small contribution (less than 1.0%) to non-road emissions, and it is operated primarily in rural areas. Also, the commission proposes an exemption for equipment used exclusively for emergency operations and for equipment used exclusively for freezing weather operations due to their low impact on air quality during the ozone season.

In the rulemaking for the DFW area construction equipment operating restrictions rules, the commission specifically requested comment on allowing the use of added controls such as catalytic converters or other after-market devices, or the use of EPA-certified cleaner equipment, to exempt such equipment from the operating restrictions of these rules. In response to the DFW construction equipment operating restrictions exemption comments and other comments to those rules concerning the difficulty in complying with these rules, the commission proposes §114.477(b). This subsection allows owners or operators to be exempt from the requirements of these rules if they submit an emissions reduction plan by May 31, 2002, that is approved by

the executive director and the EPA by May 31, 2003. The commission anticipates that by offering this exemption, the entities affected by these rules, the trade associations representing these entities, and the manufacturers will be encouraged to accelerate the research and development of emissions-reducing technology for equipment that will enable affected entities to meet the exemption. Each plan must describe in detail how the owner or operator will modify the equipment fleet to reduce $NO_x$ emissions by June 1, 2005 by a target amount equivalent to the total reductions achieved by implementation of these rules. If equipment subject to these rules is also subject to the HGA construction equipment operating restrictions rules, and the owner or operator would like to be exempt from both sets of rules, then the plan must reduce $NO_x$ emissions by a target amount equivalent to the total reductions achieved by both sets of rules. If the plan demonstrates that these reductions will occur by June 1, 2005, the reductions will be considered equivalent for purposes of timing. The commission will apply emissions inventory factors for equipment used in the modeling to develop these rules to quantify the emissions reductions resulting from the fleet modifications. The commission will develop a guidance document to assist operators in developing their plans. The guidance document will contain both the target emissions amount operators must meet, as well as emission factors for each type of equipment affected by the rules, and will offer guidance on how to calculate total emissions reductions for an equipment fleet.

The commission is requiring submission of the emission reduction plans by May 31, 2002, to allow sufficient time to review and quantify the collective emissions reductions the plans propose. The commission will complete the reviews by May 31, 2003, which coincides with the planned mid-course review of all control measures included in the SIP. After reviewing the plans, the commission will determine whether the collective emissions reductions proposed by the plans are equivalent to the reductions achieved from implementing both these rules.

The proposed new §114.479 specifies the counties that are subject to the new requirements. The counties included in the eight-county HGA nonattainment area are Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed new sections are in effect, there will be significant fiscal implications for units of state and local government located within the HGA ozone nonattainment area that own or operate non-road diesel vehicles and engines of 50 hp and larger.

For the portion of the fleet that is 50 hp up to 100 hp, owners and operators must ensure that such equipment will consist of 100% Tier 2 non-road equipment by the end of the calendar year 2007. For the portion of the fleet that is 100 hp up to 750 hp, owners and operators must ensure that such equipment consist of a minimum of 50% Tier 3 non-road equipment and the remainder Tier 2 non-road equipment by the end of the calendar year 2007. Finally, for the portion of the fleet that is greater than 750 hp, owners and operators must ensure that such equipment consist of 100% Tier 2 engines by the end of calendar year 2007.

Tier 2 and 3 standards are EPA standards whose goals are to reduce $NO_x$, HC (or VOC), and PM emissions for new non-road, compression-ignition engines. The primary differences between the current Tier 1 and Tier 2 standards is that in Tier 2 for the combined emissions of $NO_x$ and non-methane hydrocarbons (NMHC) has replaced a separate standard for $NO_x$ and HC in Tier 1; in Tier 2, standards for carbon monoxide (CO) and PM were added in engines of 50 to 175 hp; and in all other engine sizes, the CO and PM standards are more stringent for Tier 2 than Tier 1. The primary difference between Tier 3 and Tier 2 standards is that NMHC and $NO_x$ emission standards are approximately 39% more stringent in Tier 3 than Tier 2. The EPA has a voluntary program called the "Blue Sky Series" engine program to encourage the production of advanced, very-low emitting engines. These proposed rules gradually increase the percentage of Tier 2 and 3 engines needed in the fleet. "Blue Sky Series" engines will be allowed to meet either percentage requirement because the Blue Sky standards are the same as Tier 3 standards. These rules will also allow EPA-certified retrofit of newly purchased engines that meet the Tier 2 or Tier 3 emission standards to be used to meet the percentage requirements for each tier.

The proposed rules will affect the owners and operators of diesel equipment of 50 hp and larger used in the construction, general industrial, lawn and garden, utility, and material handling categories in the HGA ozone nonattainment area. Examples of equipment in the construction category include backhoes, bore/drill rigs, cement mixers, crawler tractors, excavators, graders, off-highway trucks, pavers, paving equipment, plate compactors, rollers, rubber-tire dozers, rubber-tire loaders, scrapers, signal boards, skid-steer loaders, trenchers, and feller/bunchers. Examples of equipment in the general industrial category include concrete/industrial saws, crushing equipment, oil field equipment, refrigeration/air conditioning units, scrubber/sweepers, and rail maintenance equipment. Examples of equipment used in the lawn and garden category include garden tractors, rear engine mowers, and chipper/grinders. Examples of equipment in the utility category include air compressors, hydro-power units, pressure washers, pumps, generator units, irrigation units, and welders. Examples of equipment in the material handling category include aerial lifts, cranes, forklifts, and rough-terrain forklifts.

The proposed new rules will also require affected individuals, state and local units of government, and businesses in the HGA area to submit to the commission, annual reports that demonstrate compliance with the proposed new sections. The proposed rules exempt non-road engines used in locomotives, underground mining equipment, marine applications, aircraft, airport ground support equipment, equipment used solely for agricultural purposes, emergency equipment, and freezing weather equipment.

The total number of existing diesel equipment covered by the proposed new sections and owned by units of state and local government is unknown; therefore, the total cost to units of state and local government cannot be quantified. As a sample of the potential equipment involved, the Texas Department of Transportation has 137 pieces of equipment affected by these rules. The total cost to units of state and local government will be similar to the costs discussed in the PUBLIC BENEFITS AND COSTS section of this preamble and will vary with the number of units owned that will need to be retrofitted, re-engined, or replaced to comply with the proposed new sections.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed new sections are in effect, the public benefit anticipated from enforcement of and compliance with the proposed

new sections will be the potential reduction of $NO_x$, VOC, CO, and PM emissions, potentially improved air quality, and contribution toward demonstration of attainment with the ozone NAAQS.

The commission anticipates significant fiscal implications anticipated to affected individuals, state and local government agencies, and businesses as a result of implementing the proposed new sections.

The EPA's NONROAD computer model estimated a population, in calendar year 2007, of approximately 44,525 pieces of compression-ignition, non-road equipment in the eight-county HGA ozone nonattainment area affected by the proposed new sections. Based on the 1999 population of 34,609 pieces of compression-ignition, non-road equipment in the eight-county HGA ozone nonattainment area, this is a growth factor of approximately 3.2% per year. The commission estimates that by the end of calendar year 1997, the population of compression-ignition, non-road equipment in the eight-county HGA ozone nonattainment area was approximately 32,496 units. Using the ten year life-cycle for medium to large engines in the EPA final regulatory impact analysis, approximately 12,969 units with these types of engines will be purchased as a result of aging or growth from the beginning of year 1998 through year 2000. This equipment will have to be either retrofitted or re-engined with compliant engines or replaced during years 2001 through 2007 in order to comply with the proposed new sections. The commission estimates that approximately 9,264 units will be either retrofitted, re-engined, or replaced from year 2001 through year 2005, the period covered by this fiscal note. The commission assumes that retrofit, re-engine, or replacement will begin in the year 2001. In the years following calendar year 2000, the commission expects the population of compression-ignition, non-road units to grow by 8,809 units through the end of calendar year 2007 to a total of 44,525 units. In addition, the commission estimates that another 22,747 aging units will be replaced due to the normal life-cycle of this equipment. The total of new units purchased due to growth and normal replacement is 31,556 units through year 2007. The commission estimates that approximately 22,340 of these units will be purchased during years 2001 through 2005 due to growth and normal replacement.

The EPA's regulatory impact analysis contains estimated purchase prices for new non-road diesel equipment. Two of these price estimates include new portable and motive equipment in the 250 to 450 hp range and are applicable to the proposed rule. The EPA estimated costs of $24,000 to $40,000 is for new portable equipment in the 250 hp to 450 hp range. The EPA report does not specify the types of the portable equipment, but the types could include equipment like pumps, oil field equipment, refrigeration, and air conditioning units. These types of equipment may be classified for the most part as industrial equipment. In the EPA NONROAD model, the closest equivalent hp range is 175 hp to 300 hp. In that range, approximately 78 units must be retrofitted, re-engined, or replaced through calendar year 2005 to comply with the proposed standards. The estimated total replacement cost for these 78 units is an average of approximately $373,502 to $622,503 per year from 2001 through the end of calendar year 2005. The second EPA estimated cost is $130,000 for new motive equipment in the 250 hp to 450 hp range. The EPA does not specify the types of the motive equipment; however, the motive equipment types in the NONROAD model are probably classified as tractors and other related construction equipment. In the EPA NONROAD model, there are 4,321 pieces of construction (motive) equipment in the 175 hp to 300 hp range by the end of calendar year 2007. In that size engine, approximately 899 units will be retrofitted, re-engined, or replaced from calendar year 2001 through 2005. The estimated replacement cost for these 899 units is an average of approximately $23 million per year from 2001 through the end of calendar year 2005.

Since the EPA study addressed the larger engines, the commission assumes that approximately 7,971 of the remaining 8,286 units existing at the end of calendar year 2000 in the HGA ozone nonattainment area that must be retrofitted, or replaced are smaller units of equipment with replacement costs in the range of $15,000 to $30,000. If the 7,971 smaller units of diesel non-road equipment in the HGA ozone nonattainment area have replacement costs in the range of $15,000 to $30,000, the estimated replacement cost for these units is an average of approximately $24 million to $48 million per year from 2001 through the end of calendar year 2005. The commission also assumes that 316 of the remaining population of equipment with diesel engines in the HGA ozone nonattainment area that must be retrofitted or replaced are larger units of equipment in the $130,000 to $150,000 range. If the remaining 316 units of very large diesel, non-road equipment in the HGA ozone nonattainment area have replacement costs in the range of $130,000 to $150,000, the estimated replacement cost for these units is an average of approximately $8 million to $9 million per year from 2001 through the end of calendar year 2005.

The commission estimates the cost impact to replace the 9,264 units of non-road diesel equipment due to growth and replacement to meet standards in the HGA ozone nonattainment area at the end of calendar year 2005 to be an average of approximately $56 million to $81 million per year through the end of calendar year 2005. This cost impact is based on the assumption that all 9,264 units which will require modification or replacement through the end of calendar year 2005 will be replaced with new equipment. It is probable that some of this equipment will be retrofitted to meet either Tier 2 or Tier 3 standards, or re-engined with Tier 2 or Tier 3 compliant engines at costs much lower than the replacement cost indicated here. It is also probable that many equipment operators will choose to obtain equivalent emission reductions without making any changes to their equipment. In addition, the commission anticipates the total cost impact to be mitigated by the trade-in or the sale of existing equipment if new equipment is purchased. However, over 96% of this cost is based on the assumption that all of the 9,264 units that must be retrofitted, re-engined, or replaced by the end of the calendar year 2005 will be replaced with all new equipment. The commission estimates that used equipment in good condition is sold for from 40% to 60% of its original cost. If a 50% factor is applied to replacement costs to offset the reduced cost for retrofit, re-engine, and trade-in, the final cost impact to replace or retrofit the 9,264 units is approximately $140 million to $203 million. The decision to either purchase new equipment, retrofit, or re-engine will likely be based on the economics for each unit of equipment.

Between the years 2001 and 2007, the EPA NONROAD computer model estimates the population of diesel non-road equipment in the HGA ozone nonattainment area to grow by 8,809 units. In addition, another 22,747 units will be purchased to replace aging units for a total of 31,556 units. Approximately 22,340 of the total 31,556 units purchased for growth and aging replacement will be purchased during the years 2001 through 2005. The EPA analysis contains estimates of domestic sales of various sizes of equipment. If the sales within the HGA ozone nonattainment area are similar, the commission estimates that the additional cost of the engines for this equipment would be

an average of approximately $2.1 million per year through the end of calendar year 2005. The EPA document states that the costs of meeting the new emission standards are expected to add about 1.0% to the purchase price of typical new non-road, compression-ignition equipment, although for some equipment the standards may cause price increases on the order of 2.0% to 3.0%.

The commission estimates the total fiscal impact to replace the estimated 31,604 units of equipment which will be either purchased new, retrofitted, re-engined, or replaced through 2005 to be an average of approximately $58 million to $83 million per year through calendar year 2005. Over 96% of this cost is based on the assumption that all of the 31,604 units that must be retrofitted, re-engined, or replaced by the end of calendar year 2005 will be replaced with all new equipment. It is probable that some of this equipment will be retrofitted to meet either Tier 2 or Tier 3 standards or re-engined with Tier 2 or Tier 3 compliant engines at a much lower cost than replacement cost. It is also probable that many equipment operators will choose to obtain equivalent emission reductions without making any changes to their equipment. In addition, the commission anticipates the total cost impact to be mitigated by the trade-in or the sale of existing equipment if new equipment is purchased. If trade-in allowances are considered, the commission anticipates the total annual cost between the years 2001 to 2005 to be approximately $30 million to $42 million. The decision to either purchase new equipment, retrofit, or re-engine will likely be based on the economics for each unit of equipment. The following table summarizes the costs through year 2005:

Figure 2: 30 TAC Chapter 114C-Preamble

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

The commission anticipates significant fiscal implications to small businesses and micro-businesses located in the HGA ozone nonattainment area as a result of implementing the proposed new sections. The commission anticipates that there are many small and micro-businesses in the affected area that own and operate non-road diesel equipment affected by the proposed rule. Depending on the relative age of current equipment and the economics to retrofit or re-engine the equipment versus new purchase for such equipment, affected small and micro-businesses in the HGA ozone nonattainment area may have to retrofit, re-engine, or replace some or most of their current diesel equipment in the years 2001 through the end of calendar year 2007 in order to comply with the proposed new sections. The commission anticipates that costs will be similar to those for businesses at large as indicated in the PUBLIC BENEFIT AND COSTS section of this preamble. The EPA estimated the costs of new portable equipment in the 250 hp to 450 hp category at $24,000 to $40,000 and motive equipment in the 250 hp to 450 hp range at approximately $130,000. The commission anticipates that most effected small businesses or micro-businesses will own and operate engines in the lower hp ranges, portable equipment, and other types of equipment in the lower cost ranges of approximately $15,000 to $30,000 per unit. The EPA estimated that the additional cost for diesel engines which comply with the proposed standards are in the range of $240 to $1,900 each. The total cost impact will be more dependent on the relative size of the fleet and on the size and number of the non-road diesel equipment they own and operate. The commission also anticipates that the total fiscal impact may be mitigated by the trade-in or sale of existing equipment. The total number of existing diesel equipment covered by the proposed new rules and owned by small and micro-businesses is unknown; therefore, the total cost to small and micro-businesses is undetermined.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is subject to §2001.0225 because it meets the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed new rules are intended to protect the environment or reduce risks to human health from environmental exposure to ozone and will affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed new rules would require units of state and local government, businesses, and persons in the eight-county HGA ozone nonattainment area which own or operate non-road equipment powered by compression-ignition equipment to meet the following requirements. For the portion of the fleet that is 50 hp up to 100 hp, owners and operators must ensure that such equipment will consist of 100% Tier 2 non-road equipment by the end of the calendar year 2007. For the portion of the fleet that is 100 hp up to 750 hp, owners and operators must ensure that such equipment consist of a minimum of 50% Tier 3 non-road equipment and the remainder Tier 2 non-road equipment by the end of the calendar year 2007. Finally, for the portion of the fleet that is greater than 750 hp, owners and operators must ensure that such equipment consist of 100% Tier 2 engines by the end of calendar year 2007. This air pollution control program is part of the strategy to reduce $NO_x$ emissions necessary for the counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The commission proposes an air pollution control program, including the use of Tier 2 and Tier 3 non-road, compression-ignition engine standards, be established to reduce $NO_x$ emissions necessary for the counties included in the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS. Although the proposed rules meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225 only applies 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 action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the use of Tier 2 and Tier 3 non-road, compression-ignition engine standards within this proposal were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409, and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the

state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633) during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that $NO_x$ emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain $NO_x$ emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, 382.017, 382.019, and 382.039.

The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for this rulemaking action in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed rulemaking action would require persons in the eight-county HGA nonattainment area which own or operate non-road, compression-ignition equipment to meet the following requirements. For the portion of the fleet that is 50 hp up to 100 hp, the owner or operator must ensure that such equipment will consist of 100% Tier 2 non-road equipment by the end of the calendar year 2007. For the portion of the fleet that is 100 hp up to 750 hp, the owner or operator must ensure that such equipment consist of a minimum of 50% Tier 3 non-road equipment and the remainder Tier 2 non-road equipment by the end of the calendar year 2007. Finally, for the portion of the fleet that is greater than 750 hp, the owner or operator must ensure that such equipment consist of 100% Tier 2 engines by the end of calendar year 2007. This proposed rulemaking action will act as an air pollution control strategy to reduce $NO_x$ emissions necessary for the eight counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. Promulgation and enforcement of this rule will not burden private, real property. Although the proposed rule does not directly prevent a nuisance, or prevent an immediate threat to life or property, it does prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emissions limitations and delays within the proposed rule were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS, once the EPA has established them. Under 42 USC, §7410, and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of this rule is to implement a cleaner-burning, non-road, compression-ignition fleet program necessary for the HGA nonattainment area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to this rulemaking action is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these proposed rules will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and $NO_x$ air emissions will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 50, National Primary and Secondary Ambient Air Quality Standards, and 40 CFR 51, Requirements for Preparation, Adoption, and Submittal Of Implementation Plans. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087; faxed to (512) 239-4808; or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 2000-011C-114-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Ken Gathright at (512) 239-0599 or Alan Henderson at (512) 239-1510.

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under Texas Health and Safety Code, TCAA, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed under TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §382.039, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed new sections implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; and §382.039, relating to Attainment Program.

*§114.470. Definitions.*

Unless specifically defined in the TCAA or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Blue Sky Series engine--A non-road engine meeting the requirements of Title 40 Code of Federal Regulations (CFR) §89.112(f), as amended on October 23, 1998.

(2) Compression-ignition engine--A type of engine with operating characteristics significantly similar to the theoretical diesel combustion cycle. The non-use of a throttle to regulate intake air flow for controlling power during normal operation is indicative of a compression-ignition engine.

(3) Fleet--The aggregate of non-road equipment powered by compression-ignition engines that operate within the counties specified in §114.479 of this title (relating to Affected Counties) under the authority of the same person. Regarding fleet equipment leased for one year or longer, the authority is considered to reside with the lessee. For fleet equipment leased for less than one year, the authority is considered to reside with the lessor.

(4) Non-road engine--An engine as defined in Title 40 CFR §89.2, as amended on December 29, 1999.

(5) Non-road equipment--Equipment which is powered by a non-road engine and which is not licensed for on-road use.

(6) Tier 2 engine--An engine subject to the Tier 2 emission standards listed in Title 40 CFR §89.112(a), Table 1, as amended on October 23, 1998.

(7) Tier 3 engine--An engine subject to the Tier 3 emission standards listed in Title 40 CFR §89.112(a), Table 1, as amended on October 23, 1998.

*§114.472. Control Requirements.*

(a) Persons who own or operate non-road equipment powered by compression-ignition engines 50 horsepower (hp) and larger, in the counties listed in §114.479 of this title (relating to Affected Counties), are subject to the compliance requirements specified in subsection (b) of this section.

(b) Owners or operators shall ensure that their fleet is certified to meet or exceed the Tier 2 and Tier 3 standards in accordance with the following schedule.

(1) For the part of the fleet greater than or equal to 50 and less than 100 hp:

(A) at least 25% of the affected portion of the fleet shall meet Tier 2 certification standards by December 31, 2004;

(B) at least 50% of the affected portion of the fleet shall meet Tier 2 certification standards by December 31, 2005;

(C) at least 75% of the affected portion of the fleet shall meet Tier 2 certification standards by December 31, 2006; and

(D) 100% of the affected portion of the fleet shall meet Tier 2 certification standards by December 31, 2007.

(2) For the part of the fleet greater than or equal to 100 and less than or equal to 750 hp:

(A) at least 10% of the affected portion of the fleet shall meet Tier 2 certification standards by December 31, 2004;

(B) at least 20% of the affected portion of the fleet shall meet Tier 2 certification standards by December 31, 2005;

(C) at least 30% of the affected portion of the fleet shall meet Tier 2 certification standards by December 31, 2006; and

(D) at least 50% of the affected portion of the fleet shall meet Tier 3 certification standards, and the remainder of the affected portion of the fleet shall meet Tier 2 certification standards by December 31, 2007.

(3) For that part of the fleet with an hp rating greater than 750 hp:

(A) at least 50% of the affected portion of the fleet must meet Tier 2 certification standards by December 31, 2006; and

(B) 100% of the affected portion of the fleet must meet Tier 2 certification standards by December 31, 2007.

(c) Non-road equipment that uses a "Blue Sky Series" engine, as defined in §114.470 of this title (relating to Definitions) may be considered a Tier 2 or Tier 3 engine for compliance with the percentage requirements of subsection (b) of this section.

(d) The percentage requirements of subsection (b) of this section may also be met by a retrofit of currently owned or newly purchased non-road, compression-ignition engines certified by the EPA to meet or exceed the Tier 2 or Tier 3 emission standards.

*§114.476. Reporting and Recordkeeping Requirements.*

(a) Persons affected by §114.472 of this title (relating to Control Requirements) must submit annual reports for the previous year beginning February 1, 2005, and every February 1 thereafter. The report shall be submitted to the executive director and shall contain, at a minimum:

(1) the fleet identification number (when assigned by the Texas Natural Resource Conservation Commission);

(2) the person's name, mailing address, telephone and fax numbers;

(3) the name, title, mailing address, and telephone number of the specified person responsible for the fleet;

(4) a list of all non-road equipment with compression-ignition engines 50 horsepower and larger; and

(5) a demonstration of compliance with the applicable implementation schedule under §114.472 of this title.

(b) The affected person shall maintain copies of reports required by subsection (a) of this section on-site at the reported fleet address for a minimum of three years, and upon request shall make such reports available to the executive director or local air pollution control agencies with jurisdiction.

*§114.477. Exemptions.*

(a) The following non-road equipment powered by compression-ignition engines are exempt from §114.472 and §114.476 of this title (relating to Control Requirements; and Reporting and Recordkeeping Requirements):

(1) locomotives;

(2) underground mining equipment;

(3) marine engines;

(4) aircraft engines;

(5) airport ground support equipment;

(6) equipment used solely for agricultural purposes which includes, but is not limited to, tractors, balers, combines, sprayers, swathers, and skidders;

(7) equipment used exclusively for emergency operations to protect public health and safety or the environment; and

(8) equipment used exclusively for freezing weather operations.

(b) Owners or operators who submit an emission reduction plan by May 31, 2002, that is approved by the executive director and the EPA by May 31, 2003, will be exempt from §114.472 and §114.476 of this title in the counties listed in §114.479 of this title (relating to Affected Counties) upon implementation of the rules of this division on December 31, 2004. In order to be approved, the plan must demonstrate reductions of oxides of nitrogen emissions equivalent to those required by §114.472 of this title and must contain adequate enforcement provisions.

*§114.479. Affected Counties.*

Persons in the following counties shall be in compliance with §114.472 and §114.476 of this title (relating to Control Requirements; and Reporting and Recordkeeping Requirements) no later than the dates specified in §114.472(b) of this title: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005613
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## DIVISION 9. HOUSTON/GALVESTON CONSTRUCTION EQUIPMENT OPERATING RESTRICTIONS

**30 TAC §§114.482, 114.486, 114.487, 114.489**

The Texas Natural Resource Conservation Commission (commission) proposes new §114.482, Control Requirements; §114.486, Recordkeeping Requirements; §114.487, Exemptions; and §114.489, Affected Counties and Compliance Dates. The commission proposes these revisions to add new Division 9, Houston/Galveston Construction Equipment Operating Restrictions; to Subchapter I, Non-road Engines; Chapter 114, Control of Air Pollution from Motor Vehicles; and corresponding revisions to the state implementation plan (SIP). The commission proposes these new sections in Chapter 114 and revisions to the SIP in order to control ground-level ozone in the Houston/Galveston (HGA) ozone nonattainment area. The proposed sections are one element of the control strategy for the proposed HGA Post-1999 Rate-of-Progress (ROP)/Attainment Demonstration SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post-1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base-case episodes, adopted rules to achieve a 9% ROP reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxides ($NO_x$) waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the $NO_x$ waiver were based on early base-case episodes which marginally exhibited model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, the EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995, memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revisions to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to the EPA on May 19, 1998, a revision to the HGA SIP which contained the following elements in response to the EPA guidance: The UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999, for this

modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000, SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid-course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approvable attainment demonstration, the EPA has indicated that the state must adopt those strategies modeled in the November submittal and then adopt sufficient controls to close the remaining gap in $NO_x$ emissions. The modeling included in this proposal indicates a gap of an additional 77.98 tons per day (tpd) of $NO_x$ reductions is necessary for an approvable attainment demonstration.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains post-1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The HGA ozone nonattainment area will need to ultimately reduce $NO_x$ more than 750 tpd to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of the HGA Construction Equipment Operating Restrictions program will contribute to attainment and maintenance of the one-hour ozone standard in the HGA area. An HGA construction equipment operating restriction program should also contribute to a successful demonstration of transportation conformity in the HGA area.

The purpose of these rules is to establish a restriction on the use of construction equipment (non-road, heavy-duty diesel equipment rated at 50 horsepower (hp) and greater) as an air pollution control strategy to delay the emissions of $NO_x$, a key ozone precursor, until later in the day, thus limiting ozone formation. The non-road mobile source category is one of the few sources of ozone-forming emissions that is not currently regulated by state or federal rules. Federal controls such as cleaner-burning engines and cleaner-diesel fuel have been proposed, but are not scheduled to be implemented until the 2004 time frame.

The proposed revisions provide a similar restriction on the use of construction equipment previously adopted by the commission for the Dallas/Fort Worth (DFW) ozone nonattainment area, except for the effective period, which is between the hours of 6:00 a.m. and noon, during Daylight Savings Time, which begins on the first Sunday in April and ends on the last Sunday in October, for the HGA ozone nonattainment area. The affected area includes the eight-county HGA nonattainment area of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. The contribution towards the reduction in ozone levels from restricting the hours of operation of construction equipment is an essential component of the control strategy and is necessary for the eight-county HGA ozone nonattainment area to demonstrate attainment with the ozone NAAQS.

The effective date of the amended rules for HGA will be April 3, 2005. The commission established an effective date in 2005 to allow manufacturers time to produce and release new cleaner-burning equipment and retrofit technology, which would enable equipment operators to plan for and implement purchases of this equipment before rules concerning restrictions on the operation of construction equipment become effective.

The equipment to which the rules concerning restrictions on the operation of construction equipment apply includes all non-road,

heavy-duty diesel equipment classified as "construction equipment," rated at 50 hp and greater, regardless of how it is being used. For example, equipment such as bulldozers used in sanitary landfills, non-road cranes used in demolition, and rubber tire loaders used in manufacturing operations are covered by these rules concerning restrictions on the operation of construction equipment. It is not the commission's intent to restrict the use of agriculture equipment, which does not meet the definition of construction equipment.

The commission understands that a literal interpretation of the term "construction equipment" could lead the reader to believe that the rules concerning restrictions on the operation of construction equipment only applied to non-road, heavy-duty diesel equipment used only for purposes of construction and mining, when in fact, the rules apply to all construction equipment greater than 50 hp, regardless of how it is being used.

Construction equipment is considered to be, but is not limited to, pavers, paving equipment, plate compactors, rollers, scrapers, surfacing equipment, signal boards/light plants, trenchers, bore/drill rigs, excavators, concrete/industrial saws, cement and mortar mixers, cranes, graders, off-highway trucks, crushing/processing equipment, rough terrain forklifts, rubber tire loaders, rubber tire tractors/dozers, tractors/loaders/backhoes, crawler tractors/dozers, skid steer loaders, off-highway tractors, and dumpsters/tenders.

Ozone is formed through chemical reactions between natural and man-made emissions of VOC and $NO_x$ in the presence of sunlight. Higher ozone levels occur most frequently on hot summer afternoons. The critical time for the mixing of $NO_x$ and VOC is early in the day. By delaying the hours of operation for construction equipment and delaying the release of $NO_x$ emissions until after noon during Daylight Savings Time in the HGA nonattainment area, the $NO_x$ emissions will not mix in the atmosphere with other ozone-forming compounds until after the critical mixing time has passed. Therefore, production of ozone will be stalled until later in the day when optimum ozone formation conditions no longer exist, ultimately reducing the peak level of ozone produced.

This strategy is not dependent on atmospheric conditions to reduce ozone formation, as such strategies are disfavored by 42 USC, §7423. Instead, the strategy creates reductions in the amount of $NO_x$ added to the atmosphere by construction equipment during the time of day when those emissions have been shown to contribute to exceedances of the ozone NAAQS. Use of "time of day" restrictions such as this for NAAQS compliance strategies was anticipated and discussed by the EPA in their off-road mobile source rules.

As established in the previously adopted DFW rules concerning restrictions on the operation of construction equipment, the proposed rules contain exemptions from control and recordkeeping requirements. These exemptions include construction equipment used exclusively for emergency operations to protect public health and the environment, and for mixing, transporting, pouring, or processing wet concrete. Also, the proposed rules contain an exemption that allows operators that submit an emissions reduction plan (plan) by May 31, 2002, which is approved by the executive director and the EPA by May 31, 2003, to operate during the restricted hours. The commission anticipates that by offering this exemption, equipment manufacturers or regulated businesses will invest in research and development of emissions-reducing technology for construction equipment to enable affected businesses to meet the exemption.

The emission reduction plan must describe in detail how the operator will modify his behavior or fleet of equipment to reduce $NO_x$ emissions by the implementation date in 2005 by a target amount equivalent to the total $NO_x$ reductions achieved by implementation of the rule from which the operator is applying for exemption. Owners or operators may submit plans to apply for exemption from either the construction equipment operating restriction rule or the accelerated purchase of non-road heavy-duty diesel equipment rule, or from both rules. The plans must contain emission reductions equivalent to the total $NO_x$ reductions achieved by the rule from which they are applying for exemption and must contain adequate enforcement provisions. Examples of modifications that may result in emission reductions include using new, cleaner-burning equipment, replacing existing equipment with cleaner-burning engines, retrofitting existing equipment with emissions-reducing technology, using emissions-reducing fuel, changing hours of operation, restricting equipment idling, and participating in an emissions banking and trading program. For example, an owner or operator may obtain emission reduction credits (ERCs), mobile emission reduction credits (MERCs), discrete emission reduction credit (DERCs), or mobile discrete emission reduction credit (MDERCs) in accordance with this section and 30 TAC Chapter 101 (General Air Rules), §101.29 (Emission Credit Banking and Trading). In a concurrent rulemaking (rule log number 1998-089-101-AI), the emission credit banking and trading rules are being moved to Chapter 101, Subchapter H (Emissions Banking and Trading), Division 1 (Emission Credit Banking and Trading) and Division 4 (Discrete Emission Credit Banking and Trading).

The commission will apply emission inventory factors for construction equipment used in the modeling utilized in the development of the rules concerning restrictions on the operation of construction equipment to quantify the $NO_x$ and VOC emission reductions and equivalent ozone reductions resulting from the fleet modifications. The commission will develop a guidance document to assist operators in developing their plans. The guidance document will contain both the target emissions amount operators must meet, as well as emission factors for each type of equipment affected by the rules concerning restrictions on the operation of construction equipment, and will offer guidance on how to calculate total emissions reductions for a fleet of equipment. The commission estimates that this measure results in an approximate 8.0 tpd shift of $NO_x$ emissions from morning to afternoon which is equivalent to a 6.7 tpd $NO_x$ reduction.

The commission is requiring submission of the plans by May 31, 2002 to allow sufficient time to review and quantify the collective emissions reductions the plans propose. The executive director and the EPA will complete the reviews by May 31, 2003, which coincides with the planned mid-course review of all control measures included in the SIP. After reviewing the plans, the executive director will determine whether the collective emission reductions proposed by the plans are equivalent to the $NO_x$ reductions achieved from implementing the underlying exempted rule. The commission will implement the construction equipment operating restrictions rules on April 3, 2005 and the accelerated purchase rules on December 31, 2004, as proposed, for operators who did not submit plans or whose plans were not approved.

Because this proposed strategy does not create an actual reduction in emissions nor require the use of additional control equipment or any new technology, the commission estimated that the fiscal implications may be significant due to the shift in work hours. The restriction in the hours of operation may require

that companies adjust their work schedules to coincide with the hours of operation allowed under the regulation.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION BY SECTION DISCUSSION

The new Division 9 is proposed regarding HGA construction equipment operating restrictions in order to provide an opportunity for comment on the complete control strategy.

The proposed new §114.482 establishes control requirements for construction equipment operating restrictions. The proposal restricts the operation of any non-road diesel construction equipment of 50 hp and above, between the hours of 6:00 a.m. and noon, during Daylight Savings Time, which begins on the first Sunday in April and ends on the last Sunday in October.

The proposed new §114.486 requires all persons subject to the provisions of §114.482 to maintain daily records of equipment operation in the affected counties.

The proposed new §114.487 establishes exemptions from the control requirements of §114.482 and the recordkeeping requirements of §114.486. These exemptions include diesel equipment used exclusively for situations involving emergency operations and diesel equipment while being used for mixing, transporting, pouring, or processing of wet concrete. The commission understands the definition of emergency equipment includes equipment which may have to be used to repair facilities or devices which have failed in order to prevent greater immediate environmental harm. Also, the proposed rules contain an exemption that allows operators that submit an emissions reduction plan by May 31, 2002, which is approved by the executive director and the EPA by May 31, 2003, to operate during the restricted hours.

The proposed new §114.489 specifies the counties which are subject to the new requirements and the dates and times these counties are subject to these requirements. The affected counties include all eight counties in the HGA ozone nonattainment area, which include Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. The compliance date for the HGA area is April 3, 2005.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period that the proposed rules are in effect, significant fiscal implications are anticipated for units of state and local government as a result of administration or enforcement of the proposed rules. The proposed rules would restrict the use of heavy-duty diesel construction equipment, rated at 50 hp and greater, from use between the hours of 6:00 a.m. and noon, during Daylight Savings Time, which begins on the first Sunday in April and ends the last Sunday in October. The restriction would apply to construction equipment in the eight-county HGA ozone nonattainment area of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties. The proposed rules would become effective April 3, 2005. Units of state and local government within the HGA ozone nonattainment area that have ongoing construction projects will be affected. Based on comments received from units of state and local government affected by the DFW rules, including the North Central Texas Council of Government (NCTCOG) and the Texas Department of Transportation (TxDOT), costs associated with delays and extended construction schedules may increase overall construction costs by 15% to 20%. State and local agencies engaged in road construction and repair are anticipated to bear the heaviest burden among state and local agencies. The proposed rules do not require additional control equipment or new emission control technologies to be applied to the affected diesel equipment.

The proposed rules would establish a limitation on the use of heavy-duty diesel construction equipment as an air pollution control strategy to delay the emission of $NO_x$ until later in the day, thus limiting ozone production. The commission is required to submit a SIP revision by the end of 2000 which will bring the HGA into attainment by 2007. The rules proposed for HGA in this notice are one element of the ozone attainment demonstration SIP for HGA. The purpose of the proposed rules is for the HGA nonattainment area to demonstrate attainment with the ozone NAAQS. The SIP sets forth a control strategy that provides part of the emission reductions necessary for attainment and maintenance of the ozone NAAQS.

As established in the DFW rules concerning restrictions on the operation of construction equipment, the existing rules contain exemptions from control and recordkeeping requirements. These exemptions include construction equipment used exclusively for emergency operations to protect public health and the environment, and for mixing, transporting, pouring, or processing wet concrete. Also, the existing rules contain an exemption that allows operators that submit a plan by May 31, 2002, which is approved by the executive director and the EPA by May 31, 2003, to operate during the restricted hours.

Units of state and local government within the HGA ozone nonattainment area that have ongoing construction projects may have significant fiscal implications. According to TxDOT, the TxDOT's Houston and Beaumont districts (which cover Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties) spent over $464 million during calendar year 1999 for road and bridge construction projects in the HGA area. Based on the TxDOT expenditures, an estimated 15% to 20% cost increase due to delays and extended construction schedules would add $70 million to $93 million annually to TxDOT-related construction costs in the HGA area. Note, these figures only apply to TxDOT-related road and bridge construction costs. Because the proposed rules do not require additional control equipment or new technology, the commission does not anticipate significant economic impacts to affected agencies and businesses beyond the shift in work schedule and possible implications caused by potential construction delays attributable to the proposed rules. Delaying use of diesel construction equipment until after noon may require affected state and local agencies and associated businesses to adjust their work schedules and could cause extensions of construction timelines. The fiscal impact of potential delays would depend on the scope, magnitude, and time-critical nature of the construction projects.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed

rules will be a potential reduction in the formation of ozone by delaying $NO_x$ emissions from construction equipment until later in the day when optimum conditions for the formation of ozone no longer exist, potentially improved air quality, and contribution toward demonstration of attainment with the ozone NAAQS.

The proposed rules would restrict the use of heavy-duty diesel construction equipment, rated at 50 hp and greater, from use between the hours of 6:00 a.m. and noon, during Daylight Savings Time, which begins on the first Sunday in April and ends the last Sunday in October. The restriction would apply to construction equipment in the eight-county HGA ozone nonattainment area. The proposed rules would become effective April 3, 2005.

Businesses within the HGA ozone nonattainment area that have ongoing construction projects may have significant fiscal implications in an amount that cannot be determined at this time; however, based on comments received from units of state and local government affected by the DFW rules, including the NCTCOG and TxDOT, costs associated with delays and extended construction schedules may increase overall construction costs by 15% to 20%. Because the proposed rules do not require additional control equipment or new technology, the commission does not anticipate significant economic impacts to affected agencies and businesses beyond the shift in work schedule and possible implications caused by potential construction delays attributable to the proposed rules. Delaying use of diesel construction equipment until after noon may require affected state and local agencies and businesses to adjust their work schedules and could cause extensions of construction timelines. The fiscal impact of potential delays would depend on the scope, magnitude, the slack time available in the schedule, and the time-critical nature of certain parts of the construction project.

As established in the DFW rules concerning restrictions on the operation of construction equipment, the existing rules contain exemptions from control and recordkeeping requirements. These exemptions include construction equipment used exclusively for emergency operations to protect public health and the environment, and for mixing, transporting, pouring, or processing wet concrete. Also, the existing rules contain an exemption that allows operators that submit a plan by May 31, 2002, which is approved by the executive director and EPA by May 31, 2003, to operate during the restricted hours.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Small and micro-businesses within the HGA ozone nonattainment area that have ongoing construction projects may have significant fiscal implications as a result of enforcement and administration of the proposed rules in an amount which cannot be determined.

The proposed rules would restrict the use of heavy-duty diesel construction equipment, rated at 50 hp and greater, from use between the hours of 6:00 a.m. and noon, during Daylight Savings Time, which begins on the first Sunday in April and ends the last Sunday in October. The restriction would apply to construction equipment in the eight-county HGA ozone nonattainment area. The proposed rules would become effective April 3, 2005.

Small and micro-businesses within the HGA ozone nonattainment area that have ongoing construction projects may have significant fiscal implications in an amount that cannot be determined at this time; however, based on comments received from units of state and local government affected by the DFW rules, including the NCTCOG and TxDOT, costs associated with delays and extended construction schedules may increase overall construction costs by 15% to 20%. Because the proposed rules do not require additional control equipment or new technology, the commission does not anticipate significant economic impacts to affected small and micro-businesses beyond the shift in work schedule and possible implications caused by potential construction delays attributable to the proposed rules. Delaying use of diesel construction equipment until after noon may require affected small and micro-businesses to adjust their work schedules and could cause extensions of construction timelines. The fiscal impact of potential delays would depend on the scope, magnitude, the slack time available in the schedule, and the time-critical nature of certain parts of the construction project.

As established in the DFW rule concerning restrictions on the operation of construction equipment, the existing rules contain exemptions from control and recordkeeping requirements. These exemptions include construction equipment used exclusively for emergency operations to protect public health and the environment, and for mixing, transporting, pouring, or processing wet concrete. Also, the existing rules contain an exemption that allows operators that submit an emissions reduction plan (plan) by May 31, 2002, which is approved by the executive director and the EPA by May 31, 2003, to operate during the restricted hours.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is subject to §2001.0225 because it meets 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 proposed rules are intended to protect the environment or reduce risks to human health from environmental exposure to ozone and, although we do not have definitive cost estimates at this time, construction delays could affect a sector of the economy in a material way. The proposed rules are intended to implement an operating-use restriction program requiring that heavy-duty diesel construction equipment be restricted from use between the hours of 6:00 a.m. and noon, during Daylight Savings Time, which begins on the first Sunday in April and ends the last Sunday in October. This program is part of the strategy to reduce the formation of ozone by delaying $NO_x$ emissions from construction equipment until later in the day when optimum conditions for the formation of ozone no longer exist. The program was developed for the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The proposed rules are one element of the HGA Post-1999 ROP/Attainment Demonstration SIP. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention

and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633) during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that $NO_x$ emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain $NO_x$ emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, 382.017, 382.019, and 382.039.

The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking action is to establish a construction equipment operating restriction to delay $NO_x$ emissions that lead to high levels of ground-level ozone production. This rulemaking action will act as an air pollution control strategy to reduce $NO_x$ emissions necessary for the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The affected area consists of the eight counties included in the HGA ozone nonattainment area. Promulgation and enforcement of the rules will not burden private, real property as it only regulates mobile sources, and will not cause a takings to occur. Although the rules do not directly prevent a nuisance, prevent an immediate threat to life or property, or prevent a real and substantial threat to public health and safety, the rules partially fulfill a federal mandate under the 42 USC, §7410. Specifically, the emissions limitations and delays within these rules were developed in order to meet the ozone NAAQS set by the EPA under the 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS, once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rules is to implement a construction equipment operating restriction necessary for the HGA nonattainment area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which also applies to these rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. For the reasons stated, these proposed rules will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable

CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and $NO_x$ air emissions will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 50, National Primary and Secondary Ambient Air Quality Standards, and 40 CFR 51, Requirements for Preparation, Adoption, and Submittal Of Implementation Plans. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, faxed to (512) 239-4808, or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 2000-011B-114-A1. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Gayla McCarty at (512) 239-4631 or Alan Henderson at (512) 239-1510.

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under Texas Health and Safety Code, TCAA, §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed under TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §382.039, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed new sections implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; and §382.039, relating to Attainment Program.

*§114.482. Control Requirements.*

No person shall start or operate any non-road diesel construction equipment, of 50 horsepower and above, between the hours of 6:00 a.m. and noon, during Daylight Savings Time, which begins on the first Sunday in April and ends on the last Sunday in October, in the counties listed in §114.489 of this title (relating to Affected Counties and Compliance Dates.)

*§114.486. Recordkeeping Requirements.*

(a) Any person that operates construction equipment described in §114.482 of this title (relating to Control Requirements) in those counties listed in §114.489 of this title (relating to Affected Counties and Compliance Dates) is subject to requirements of this section.

(b) Such person described in subsection (a) of this section shall provide to the executive director, or other air pollution program with jurisdiction, any records required to be maintained in accordance with this section within five days of a written request from the executive director, or other air pollution program with jurisdiction.

(c) Such person described in subsection (a) of this section shall maintain daily operating records on the job site. These records must be maintained for a minimum of two years. The records at a minimum must contain:

(1) date(s) of operation;

(2) start and end times of daily operation;

(3) types of equipment being used; and

(4) name(s) of the equipment operator(s).

*§114.487. Exemptions.*

(a) The following uses of construction equipment are exempt from §114.482 and §114.486 of this title (relating to Control Requirements; and Recordkeeping Requirements) in the counties listed in §114.489 of this title (relating to Affected Counties and Compliance Dates):

(1) equipment used exclusively for emergency operations to protect public health and safety or the environment; and

(2) equipment used for mixing, transporting, pouring, or processing of wet concrete provided such equipment is actually processing wet concrete.

(b) Operators that submit an emissions reduction plan by May 31, 2002 (that is approved by the executive director and the EPA by May 31, 2003) will be exempt upon implementation of the rule in 2005, and will be permitted to operate during the restricted hours. In order to be approved, the plan must demonstrate reductions of oxides of nitrogen equivalent to those required by both §114.472 of this title (relating to Control Requirements) and §114.482 of this title, and must contain adequate enforcement provisions.

*§114.489. Affected Counties and Compliance Dates.*

Effective April 3, 2005, affected persons in the following counties shall be in compliance with §§114.482, 114.486, and 114.487 of this title (relating to Control Requirements; Recordkeeping Requirements; and Exemptions). These include Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005616
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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# SUBCHAPTER J. OPERATIONAL CONTROLS FOR MOTOR VEHICLES
## DIVISION 1. MOTOR VEHICLE IDLING LIMITATIONS

**30 TAC §§114.500, 114.502, 114.507, 114.509**

The Texas Natural Resource Conservation Commission (commission) proposes new §114.500, Definitions; §114.502, Control Requirements for Motor Vehicle Idling; §114.507, Exemptions; and §114.509, Affected Counties and Compliance Dates. The commission proposes these new sections to Chapter 114, Control of Air Pollution From Motor Vehicles; new Subchapter J, Operational Controls for Motor Vehicles; new Division 1, Motor Vehicle Idling Restrictions; and corresponding revisions to the state implementation plan (SIP) in order to control ground-level ozone in the Houston/Galveston (HGA) ozone nonattainment area.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC), §§7401 et seq.), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of its Post- 1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base-case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxide ($NO_x$) waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the $NO_x$ waiver were based on early base-case episodes which marginally exhibited model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the COAST study. The state believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revisions to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to the EPA on May 19, 1998 a revision to the HGA SIP which contained the following elements in response to EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement

to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid- course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

In order for the state to have an approvable attainment demonstration, the EPA has indicated that the state must adopt those strategies modeled in the November submittal and then adopt sufficient controls to close the remaining gap in $NO_x$ emissions. The modeling included in this proposal indicates a gap of an additional 77.98 tons per day (tpd) of $NO_x$ reductions is necessary for an approvable attainment demonstration. The commission estimates that this measure will achieve a minimum of 0.92 tpd of $NO_x$ equivalent reductions and is therefore a necessary measure to consider for closing the gap and successfully demonstrating attainment.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contains post- 1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

The HGA ozone nonattainment area will need to ultimately reduce $NO_x$ more than 750 tpd to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of the proposed rules limiting idling of heavy-duty motor vehicles can contribute to attainment of the one-hour ozone standard in the HGA area. The proposed rules limiting idling of heavy-duty motor vehicles also may contribute to a successful demonstration of transportation conformity in the HGA area.

These proposed rules are one element of the control strategy for the HGA Attainment Demonstration SIP. The purpose of these proposed rules is to establish heavy-duty motor vehicle idling restrictions as one element of an air pollution control strategy in the eight counties of the HGA ozone nonattainment area to reduce $NO_x$ necessary for the counties to be able to demonstrate attainment with the ozone NAAQS.

These proposed rules will implement idling limits for gasoline and diesel powered engines in heavy-duty motor vehicles in the HGA area. The proposed idling limits will lower $NO_x$ emissions and other pollutants from fuel combustion. Because $NO_x$ is a precursor to ground-level ozone formation, reduced emissions of $NO_x$ will result in ground-level ozone reductions. To comply with the motor vehicle idling regulations, no person in the affected counties may cause, suffer, allow, or permit the primary propulsion engine of a heavy-duty motor vehicle to idle for more than five

consecutive minutes when the vehicle is not in motion during the time from April 1 through October 31.

The commission developed an ozone control strategy which limits the time allowed for the engines of heavy-duty motor vehicles to idle when not in motion. Currently, there are no federal regulations governing idle time for heavy-duty motor vehicles. Therefore, the state has the authority to control motor vehicle idling and the proposed idling requirements developed by the commission for this $NO_x$ emission reduction strategy will result in restrictions on the time allowed for motor vehicle idling.

Modeling assessing the benefits of this $NO_x$ emission reduction strategy demonstrated that emission reductions could be achieved by limiting the idling time of heavy-duty motor vehicles. By the year 2007, the idling limits will reduce $NO_x$ emissions in the affected area by 0.92 tpd. The commission estimates the daily cost savings benefit of this strategy to be approximately $126,150 per ton of $NO_x$ reduced. This figure was calculated from the estimated $NO_x$ reductions from this strategy of 0.92 tpd, the estimated reduction in fuel consumption per hour, and the current price per gallon of fuel sold in the affected area.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION BY SECTION DISCUSSION

The proposed new §114.500 contains the definitions of idle, motor vehicle, and primary propulsion engine.

The proposed new §114.502 establishes the control requirements that limit motor vehicle idling to five consecutive minutes when the vehicle is not in motion during the time from April 1 through October 31.

The proposed new §114.507 provides exemptions to the control requirements of §114.502 for motor vehicles that have a gross vehicle weight rating of 14,000 pounds or less, that are forced to remain motionless because of traffic conditions over which the operator has no control; are being used as an emergency or law enforcement motor vehicle; or when the engine of a motor vehicle is providing power takeoff for refrigeration, lift gate pumps or other auxiliary uses; or when the engine of a motor vehicle is being operated for maintenance or diagnostic purposes; or when the engine of a motor vehicle is being operated solely to defrost a windshield.

The proposed new §114.509 establishes a compliance date of April 1, 2001, and identifies the eight HGA counties covered by the motor vehicle idle control requirements of §114.502.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed rules are in effect there will be no significant fiscal implications for any single unit of state and local government as a result of administration or enforcement of these proposed rules.

The proposed rules will implement idling limits for state and local government owned and operated gasoline and diesel powered engines in heavy-duty motor vehicles with a gross vehicle weight rating (GVWR) greater than 14,000 pounds in the HGA ozone nonattainment area. The proposed rules would affect approximately 3,200 state and local government and 92,718 privately-owned or operated gas and diesel powered heavy-duty vehicles registered in the HGA ozone nonattainment area. To comply with the motor vehicle idling regulations, the primary propulsion engine for any state and local government owned and operated heavy-duty vehicle operating in the HGA nonattainment area must not be allowed to idle for more than five consecutive minutes when the vehicle is not in motion during the period of April 1 through October 31 of each calendar year.

The proposed rules will implement idling limits for gasoline and diesel powered engines in heavy-duty motor vehicles with a GVWR greater than 14,000 pounds in the HGA ozone nonattainment area. Exemptions to these proposed rules include the following: vehicles with a GVWR of 14,000 pounds or less; vehicles that are forced to remain motionless because of traffic conditions over which the operator has no control; vehicles that are being used as an emergency or law enforcement motor vehicle; when the primary propulsion engine is providing power takeoff for refrigeration, lift gate pumps or other auxiliary uses; when the primary propulsion engine is being operated for maintenance or diagnostic purposes; or when the primary propulsion engine is being operated solely to defrost a windshield.

There will be no significant fiscal impacts to units of state and local government as a result of administration or enforcement of the proposed rules; however, adhering to the proposed idling restrictions could provide cost savings by reducing fuel consumption. Heavy-duty diesel and gasoline powered vehicles can consume up to one gallon of fuel per hour while idling. The Eastern Research Group (ERG) conducted a study titled *Determination of $NO_x$ Benefits from Proposed Idle Shut-Off Rule*, July 2000, to determine the benefits of idle restrictions. Assuming two five-minute idle periods per day, approximately 88 hours of idle time could be saved per diesel and gasoline vehicle per year, resulting in a cost savings of approximately $132 per vehicle per year. There are approximately 3,200 state and local government gas and diesel powered heavy-duty vehicles registered in the HGA ozone nonattainment area. The commission anticipates that the total annual savings to units of state and local government in the HGA ozone nonattainment area will be approximately $422,400.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed rules will be the potential reduction of $NO_x$, which contributes to the formation of ground-level ozone, potentially improved air quality, and contribution toward demonstration of attainment with the NAAQS for the HGA ozone nonattainment area. There are no significant fiscal implications as a result of administration or enforcement of the proposed rules for any single person or business which owns and operates heavy-duty gasoline and diesel vehicles within the HGA ozone nonattainment area.

The proposed rules will implement idling limits for privately-owned and operated gasoline and diesel powered engines in heavy-duty motor vehicles with a gross vehicle weight rating greater than 14,000 pounds in the HGA nonattainment area. To comply with the motor vehicle idling regulations, the primary propulsion engine for any person or business-owned

and operated heavy-duty vehicle operating in the HGA nonattainment area must not be allowed to idle for more than five consecutive minutes when the vehicle is not in motion during the period of April 1 through October 31 of each calendar year. Exemptions to this rule affecting persons and businesses are the same as those described in the Cost to State and Local Government section of this fiscal note.

There will be no significant fiscal impacts to any person or business as a result of administration or enforcement of the proposed rules; however, adhering to the proposed idling restrictions could provide cost savings by reducing fuel consumption. Heavy-duty diesel and gasoline powered vehicles can consume up to one gallon of fuel per hour while idling. The ERG conducted a study titled *Determination of $NO_x$ Benefits from Proposed Idle Shut-Off Rule*, in July 2000 to determine the benefits of idle restrictions. Assuming two five-minute idle periods per day, approximately 88 hours of idle time could be saved per vehicle per year, resulting in a cost savings of approximately $132 per vehicle per year. There are approximately 92,718 privately-owned and operated gas and diesel powered heavy-duty vehicles registered in the HGA ozone nonattainment area. It is anticipated that the total annual savings to persons and businesses in the HGA ozone nonattainment area will be approximately $12 million.

SMALL AND MICRO-BUSINESS ASSESSMENT

No significant adverse effects are anticipated to small or micro-businesses as a result of implementing the proposed rules. The proposed rules will implement idling limits for small and micro- business owned and operated gasoline and diesel powered engines in heavy-duty motor vehicles with a gross vehicle weight rating greater than 14,000 pounds in the HGA nonattainment area. To comply with the motor vehicle idling regulations, the primary propulsion engine for any persons or business- owned and operated heavy-duty vehicle operating in the HGA nonattainment area must not be allowed to idle for more than five consecutive minutes when the vehicle is not in motion during the period of April 1 through October 31 of each calendar year.

There will be no significant fiscal impacts to any small or micro-business as a result of administration or enforcement of the proposed rules; however, adhering to the proposed idling restrictions could provide cost savings by reducing fuel consumption. Heavy-duty diesel and gasoline powered vehicles can consume up to one gallon of fuel per hour while idling. The ERG conducted a study titled *Determination of $NO_x$ Benefits from Proposed Idle Shut-Off Rule*, in July 2000 to determine the benefits of idle restrictions. Assuming two five-minute idle periods per day, approximately 88 hours of idle time could be saved per vehicle per year, resulting in a cost savings of approximately $132 per vehicle per year. Of the 92,718 privately-owned and operated gas and diesel powered heavy-duty vehicles registered in the HGA ozone nonattainment area, some of these vehicles are owned by small or micro-businesses. The total savings to small and micro-businesses would depend on the number of heavy-duty vehicles owned and operated.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed 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 of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed new sections to Chapter 114 are intended to protect the environment or reduce risks to human health from environmental exposure to ozone but the proposed control requirements within this proposal should not adversely affect in any material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rules are intended to implement heavy-duty motor vehicle idle limitations as part of the strategy to reduce emissions of $NO_x$ necessary for the counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The proposed rules are part of the commission response to the request and one element of the proposed Attainment Demonstration SIP. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633) during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific

programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

Specifically, the motor vehicle idle requirements within these proposed rules were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409, and therefore meet a federal requirement. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established those standards. Under 42 USC, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through a control program directed to sources of the pollutants involved. These proposed rules are not an express requirement of state law, but were developed specifically in order to meet the air quality standards established under federal law as NAAQS. These proposed rules are intended to help bring ozone nonattainment areas into compliance and to help keep attainment and near nonattainment areas from reaching nonattainment. The proposed rules do not exceed a standard set by federal law, exceed an express requirement of state law unless specifically required by federal law, nor exceed a requirement of a delegation agreement. The proposed rules were not developed solely under the general powers of the agency, but were specifically developed to meet the air quality standards established under federal law as NAAQS.

The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these proposed rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed rulemaking is to establish motor vehicle idle limits which will act as an air pollution control strategy to reduce $NO_x$ emissions necessary for the eight- county HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. Promulgation and enforcement of the proposed rules should not burden private, real property because this proposed rulemaking action should not result in any increased costs. Although the proposed rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within this proposal have been developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under 42 USC, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the proposed rules is to implement motor vehicle idle limits which are necessary for the HGA ozone nonattainment areas to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law; therefore, these proposed rules do not constitute a takings under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and $NO_x$ air emissions will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 50, National Primary and Secondary Ambient Air Quality Standards, and 40 CFR 51, Requirements for Preparation, Adoption, and Submittal Of Implementation Plans. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue,

Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., TNRCC, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 2000-011N-114-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Scott Carpenter at (512) 239-1757 or Alan Henderson at (512) 239- 1510.

STATUTORY AUTHORITY

The new sections are proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under the Texas Health and Safety Code, TCAA, §382.017, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA. The new sections are also proposed under TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; and §382.039, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed new sections implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; and §382.039, relating to Attainment Program.

*§114.500. Definitions.*

Unless specifically defined in the TCAA or in the rules of the commission, the terms used in this subchapter have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, §3.2 of this title (relating to Definitions); §101.1 of this title (relating to Definitions); and §114.1 of this title (relating to Definitions), the following words and terms, when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Idle - The operation of an engine in the operating mode where the engine is not engaged in gear, where the engine operates at a speed at the revolutions per minute specified by the engine or vehicle manufacturer for when the accelerator is fully released, and there is no load on the engine.

(2) Motor vehicle - Any self-propelled device powered by an internal combustion engine and designed to operate with four or more wheels in contact with the ground, in or by which a person or property is or may be transported, and is required to be registered under Texas Transportation Code (TTC), §502.002, excluding vehicles registered under TTC, §502.006(c).

(3) Primary propulsion engine - The internal combustion engine attached to a motor vehicle that provides the power to propel the motor vehicle into and maintain motion.

*§114.502. Control Requirements for Motor Vehicle Idling.*

No person shall cause, suffer, allow, or permit the primary propulsion engine of a motor vehicle to idle for more than five consecutive minutes in the counties listed in §114.509 of this title (relating to Affected Counties and Compliance Dates) when the vehicle is not in motion during the period of April 1 through October 31 of each calendar year.

*§114.507. Exemptions.*

The provisions of §114.502 of this title (relating to Control Requirements for Motor Vehicle Idling) shall not apply to:

(1) a motor vehicle that has a gross vehicle weight rating of 14,000 pounds or less;

(2) a motor vehicle forced to remain motionless because of traffic conditions over which the operator has no control;

(3) a motor vehicle being used as an emergency or law enforcement motor vehicle;

(4) the primary propulsion engine of a motor vehicle providing power takeoff for refrigeration, lift gate pumps or other auxiliary uses;

(5) the primary propulsion engine of a motor vehicle being operated for maintenance or diagnostic purposes; or

(6) the primary propulsion engine of a motor vehicle being operated solely to defrost a windshield.

*§114.509. Affected Counties and Compliance Dates.*

Beginning April 1, 2001, all affected persons in the following counties shall comply with §114.502 of this title (relating to Control Requirements): Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005628
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## CHAPTER 115. CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §§115.161, 115.162, 115.164 - 115.167, and 115.169, concerning Batch Processes; §§115.122, 115.125 - 115.127, and 115.129, concerning Vent Gas Control; and §115.449, concerning Offset Lithographic Printing. The commission proposes these revisions to Chapter 115, concerning Control of Air Pollution from Volatile Organic Compounds, and to the state implementation plan (SIP) in order to conform with the United States Environmental Protection Agency's (EPA) reasonably available control technology (RACT) requirements in the Houston/ Galveston (HGA) ozone nonattainment area and to obtain volatile organic compound (VOC) emission reductions which will result in reductions in ozone formation in HGA. In an effort to improve implementation of the existing Chapter 115, the commission also proposes amendments to §115.10, concerning Definitions; and §§115.211, 115.212, and 115.216, concerning Loading and Unloading of Volatile Organic Compounds; new §115.120, concerning Vent Gas Definitions; §115.240, concerning Stage II Vapor Recovery Definitions; and §115.430, concerning Flexographic and Rotogravure Printing Definitions; and revisions to the SIP.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the 1990 Amendments to the Federal Clean Air Act (FCAA), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with the FCAA. On January 4, 1995, the state submitted the first of its Post-1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in VOC, and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxide ($NO_x$) waiver allowed by the FCAA (42 United States Code (USC)), §7511a(f). The January 1995 SIP and the $NO_x$ waiver were based on early base case episodes which marginally exhibited model performance in accordance with EPA modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the Coastal Oxidant Assessment for Southeast Texas (COAST) study. The commission believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area. This modeling has been ongoing since that time.

Around the same time as the 1995 submittal, EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revision to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the one-hour standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to the EPA on May 19, 1998 a revision to the HGA SIP which contained the following elements in response to the EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the commission eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation include options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporate the estimated reductions in

emissions that are expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of this SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. Decisions regarding the actual control strategy to be submitted to the EPA will be the next step in an iterative process of evaluating potential control strategies, an effort which will continue through 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The HGA Attainment Demonstration SIP revision which was adopted April 19, 2000, contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-1999 ROP plan by December 31, 2000; to perform a mid-course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on- road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

The Houston nonattainment area will need to ultimately reduce $NO_x$ more than 750 tons per day (tpd) to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of VOC RACT rules can contribute to attainment and maintenance of the one-hour ozone standard in the HGA area. The VOC RACT rules also may contribute to a successful demonstration of transportation conformity in the HGA area.

Under 42 USC, §7511b of the 1990 Amendments to the FCAA, the EPA is required to issue Control Techniques Guideline (CTG) guidance documents for the purpose of assisting states in developing RACT controls for sources of VOC emissions. In turn, each state is required to submit a revision to its SIP which implements RACT regulations for VOC sources in moderate or above ozone nonattainment areas. Specifically, FCAA, 42 USC, §7511a(b)(2)(A), requires states to submit RACT regulations for VOC sources that are covered by a CTG issued after November 15, 1990 (the enactment date of the 1990 FCAA), but prior to the time of attainment. Similarly, FCAA, 42 USC, §7511a(b)(2)(C), requires that RACT be applied to major VOC sources located in moderate or above ozone nonattainment areas which are not the subject of a CTG; such sources are known as "non-CTG" sources. Limits in state rules must be at least as stringent as the CTG limits or otherwise must be determined to meet RACT.

Each CTG contains a "presumptive norm" for RACT for a specific source category, based on the EPA's evaluation of the capabilities and problems general to that category. Where applicable, the EPA recommends that states adopt requirements consistent with the presumptive norm. However, the presumptive norm is only a recommendation. States may choose to develop their own RACT requirements on a case-by-case basis, considering the emission reductions needed to obtain achievement of the NAAQS and the economic and technical circumstances of the individual source.

Source categories for which the EPA was to issue CTGs under FCAA, 42 USC, §7511a(b)(2)(A), include batch processes and offset lithographic printing. Instead of issuing CTGs for these source categories, the EPA issued guidance documents known as Alternative Control Techniques (ACT) documents. An ACT does not establish the presumptive norm for RACT but merely contains information on emissions, controls, control options, and costs. The EPA itself has consistently noted in the ACT documents that each ACT "...presents options only, and does not contain a recommendation on RACT." Although the EPA has not issued the required CTGs for batch processes and offset lithographic printing, 42 USC, §7511a(b)(2)(C) of the 1990 FCAA Amendments still requires states to ensure that RACT is in place for all major VOC sources in moderate and above ozone nonattainment areas.

Historically, the commission's position has been that the existing general vent gas rule in Chapter 115, Subchapter B: Division 2 is adequate to ensure RACT for batch processes; however, this is difficult to demonstrate because the necessary information for such a demonstration is not in the emissions inventory (EI). Staff attempted to develop a demonstration of equivalency between the existing general vent gas rule and the batch processes ACT using the EPA's 5% rule. The EPA's "5% rule" provides a mechanism for states to justify exemptions or cutpoints which are more lenient than the EPA's RACT baseline. It is applied by determining the total emissions allowed by the EPA's RACT baseline (including exemptions) and comparing this to the emissions allowed (including exemptions) by a state regulation. If the difference is less than 5.0%, the EPA considers that there is no substantive difference between the EPA and state requirements. The staff was unable to assemble the information necessary to demonstrate to the EPA's satisfaction that existing rules represent RACT for batch processes in HGA. Consequently, it is necessary to adopt and implement Chapter 115 rules for batch processes in HGA.

Bakeries are a non-CTG source category. The EPA published an ACT guidance document detailing appropriate control technology for bakeries. Based on this document, as well as on input from the bakery industry, the commission developed the applicable portion of the Chapter 115 vent gas rule pertaining to bakeries.

The EPA has stated that this rule is deficient in implementing RACT for bakeries and therefore is unapprovable. The EPA has made it clear that failure to correct the deficiencies will result in undesirable consequences for the affected ozone nonattainment areas, as specified in the FCAA. The commission adopted revisions on February 24, 1999 which address deficiencies in the bakery rule as it applies in the Dallas/Fort Worth (DFW) ozone nonattainment area. (See the March 12, 1999 issue of the *Texas Register* (24 TexReg 1777)). However, there are still deficiencies in the bakery rule as it applies in HGA which must be corrected for the HGA Attainment Demonstration SIP to be approvable. Specifically, the EPA has specified that RACT for bakery ovens is 80-90% control efficiency, while the commission rule as negotiated in 1994 requires only a 30% emission reduction.

The Chapter 115 offset lithographic printing rule (§§115.440, 115.442, 115.443, 115.445, 115.446, and 115.449) is currently a contingency rule for HGA. Because HGA is a severe ozone nonattainment area, a source in HGA is major if it has the potential to emit 25 tons per year (tpy) or more of VOC emissions. FCAA, 42 USC, §7511a(b)(2), requires that RACT be applied to major sources, and consequently it is necessary to implement this rule in HGA for sources with VOC emissions equal to or greater than 25 tpy. The rule will remain a contingency rule for offset lithographic printers in HGA with VOC emissions below 25 tpy. The offset lithographic printers in HGA with VOC emissions below 25 tpy must still comply with the general vent gas rules in Chapter 115.

SECTION BY SECTION DISCUSSION

The proposed amendments to §115.10, concerning Definitions, delete the definitions of bakery oven, synthetic organic chemical manufacturing industry batch distillation operation, synthetic organic chemical manufacturing industry batch process, synthetic organic chemical manufacturing industry distillation operation, synthetic organic chemical manufacturing industry distillation unit, and synthetic organic chemical manufacturing industry reactor process. These terms are used solely within the Chapter 115 vent gas rules (§§115.121 - 115.123, 115.125 - 115.127, and 115.129) and are proposed to be relocated to a new §115.120, concerning Vent Gas Definitions.

The proposed amendments to §115.10 also delete the definitions of independent small business marketer of gasoline, and owner or operator of a motor vehicle fuel dispensing facility. These terms are used solely within the Chapter 115 Stage II vapor recovery rules (§§115.241 - 115.249) and are proposed to be relocated to a new §115.240, concerning Stage II Vapor Recovery Definitions.

In addition, the proposed amendments to §115.10 delete the definitions of flexographic printing process, packaging rotogravure printing, publication rotogravure printing, and rotogravure printing. These terms are used solely within the Chapter 115 flexographic and rotogravure printing rules (§§115.432, 115.433, 115.435 - 115.437, and 115.439) and are proposed to be relocated to a new §115.430, concerning Flexographic and Rotogravure Printing Definitions.

The proposed amendments to §115.10 also delete the definitions of flare and vapor combustor. The definitions of these terms in §115.10 have been superceded by the corresponding definitions of these terms in 30 TAC §101.1, concerning Definitions. (See the December 17, 1999 issue of the *Texas Register* (24 TexReg 11494)). The commission added the definitions of flare and vapor combustor to §115.10 on June 30, 1999 as placeholders until definitions of these terms could be added to §101.1. (See the July 16, 1999 issue of the *Texas Register* (24 TexReg 5488)).

In addition, the proposed amendments to §115.10 delete the definition of vapor recovery system and combine it with the definition of vapor control system. The existing definitions of vapor recovery system and vapor control system are identical, and the commission is in the process of a transition in the Chapter 115 rules to the term "vapor control system" from the misleading term "vapor recovery system," which is defined to include both recovery and combustion control devices. Combining both terms under the definition of vapor control system will facilitate this transition.

The proposed amendments to §115.10 also revise the definitions of external floating roof and internal floating cover to more clearly specify that an external floating roof storage tank which is equipped with a self-supporting fixed roof (typically a bolted aluminum geodesic dome) is considered to be an internal floating roof storage tank for the purposes of Chapter 115 only.

In addition, the proposed amendments to §115.10 add a definition of liquefied petroleum gas in order to clarify the exemptions in §115.217(a)(3) and (b)(4) for loading and unloading of liquefied petroleum gas. Before the commission adopted revisions on June 30, 1999 (effective date: July 21, 1999), the previous versions of these exemptions referred to the safety rules of the Liquefied Petroleum Gas Division of the Texas Railroad Commission (RRC), which regulates many aspects of the handling and transport of liquefied petroleum gas. Because these exemptions historically referred to the RRC rules, it follows logically that the term "liquified petroleum gas" was intended to have the same meaning as defined in those RRC rules (specifically, 16 TAC §9.2(32), effective March 2, 1998). The National Fire Protection Association, which develops and publishes fire codes and safety standards, has a definition of liquefied petroleum gas in *Standard 58 - Standard for the Storage and Handling of Liquefied Petroleum Gases* which is functionally identical to the RRC's definition. Furthermore, Section 3-1 of the *Petroleum Products Handbook*, First Edition (Virgil B. Guthrie, editor), states that this is the most commonly used definition of liquefied petroleum gas. Therefore, the proposed definition of liquefied petroleum gas is consistent with other Texas state rules and industrial reference materials.

The proposed amendments to §115.10 also revise the definition of polymer and resin manufacturing process by replacing the "and" with "or" to make it clear that a manufacturing process only has to manufacture a listed polymer or a listed resin, but not both, in order to meet the definition. This proposed amendment will make the definition consistent with the usage of this definition in the fugitive monitoring rules for ozone nonattainment areas (§§115.352 - 115.357 and 115.359).

In addition, the proposed amendments to §115.10 revise the definition of synthetic organic chemical manufacturing process by replacing the reference to Table I (Synthetic Organic Chemicals) with a reference to 40 Code of Federal Regulations (CFR) 60.489 (effective October 18, 1983). Concurrently, Table I is being deleted. The list of affected chemicals is unchanged because Table I was derived from the corresponding table in 40 CFR 60.489.

Finally, the proposed amendments to §115.10 revise the definition of transport vessel to delete the ambiguous term "primarily." The revision will clearly specify that a transport vessel includes

any land-based mode of transportation (truck or rail) of oil, gasoline, or other volatile organic liquid bulk cargo in a storage tank which has a capacity greater than 1,000 gallons. This has always been the interpretation of the term "transport vessel," so this revision simply makes that interpretation more clear.

The proposed new §115.120, concerning Vent Gas Definitions, adds definitions of bakery oven, synthetic organic chemical manufacturing industry batch distillation operation, synthetic organic chemical manufacturing industry batch process, synthetic organic chemical manufacturing industry distillation operation, synthetic organic chemical manufacturing industry distillation unit, and synthetic organic chemical manufacturing industry reactor process. These definitions are proposed to be relocated from the §115.10, concerning Definitions, because they are used solely within the Chapter 115 vent gas rules (§§115.121 - 115.123, 115.125 - 115.127, and 115.129).

The proposed amendments to §115.122, concerning Control Requirements, change the 30% emission reduction requirement from the 1990 baseline emissions inventory for major source bakeries in HGA to an 80% emission reduction requirement from the uncontrolled VOC emission rate of the oven(s) and establish a December 31, 2001 compliance date. The proposed amendments to §115.122 also change the baseline for major source bakeries in the DFW ozone nonattainment area from the 1990 baseline emissions inventory to the uncontrolled VOC emission rate of the oven(s). In addition, the proposed amendments to §115.122 update rule cross-references; update references from "standard exemption" to "permit by rule;" and change references from "vapor recovery system" to "vapor control system" for clarification.

The proposed amendments to §115.125, concerning Testing Requirements, extend the existing test methods to Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties; consolidate the existing §115.125(a) and (b) into a single subsection; and reorganize the section by grouping related test methods together. Because it is not reasonably possible to measure the mass emission rate from an elevated flare (an elevated flare's flame is open to the atmosphere, such that the emissions cannot be routed through a stack), the test methods for flow rate and VOC concentration in the existing §115.125(a)(3) - (6) and (b)(3) - (6), which are proposed to be renumbered as §115.125(1) and (2), do not apply to flares. In order to specify performance requirements for flares, the proposed revisions to new §115.125(3) establish the test requirements of 40 CFR 60.18(b) for flares in the Beaumont/Port Arthur (BPA), DFW, and HGA ozone nonattainment areas. Because flares cannot be stack-tested, the proposed amendments to §115.125(3) also specify that compliance with the requirements of 40 CFR 60.18(b) represents compliance with the emission specifications of §115.121 and the control efficiency requirements of §115.122. In addition, the proposed amendments to §115.125 include an option that the owner or operator of a vapor combustor may consider it to be a flare and meet the flare requirements specified in 40 CFR 60.18(b) instead of the test methods and procedures appropriate for a thermal or catalytic oxidizer. The proposed amendments to §115.125 also add a new paragraph (5), which authorizes the use of test methods other than those specifically listed in §115.125, provided that any new test method is validated using the procedures in 40 CFR 63, Appendix A, Test Method 301, with the executive director acting as the administrator. This revision is necessary because in some specific unique situations, the listed test methods may be inappropriate. The new paragraph (5) increases flexibility by allowing the use of additional test methods which may be more cost-effective and more appropriate in certain unique situations.

The proposed amendments to §115.126, concerning Monitoring and Recordkeeping Requirements, extend the existing test methods to Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties; consolidate the existing §115.126(a) and (b) into a single subsection; update references to other sections; and replace "true partial pressure" with the more understandable term "concentration." The proposed amendments to §115.126 also change the 30% emission reduction requirement from the 1990 baseline emissions inventory for major source bakeries in HGA to an 80% emission reduction requirement from the uncontrolled VOC emission rate of the oven(s), establish a December 31, 2001 compliance date, and require submittal of a control plan by March 31, 2001 which shows how the owner or operator will meet the emission reduction requirements. In addition, the proposed amendments to §115.126 change the baseline for major source bakeries in DFW from the 1990 emissions inventory to the uncontrolled VOC emission rate of the oven(s), and delete the annual reporting requirements for major source bakeries in DFW and HGA. Because the major source bakeries in DFW and HGA have installed (or are in the process of installing) catalytic oxidizers which can readily meet the control requirements and the monitoring and recordkeeping requirements will ensure that these control devices are functioning properly, there is no need for these bakeries to submit an annual report.

Finally, the proposed amendments to §115.126 also specify that flares in BPA, DFW, and HGA must meet the requirements of 40 CFR 60.18(b) and Chapter 111; and state that records of appropriate operating parameters must be kept for types of vapor control systems not specifically listed in §115.126(1)(A) and (B). The proposed §115.126(1)(A)(iv) and (1)(B) specify exhaust gas temperature monitoring of vapor combustors, with an option that the owner or operator of a vapor combustor may consider it to be a flare and monitor the unit under the flare requirements specified in 40 CFR 60.18(b) and 30 TAC Chapter 111. These amendments are necessary to ensure that control devices are functioning properly and to clarify how vapor combustors are to be monitored. Based upon information from the Air Permits Division, most existing flares meet the design and operating criteria of 40 CFR 60.18(b). The commission solicits information regarding vents in BPA, DFW, and HGA which are controlled by flares that do not meet the requirements of 40 CFR 60.18(b).

Sources which are addressed by a Chapter 115 contingency rule (i.e., one in which Chapter 115 requirements are triggered for that source by the commission publishing notification in the *Texas Register* that implementation of the contingency rule is necessary) are subject to the requirements of Division 2, concerning Vent Gas Control, until the compliance date of that contingency rule. The purpose is to ensure that a Chapter 115 rule (either the general vent gas rule or the more specific contingency rule, but not both) applies at all times to sources addressed by a contingency rule. The proposed amendments to §115.127(a) add a new paragraph (8) which specifies that for a source that is addressed by a Chapter 115 contingency rule, the owner or operator of that source may choose to comply with the requirements of the contingency rule as though the contingency rule already had been implemented for that source, rather than complying with Division 2. In the case of bakeries, this option would be an alternative to complying with the general vent gas control requirements of §115.121(a)(1) and §115.122(a)(1) because these currently applicable requirements are in the same division

(Division 2, concerning Vent Gas Control), as the bakery contingency measure requirements.

For example, under §115.449(c) the offset printing rules of §§115.442 - 115.446 are a contingency rule for each printing operation in DFW for which all offset lithographic printing presses on a property, when uncontrolled, emit a combined weight of VOC less than 50 tons per calendar year. Such sources are currently subject to the requirements of Division 2, concerning Vent Gas Control. Under the proposed new §115.127(a)(8), the owner or operator of such a printing operation instead would have the option of complying with the offset printing rules of §§115.442 - 115.446 as though that offset printing contingency rule had been implemented in DFW and the compliance date had already passed.

In addition, the proposed amendments to §115.127 delete the concentration thresholds in true partial pressure and retain the more understandable concentration thresholds in parts per million by volume.

The proposed amendments to §115.129, concerning Counties and Compliance Schedules, specify the compliance schedule for the new requirements described earlier in this preamble; delete language which is obsolete due to the passing of the May 31, 1996 and November 15, 1996 compliance dates; and update references to other sections.

The proposed rule amendments add the Chapter 115 batch process requirements (§§115.160 - 115.167 and 115.169) to the eight-county HGA ozone nonattainment area. The rule language is based upon the EPA's *Control of Volatile Organic Compound Emissions from Batch Processes - Alternative Control Techniques Information Document* (EPA-453/R-94-020, February 1994).

The proposed amendments to §115.161, concerning Applicability, specify that the batch process requirements of §§115.162 - 115.167 apply to vent gas streams at batch process operations in the HGA area under the Standard Industrial Classification (SIC) codes 2821 (plastic resins and materials), 2833 (medicinals and botanicals), 2834 (pharmaceutical preparations), 2861 (gum and wood chemicals), 2865 (cyclic crudes and intermediates), 2869 (industrial organic chemicals, not elsewhere classified), and 2879 (agricultural chemicals, not elsewhere classified).

The proposed amendments to §115.161 also specify that the existing requirements of Subchapter B, Division 2, concerning Vent Gas Control, will continue to apply to batch process operations in HGA which are exempt from §§115.162 - 115.166 because they are located at an account which has total VOC emissions (determined before control but after the last recovery device) of less than 25 tpy from all stationary emission sources at the account.

The proposed amendments to §115.162, concerning Control Requirements, make batch process operations in HGA subject to: the applicable RACT equations for low, moderate, and high volatility materials; a successive ranking scheme which determines which sources must be controlled and which are exempt; and the EPA's "once-in, always-in" (OIAI) requirement. OIAI is an EPA concept which means that once emissions from a source exceed the applicability cutoff for a particular VOC regulation in the SIP, that source is always subject to the control requirements of the regulation.

Although no amendments are proposed to §115.163, concerning Alternate Control Requirements, an alternate means of control will be available under this section for batch process operations in HGA.

The proposed amendments to §115.164, concerning Determination of Emissions and Flow Rates, make batch process operations in HGA subject to the procedures for determining the uncontrolled annual emission total and the average flow rate for process vents.

The proposed amendments to §115.165, concerning Approved Test Methods and Testing Requirements, make batch process operations in HGA subject to specified test methods and testing requirements for determining compliance with the control requirements. Minor modifications to the test methods may be used if approved by the executive director.

Because it is not reasonably possible to measure the mass emission rate from an elevated flare (an elevated flare's flame is open to the atmosphere, such that the emissions cannot be routed through a stack), the test methods for flow rate and VOC concentration do not apply to flares. In order to specify performance requirements for flares, §115.165 includes the test requirements of 40 CFR 60.18(b). Because flares cannot be stack-tested, the §115.165 also specifies that compliance with the requirements of 40 CFR 60.18(b) represents a 98% control efficiency. Based upon information from the Air Permits Division, most existing flares meet the design and operating criteria of 40 CFR 60.18(b). The commission solicits information regarding flares which are used to control emissions from batch process operations in HGA, but do not meet the requirements of 40 CFR 60.18(b).

Section 115.165 also includes authorization for the use of test methods other than those specifically listed in §115.165, provided that any new test method is validated using the procedures in 40 CFR 63, Appendix A, Test Method 301, with the executive director acting as the administrator. This option is included in §115.165 because in some specific unique situations the listed test methods may be inappropriate. The availability of this option increases flexibility by allowing the use of additional test methods which may be more cost-effective and more appropriate in certain unique situations.

The proposed amendments to §115.166, concerning Recordkeeping Requirements, make batch process operations in HGA subject to requirements for: continuous monitoring and recording of control device operating parameters; recordkeeping of the annual mass emission total, average flow rate, and associated documentation for each process vent; and the control device operating parameters to be measured and recorded during performance testing. The proposed amendments also change an incorrect reference in §115.166(1) from "VOC transfer operations" to "batch process operations." As a result of this correction, the term "VOC" is being spelled out in §115.166(1)(A)(iii)(II).

The proposed amendments to §115.167, concerning Exemptions, make the following exemptions available in HGA: batch process operations which are located at an account in HGA which has total VOC emissions (determined before control but after the last recovery device) of less than 25 tpy; single unit operations that have a mass annual emissions of 500 pounds per year or less; and combined vents from a batch process train which have a mass annual emissions total below specified levels which vary depending on the volatility of the VOCs. In addition, the proposed amendments revise the existing exemption in §115.167(2) to clarify that §115.164, concerning Determination

of Emissions and Flow Rates, is to be used for determining if the exemptions available under §115.167(2) are met. The proposed amendments to §115.167 also specify that the existing requirements of Subchapter B, Division 2, concerning Vent Gas Control, will continue to apply to batch process operations which qualify for exemption because they are located at an account in HGA which has total VOC emissions (determined before control but after the last recovery device) of less than 25 tpy.

The proposed amendments to §115.169, concerning Counties and Compliance Schedules, specify the newly affected counties in HGA (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller) and a December 31, 2002 compliance date for the new requirements. The proposed amendments to §115.169 also specify that batch process operations which are subject to the requirements of §§115.162 - 115.166 must continue to comply with the existing requirements of Subchapter B, Division 2, concerning Vent Gas Control, until these batch process operations are in compliance with the new requirements.

The proposed amendments to §115.211, concerning Emission Specifications, delete a reference to gasoline bulk plants which is no longer necessary due to the deletion of the gasoline bulk plant emission specification adopted by the commission on November 10, 1999. (See the November 26, 1999 issue of the *Texas Register* (24 TexReg 10559)).

The proposed amendments to §115.212, concerning Control Requirements, revise §115.212(a)(3) and (b)(3) to state that the requirements regarding vapor and liquid leaks during land-based VOC transfer apply specifically to transport vessels. This revision is necessary in order to clarify that the requirements are not intended to apply to vessels which do not meet the definition of "transport vessel" in §115.10 (for example, drums).

The proposed amendments to §115.216, concerning Monitoring and Recordkeeping Requirements, revise §115.216(3)(A)(i) to only require records of the identification number of tank-truck tanks for which annual leak testing is required under §115.214(a)(1)(C) or (b)(1)(C), rather than all tank-truck tanks as is currently required. This amendment is being proposed because it is unnecessary to track the identification number of tank-truck tanks which are excluded from the annual leak testing requirements.

The proposed new §115.240, concerning Stage II Vapor Recovery Definitions, adds definitions of independent small business marketer of gasoline, and owner or operator of a motor vehicle fuel dispensing facility. These definitions are proposed to be relocated from the §115.10, concerning Definitions, because they are used solely within the Chapter 115 Stage II vapor recovery rules (§§115.241 - 115.249).

The proposed new §115.430, concerning Flexographic and Rotogravure Printing Definitions, adds definitions of flexographic printing process, packaging rotogravure printing, publication rotogravure printing, and rotogravure printing. These definitions are proposed to be relocated from the §115.10, concerning Definitions, because they are used solely within the Chapter 115 flexographic and rotogravure printing rules (§§115.432, 115.433, 115.435 - 115.437, and 115.439). In addition, the commission proposes to change the title of Subchapter E, Division 3 from "Graphic Arts (Printing) by Rotogravure and Flexographic Processes" to "Flexographic and Rotogravure Printing" in order to more clearly specify the operations addressed by to this division.

HGA is classified as a severe ozone nonattainment area and the major source definition includes VOC sources with emissions of 25 tpy and higher. Because FCAA, 42 USC, §7511a(b)(2), requires that RACT be applied to major sources, the proposed amendments to §115.449, concerning Counties and Compliance Schedules, implement the offset lithographic printing rule in HGA for sources with VOC emissions equal to or greater than 25 tpy and establishes a compliance date of December 31, 2002. The offset lithographic printing rule is currently a contingency rule for HGA; after the proposed change, the rule will be a contingency rule for offset lithographic printers in HGA with VOC emissions below 25 tpy.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Since 30 TAC Chapter 115 is an applicable requirement under 30 TAC Chapter 122, owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise their operating permit to include the revised Chapter 115 requirements for each emission unit affected by the revisions to Chapter 115 at their site.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist in the Strategic Planning and Appropriations Section, has reviewed these proposed amendments to Chapter 115, Control of Air Pollution from Volatile Organic Compounds, under the requirements of Texas Government Code, §2001.024, and has made the following determination concerning the fiscal effects of the proposed amendments for each year of the first five years the amendments are in effect.

Mr. Davis has determined that for the first five-year period the proposed amendments to Chapter 115 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, except those that may operate sources subject to the proposed revisions to Chapter 115. For these units of state and local government, the fiscal implications of these revisions to Chapter 115 will be equivalent to those for any affected public or private entity.

Most of the sources which will have to comply with the proposed rules are currently subject to air permits and are already being inspected for compliance. Consequently, only a limited number of additional facilities will need to be inspected for compliance with the proposed Chapter 115 rule amendments. The commission anticipates that the Field Operations Division inspectors will inspect for compliance with the proposed requirements when conducting their routine inspections. The commission also anticipates that enforcement of these rules will not significantly increase the number of facilities currently inspected by the state and local governments. However, these rules will cause a minor increase in workload when inspecting the affected facilities.

PUBLIC BENEFIT AND COSTS

Mr. Davis has also determined that for each year of the first five years the proposed amendments to Chapter 115 are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be: a reduction of public exposure to VOC emitted from affected batch processes, offset lithographic printers, and bakeries; the concomitant reduced risks to human health and safety from ozone; a reduction of ground-level ozone in the HGA ozone nonattainment area; and conformance with the requirements of the FCAA.

The proposed amendments to Chapter 115 will ensure that the batch process, offset lithographic printing, and bakery rules represent RACT in HGA, which will satisfy FCAA requirements and enable these rules to be federally approvable. The amendments would require these sources in the HGA ozone nonattainment area to meet new emission specifications and other requirements in order to reduce VOC emissions and ozone air pollution. These standards and specifications are part of the strategy to reduce emissions of VOC necessary for the counties in the HGA ozone nonattainment area to be able to demonstrate attainment with the NAAQS for ozone. The proposed amendments are one element of the proposed HGA attainment demonstration SIP. A SIP is a plan developed for any region where existing (measured and estimated) ambient levels of pollutant exceeds the levels specified in a national standard. The plan sets forth a control strategy that provides emission reductions necessary for attainment and maintenance of the national standards.

For batch processes, the commission estimates the cost-effectiveness (the cost per ton of VOC emissions reduced), annualized total cost of control, annual operating costs, and total capital cost for flow rates of 500 and 5,000 standard cubic feet per minute (scfm) as follows, based on the cost- effectiveness data of Appendix F of EPA's *Control of Volatile Organic Compound Emissions from Batch Processes - Alternative Control Techniques Information Document* (EPA-453/R-94- 020, February 1994).

Figure: 30 TAC Chapter 115 - Preamble

For sources which route vent gas emissions (including batch process emissions) to flares that do not already meet the requirements of 40 CFR 60.18(b), the commission estimates the cost of testing to determine the exit velocity and the net heating value of the vapors being combusted to be approximately $6,000, based upon vendor estimates. The commission estimates that installing a heat-sensing device, such as an ultraviolet beam sensor or thermocouple, at the pilot light to indicate the continuous presence of a flame would cost approximately $19,300 to $22,300, based upon vendor estimates.

For bakeries, an analysis of the emissions inventory revealed that there are four bakeries in HGA with VOC emissions at or above 25 tpy and four bakeries in DFW with VOC emissions at or above 50 tpy that will become subject to the vent gas rule's revised control requirements. These bakeries have already installed (or are installing) catalytic oxidizers in response to previous rulemaking. Each of these catalytic oxidizers can meet the revised control requirements, and therefore there will be no cost to install add-on control devices. Elimination of the annual reporting requirement will result in a minor cost savings due to the associated reduction in manpower needed to assemble the reports.

For offset lithographic printers, the commission estimates that there are approximately 20 sources in HGA with VOC emissions at or above 25 tpy that will become subject to the offset printing requirements. The printers with offset heatset printing presses have already installed add-on controls due to Chapter 111 opacity limitations and/or Chapter 116 new source review permitting requirements. Because these add-on controls can already meet the control requirements, there will be no cost for installation of add-on control devices. Regarding the fountain solution limitations which would apply to both heatset and nonheatset offset printing, EPA's draft *Control Techniques Guideline for Offset Lithographic Printing* (December 14, 1992) estimates that reducing alcohol in the fountain solution results in a savings of $920 per ton of alcohol not used. This document states that nonalcohol fountain solutions save money because they are used in lower quantities, even though they cost more than alcohol. Regarding the cleaning solution limitations which would apply to both heatset and nonheatset offset printing, the draft CTG states that lower VOC cleaning solutions are slightly more expensive than traditional cleaning solutions. This document estimates that the incremental costs of using lower VOC cleaning solutions range from approximately $550 to $24,000 per year, depending on the size and type of the printing plant.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

The agency has been unable to identify any small businesses or micro-businesses as defined in the Texas Government Code which would be affected by these proposed amendments to Chapter 115. If there are affected small businesses or micro-businesses, the estimated annualized cost for installing and operating the control technology in dollars per ton of VOC reduced that was used for the various types of units in this fiscal note would appear to be a reasonable cost estimate for small businesses or micro- businesses. The proposed amendments do not specify a particular control technology to achieve the emission limits and there may be other control technologies or combinations of control technologies which may be used to comply.

DRAFT 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 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, 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 amendments to Chapter 115 are one element of the HGA Attainment Demonstration SIP and will require VOC emission reductions from batch processes, offset lithographic printers, and bakeries in the HGA ozone nonattainment area. While the rules are intended to protect the environment, based on the analysis provided earlier in this preamble and in particular, the discussion in the Public Benefit and Costs section, the commission does not believe that the rules will adversely affect, in a material way, the operation of certain batch processes, offset lithographic printers, and bakeries. The commission does not believe these entities comprise a sector of the economy, or that these rules will 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 amendments do not meet the definition of a "major environmental rule" as defined in the Texas Government Code, and they do not meet any of the four applicability requirements listed in §2001.0225(a). FCAA, 42 USC, §7410, requires states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While FCAA, 42 USC, §7410, does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and

auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that the FCAA does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of the FCAA. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of FCAA, 42 USC, §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of FCAA, 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633) during the 75th Legislative Session. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, the FCAA does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law. FCAA, 42 USC, §7511a(b)(2)(C), requires states to ensure that RACT is in place for all major VOC sources in moderate and above ozone nonattainment areas. The commission has performed photochemical grid modeling which predicts that VOC emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking is not an express requirement of state law, but was developed specifically in order to ensure that RACT is in place for all major VOC sources in the HGA ozone nonattainment area as required under federal law. This will enable the Chapter 115 batch process, offset lithographic printing, and bakery rules for HGA to be federally approvable. This rulemaking is also intended to obtain VOC emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the RACT requirements and NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, and 382.017.

The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking is twofold: to ensure that RACT is in place for all major VOC sources in the HGA ozone nonattainment area in order to conform with the EPA's RACT requirements, thus enabling the Chapter 115 batch process, offset lithographic printing, and bakery rules for HGA to be federally approvable; and to obtain VOC emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. This rulemaking action may require the installation of control systems at batch process operations, offset lithographic printers, and bakeries in HGA in some cases. Promulgation and enforcement of the rule amendments may possibly burden private property because in some cases the permanent installation of control systems and associated piping is necessary in order to comply with the rules. Although the rule revisions do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and fulfill federal mandates under the 1990 Amendments to the FCAA, 42 USC, §7410 and §7511a(b)(2). Specifically, FCAA, 42 USC, §7511a(b)(2)(C), requires states to ensure that RACT is in place for all major VOC sources in moderate and above ozone nonattainment areas. In addition, the emission limitations and control requirements within this rulemaking were developed in order to meet the NAAQS for ozone set by the EPA under FCAA, 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under the FCAA, 42 USC, §7410, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of this rulemaking is to ensure that RACT is in place for all major VOC sources in the HGA ozone nonattainment area as required under federal law and to meet the air quality standards

established under federal law as NAAQS. Consequently, the following exemption applies to these rules: an action reasonably taken to fulfill an obligation mandated by federal law.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council. For this rulemaking, the commission has determined that the rules are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. This rulemaking is intended to reduce overall emissions of VOC from batch process vent gas streams, bakeries, and offset lithographic printers. This action is consistent with the CMP because it does not authorize any new emissions and will reduce existing emissions of VOC. Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087; faxed to (512) 239- 4808; or emailed to *siprules@tnrcc.state.tx.us.* All comments should reference Rule Log Number 2000-011i-115-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Eddie Mack of the Strategic Assessment Division at (512) 239-1488.

## SUBCHAPTER A. DEFINITIONS

### 30 TAC §115.10

STATUTORY AUTHORITY

The amendment is proposed under the Texas Health and Safety Code, TCAA, §382.011, concerning General Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.017, concerning Rules, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and §382.012, concerning State Air Control Plan, which requires the commission to develop plans for protection of the state's air.

The proposed amendment implements the Texas Health and Safety Code, TCAA, §§382.011, 382.012, and 382.017.

*§115.10. Definitions.*

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the Texas Natural Resource Conservation Commission (commission), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this chapter are found in §101.1 of this title (relating to Definitions) and §3.2 of this title (relating to Definitions).

~~[(1) Bakery oven - An oven for baking bread or any other yeast-leavened products.]~~

(1) [~~(2)~~] Beaumont/Port Arthur area - Hardin, Jefferson, and Orange Counties.

(2) [~~(3)~~] Capture efficiency - The amount of volatile organic compounds (VOC) collected by a capture system which is expressed as a percentage derived from the weight per unit time of VOC entering a capture system and delivered to a control device divided by the weight per unit time of total VOC generated by a source of VOC.

(3) [~~(4)~~] Carbon adsorption system - A carbon adsorber with an inlet and outlet for exhaust gases and a system to regenerate the saturated adsorbent.

(4) [~~(5)~~] Component - A piece of equipment, including, but not limited to pumps, valves, compressors, and pressure relief valves, which has the potential to leak VOC.

(5) [~~(6)~~] Continuous monitoring - Any monitoring device used to comply with a continuous monitoring requirement of this chapter will be considered continuous if it can be demonstrated that at least 95% of the required data is captured.

(6) [~~(7)~~] Covered attainment counties - Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

(7) [~~(8)~~] Dallas/Fort Worth area - Collin, Dallas, Denton, and Tarrant Counties.

(8) [~~(9)~~] El Paso area - El Paso County.

(9) [~~(10)~~] External floating roof - A cover or roof in an open-top tank which rests upon or is floated upon the liquid being contained and is equipped with a single or double seal to close the space between the roof edge and tank shell. A double seal consists of two complete and separate closure seals, one above the other, containing an enclosed space between them. For the purposes of this chapter (relating to Control of Air Pollution from Volatile Organic Compounds), an [~~An~~] external floating roof storage tank which is equipped with a self-supporting fixed roof (typically a bolted aluminum geodesic dome) shall be considered to be an internal floating roof storage tank.

~~[(11) Flare - An open combustor without enclosure or shroud which is used as a control device.]~~

~~[(12) Flexographic printing process - A method of printing in which the image areas are raised above the non-image areas, and the image carrier is made of an elastomeric material.]~~

(10) [~~(13)~~] Fugitive emission - Any VOC entering the atmosphere which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.

(11) [~~(14)~~] Gasoline bulk plant - A gasoline loading and/or unloading facility, excluding marine terminals, having a gasoline throughput less than 20,000 gallons (75,708 liters) per day, averaged over each consecutive 30-day period. A motor vehicle fuel dispensing facility is not a gasoline bulk plant.

(12) [~~(15)~~] Gasoline terminal - A gasoline loading and/or unloading facility, excluding marine terminals, having a gasoline throughput equal to or greater than 20,000 gallons (75,708 liters) per day, averaged over each consecutive 30-day period.

(13) [~~(16)~~] Houston/Galveston area - Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

~~[(17) Independent small business marketer of gasoline - A person engaged in the marketing of gasoline who owns the dispensing equipment at a motor vehicle fuel dispensing facility and receives at least 50% of his annual income from the marketing of gasoline. A person is not an independent small business marketer of gasoline if such person:]~~

~~[(A) is a refiner; or]~~

~~[(B) controls (i.e., owns more than 50% of a business or corporation's stock), is controlled by, or is under common control with, a refiner; or]~~

~~[(C) is otherwise directly or indirectly affiliated with a refiner or with a person who controls, is controlled by, or is under common control with a refiner (unless the sole affiliation is by means of a supply contract or an agreement or contract to use a trademark, trade name, service mark, or other identifying symbol or name owned by such refiner or any such person).]~~

(14) [~~(18)~~] Internal floating cover - A cover or floating roof in a fixed roof tank which rests upon or is floated upon the liquid being contained, and is equipped with a closure seal or seals to close the space between the cover edge and tank shell. For the purposes of this chapter (relating to Control of Air Pollution from Volatile Organic Compounds), an [~~An~~] external floating roof storage tank which is equipped with a self-supporting fixed roof (typically a bolted aluminum geodesic dome) shall be considered to be an internal floating roof storage tank.

(15) Liquefied petroleum gas - Any material that is composed predominantly of any of the following hydrocarbons or mixtures of hydrocarbons: propane, propylene, normal butane, isobutane, and butylenes.

(16) [~~(19)~~] Leak-free marine vessel - A marine vessel whose cargo tank closures (hatch covers, expansion domes, ullage openings, butterworth covers, and gauging covers) were inspected prior to cargo transfer operations and all such closures were properly secured such that no leaks of liquid or vapors can be detected by sight, sound, or smell. Cargo tank closures shall meet the applicable rules or regulations of the marine vessel's classification society or flag state. Cargo tank pressure/vacuum valves shall be operating within the range specified by the marine vessel's classification society or flag state and seated when tank pressure is less than 80% of set point pressure such that no vapor leaks can be detected by sight, sound, or smell. As an alternative, a marine vessel operated at negative pressure is assumed to be leak-free for the purpose of this standard.

(17) [~~(20)~~] Marine loading facility - The loading arm(s), pumps, meters, shutoff valves, relief valves, and other piping and valves that are part of a single system used to fill a marine vessel at a single geographic site. Loading equipment that is physically separate (i.e., does not share common piping, valves, and other loading equipment) is considered to be a separate marine loading facility.

(18) [~~(21)~~] Marine loading operation - The transfer of oil, gasoline, or other volatile organic liquids at any affected marine terminal, beginning with the connections made to a marine vessel and ending with the disconnection from the marine vessel.

(19) [~~(22)~~] Marine terminal - Any marine facility or structure constructed to load oil, gasoline, or other volatile organic liquid bulk cargo into a marine vessel. A marine terminal consists of one or more marine loading facilities.

(20) [~~(23)~~] Natural gas/gasoline processing - A process that extracts condensate from gases obtained from natural gas production and/or fractionates natural gas liquids into component products, such as ethane, propane, butane, and natural gasoline. The following facilities shall be included in this definition if, and only if, located on the same property as a natural gas/gasoline processing operation previously defined: compressor stations, dehydration units, sweetening units, field treatment, underground storage, liquified natural gas units, and field gas gathering systems.

[(24) Owner or operator of a motor vehicle fuel dispensing facility (as used in §§115.241 - 115.249 of this title (relating to Control of Vehicle Refueling Emissions (Stage II) at Motor Vehicle Fuel Dispensing Facilities)) - Any person who owns, leases, operates, or controls the motor vehicle fuel dispensing facility.]

[(25) Packaging rotogravure printing - Any rotogravure printing upon paper, paper board, metal foil, plastic film, or any other substrate which is, in subsequent operations, formed into packaging products or labels.]

(21) [(26)] Petroleum refinery - Any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of crude oil, or through the redistillation, cracking, extraction, reforming, or other processing of unfinished petroleum derivatives.

(22) [(27)] Polymer or [and] resin manufacturing process - A process that produces any of the following polymers or resins: polyethylene, polypropylene, polystyrene, and styrenebutadiene latex.

(23) [(28)] Printing line - An operation consisting of a series of one or more printing processes and including associated drying areas.

[(29) Publication rotogravure printing - Any rotogravure printing upon paper which is subsequently formed into books, magazines, catalogues, brochures, directories, newspaper supplements, or other types of printed materials.]

[(30) Rotogravure printing - The application of words, designs, and/or pictures to any substrate by means of a roll printing technique which involves a recessed image area. The recessed area is loaded with ink and pressed directly to the substrate for image transfer.]

[(31) Synthetic Organic Chemical Manufacturing Industry (SOCMI) batch distillation operation - A SOCMI noncontinuous distillation operation in which a discrete quantity or batch of liquid feed is charged into a distillation unit and distilled at one time. After the initial charging of the liquid feed, no additional liquid is added during the distillation operation.]

[(32) Synthetic Organic Chemical Manufacturing Industry (SOCMI) batch process - Any SOCMI noncontinuous reactor process which is not characterized by steady-state conditions, and in which reactants are not added and products are not removed simultaneously.]

[(33) Synthetic Organic Chemical Manufacturing Industry (SOCMI) distillation operation - A SOCMI operation separating one or more feed stream(s) into two or more exit streams, each exit stream having component concentrations different from those in the feed stream(s). The separation is achieved by the redistribution of the components between the liquid and vapor-phase as they approach equilibrium within the distillation unit.]

[(34) Synthetic Organic Chemical Manufacturing Industry (SOCMI) distillation unit - A SOCMI device or vessel in which distillation operations occur, including all associated internals (including, but not limited to, trays and packing), accessories (including, but not limited to, reboilers, condensers, vacuum pumps, and steam jets), and recovery devices (such as absorbers, carbon adsorbers, and condensers) which are capable of, and used for, recovering chemicals for use, reuse, or sale.]

[(35) Synthetic Organic Chemical Manufacturing Industry (SOCMI) reactor process - A SOCMI unit operation in which one or more chemicals, or reactants other than air, are combined or decomposed in such a way, that their molecular structures are altered and one or more new organic compounds are formed.]

(24) [(36)] Synthetic organic chemical manufacturing process - A process that produces, as intermediates or final products, one or more of the chemicals listed in 40 Code of Federal Regulations 60.489 (effective October 18, 1983) [Table I of this section].

(25) [(37)] Tank-truck tank - Any storage tank having a capacity greater than 1,000 gallons, mounted on a tank-truck or trailer. Vacuum trucks used exclusively for maintenance and spill response are not considered to be tank-truck tanks.

(26) [(38)] Transport vessel - Any land-based mode of transportation (truck or rail) that is equipped with a storage tank having a capacity greater than 1,000 gallons which is used [primarily] to transport oil, gasoline, or other volatile organic liquid bulk cargo. Vacuum trucks used exclusively for maintenance and spill response are not considered to be transport vessels.

(27) [(39)] True partial pressure - The absolute aggregate partial pressure (psia) of all VOC in a gas stream.

(28) [(40)] Vapor balance system - A system which provides for containment of hydrocarbon vapors by returning displaced vapors from the receiving vessel back to the originating vessel.

[(41) Vapor combustor - A partially enclosed combustion device, where the combustion flame may be partially visible, but at no time does the device operate with a fully visible flame. A vapor combustor is used to destroy VOCs to the destruction requirements defined in the applicable emission specifications and control requirements sections of this chapter by smokeless combustion without extracting energy in the form of process heat or steam. Auxiliary fuel and/or a flame air control damping system, which can operate at all times to control the air/fuel mixture to the combustor's flame zone, may be required to ensure smokeless combustion during operation.]

(29) [(42)] Vapor control system or vapor recovery system - Any control system which utilizes vapor collection equipment to route VOC to a control device that reduces VOC emissions.

[(43) Vapor recovery system - Any control system which utilizes vapor collection equipment to route VOC to a control device that reduces VOC emissions.]

(30) [(44)] Vapor-tight - Not capable of allowing the passage of gases at the pressures encountered except where other acceptable leak-tight conditions are prescribed in this chapter [the Regulations].

(31) [(45)] Waxy, high pour point crude oil - A crude oil with a pour point of 50 degrees Fahrenheit (10 degrees Celsius) or higher as determined by the American Society for Testing and Materials Standard D97-66, "Test for Pour Point of Petroleum Oils." [Figure: 30 TAC §115.10(45)]

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005638
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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# SUBCHAPTER B. GENERAL VOLATILE ORGANIC COMPOUND SOURCES
## DIVISION 2. VENT GAS CONTROL

**30 TAC §§115.120, 115.122, 115.125 - 115.127, 115.129**

STATUTORY AUTHORITY

The new section and amendments are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.011, concerning General Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.017, concerning Rules, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and §382.012, concerning State Air Control Plan, which requires the commission to develop plans for protection of the state's air.

The proposed new section and amendments implement the Texas Health and Safety Code, TCAA, §§382.011, 382.012, and 382.017.

*§115.120. Vent Gas Definitions.*

The following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this division are found in §115.10 of this title (relating to Definitions), §101.1 of this title (relating to Definitions), and §3.2 of this title (relating to Definitions).

(1) Bakery oven - An oven for baking bread or any other yeast-leavened products.

(2) Synthetic Organic Chemical Manufacturing Industry (SOCMI) batch distillation operation - A SOCMI noncontinuous distillation operation in which a discrete quantity or batch of liquid feed is charged into a distillation unit and distilled at one time. After the initial charging of the liquid feed, no additional liquid is added during the distillation operation.

(3) Synthetic Organic Chemical Manufacturing Industry (SOCMI) batch process - Any SOCMI noncontinuous reactor process which is not characterized by steady-state conditions, and in which reactants are not added and products are not removed simultaneously.

(4) Synthetic Organic Chemical Manufacturing Industry (SOCMI) distillation operation - A SOCMI operation separating one or more feed stream(s) into two or more exit streams, each exit stream having component concentrations different from those in the feed stream(s). The separation is achieved by the redistribution of the components between the liquid and vapor-phase as they approach equilibrium within the distillation unit.

(5) Synthetic Organic Chemical Manufacturing Industry (SOCMI) distillation unit - A SOCMI device or vessel in which distillation operations occur, including all associated internals (including, but not limited to, trays and packing), accessories (including, but not limited to, reboilers, condensers, vacuum pumps, and steam jets), and recovery devices (such as absorbers, carbon adsorbers, and condensers) which are capable of, and used for, recovering chemicals for use, reuse, or sale.

(6) Synthetic Organic Chemical Manufacturing Industry (SOCMI) reactor process - A SOCMI unit operation in which one or more chemicals, or reactants other than air, are combined or decomposed in such a way that their molecular structures are altered and one or more new organic compounds are formed.

*§115.122. Control Requirements.*

(a) For all persons in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas, the following control requirements shall apply. [:]

(1) Any vent gas streams affected by §115.121(a)(1) of this title (relating to Emission Specifications) must be controlled properly with a control efficiency of at least 90% or to a volatile organic compound (VOC) concentration of no more than 20 parts per million by volume (ppmv) (on a dry basis corrected to 3.0% oxygen for combustion devices):

(A) - (B) (No change.)

(C) by any other vapor control [~~recovery~~] system, as defined in §115.10 of this title (relating to Definitions).

(2) Any vent gas streams affected by §115.121(a)(2) of this title must be controlled properly with a control efficiency of at least 98% or to a VOC concentration of no more than 20 ppmv (on a dry basis corrected to 3.0% oxygen for combustion devices):

(A) (No change.)

(B) by any other vapor control [~~recovery~~] system, as defined in §115.10 of this title.

(3) For the Dallas/Fort Worth, El Paso, and Houston/Galveston areas, VOC emissions from each bakery with a bakery oven vent gas stream(s) affected by §115.121(a)(3) of this title shall be reduced as follows.

(A) Each bakery in the Houston/Galveston area with a total weight of VOC emitted from all bakery ovens on the property, when uncontrolled, equal to or greater than 25 tons per calendar year shall ensure that the overall emission reduction from the uncontrolled VOC emission rate of the oven(s) will be [~~reduce total VOC emissions by~~] at least 80% [~~30% from the bakery's 1990 baseline emissions inventory~~] by December 31, 2001 [~~May 31, 1996~~].

(B) Each bakery in the Dallas/Fort Worth area with a total weight of VOC emitted from all bakery ovens on the property, when uncontrolled, equal to or greater than 50 tons per calendar year, shall ensure that the overall emission reduction from the uncontrolled VOC emission rate of the oven(s) will be [~~reduce total VOC emissions by~~] at least 80% [~~from the bakery's 1990 baseline emissions inventory~~] by December 31, 2000.

(C) Each bakery in the Dallas/Fort Worth area with a total weight of VOC emitted from all bakery ovens on the property, when uncontrolled, equal to or greater than 25 tons per calendar year, but less than 50 tons per calendar year, shall reduce total VOC emissions by at least 30% from the bakery's 1990 [~~baseline~~] emissions inventory in accordance with the schedule specified in §115.129(d) [~~§115.129(a)(4)~~] of this title (relating to Counties and Compliance Schedules).

(D) Each bakery in the El Paso area with a total weight of VOC emitted from all bakery ovens on the property, when uncontrolled, equal to or greater than 25 tons per calendar year shall reduce total VOC emissions by at least 30% from the bakery's 1990 [~~baseline~~] emissions inventory in accordance with the schedule specified in §115.129(e) [~~§115.129(a)(5)~~] of this title.

(E) (No change.)

(4) Any vent gas stream that becomes subject to the provisions of paragraphs (1), (2), or (3) of this subsection by exceeding provisions of §115.127(a) of this title (relating to Exemptions) shall remain subject to the provisions of this subsection, even if throughput or emissions later fall below the exemption limits unless and until emissions are reduced to no more than the controlled emissions level existing before implementation of the project by which throughput or

emission rate was reduced to less than the applicable exemption limits in §115.127(a) of this title; and:

(A) the project by which throughput or emission rate was reduced is authorized by any permit or permit amendment or standard permit or permit by rule [standard exemption] required by Chapter 116 or Chapter 106 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification; and Permits by Rule [Exemptions from Permitting]). If a permit by rule [a standard exemption] is available for the project, compliance with this subsection must be maintained for 30 days after the filing of documentation of compliance with that permit by rule [standard exemption]; or

(B) if authorization by permit, permit amendment, standard permit, or permit by rule [standard exemption] is not required for the project, the owner or [/] operator has given the executive director 30 days' notice of the project in writing.

(b) For all persons in Nueces and Victoria Counties, any vent gas streams affected by §115.121(b) of this title must be controlled properly with a control efficiency of at least 90% or to a VOC concentration of no more than 20 ppmv (on a dry basis corrected to 3.0% oxygen for combustion devices):

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

(3) by any other vapor control [recovery] system, as defined in §115.10 of this title.

(c) For all persons in Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties, the following control requirements shall apply. [:]

(1) Any vent gas streams affected by §115.121(c)(1) of this title must be controlled properly:

(A) - (B) (No change.)

(C) by any other vapor control [recovery] system, as defined in §115.10 of this title, with a control efficiency of at least 90% or to a VOC concentration of no more than 20 ppmv (on a dry basis corrected to 3.0% oxygen for combustion devices).

(2) Any vent gas streams affected by §115.121(c)(2) of this title must be controlled properly:

(A) (No change.)

(B) by any other vapor control [recovery] system, as defined in §115.10 of this title, with a control efficiency of at least 90% or to a VOC concentration of no more than 20 ppmv (on a dry basis corrected to 3.0% oxygen for combustion devices).

(3) Any vent gas streams affected by §115.121(c)(3) of this title must be controlled properly:

(A) (No change.)

(B) by any other vapor control [recovery] system, as defined in §115.10 of this title, with a control efficiency of at least 90% or to a VOC concentration of no more than 20 ppmv (on a dry basis corrected to 3.0% oxygen for combustion devices).

(4) Any vent gas streams affected by §115.121(c)(4) of this title must be controlled properly:

(A) (No change.)

(B) by any other vapor control [recovery] system, as defined in §115.10 of this title, with a control efficiency of at least 90% or to a VOC concentration of no more than 20 ppmv (on a dry basis corrected to 3.0% oxygen for combustion devices).

*§115.125. Testing Requirements.*

[(a)] Compliance with the emission specifications, vapor control system efficiency, and certain control requirements and exemption criteria of §§115.121 - 115.123 and 115.127 of this title (relating to Emission Specifications; Control Requirements; Alternate Control Requirements; and Exemptions) [For the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas, compliance with §115.121(a) of this title (relating to Emission Specifications)] shall be determined by applying one or more of the following test methods and procedures, as appropriate.[:]

(1) Flow rate. Test Methods 1-4 (40 Code of Federal Regulations (CFR) 60, Appendix A) are used for determining flow rates, as necessary.

(2) Concentration of volatile organic compounds (VOC).

(A) Test Method 18 (40 CFR 60, Appendix A) is used for determining gaseous organic compound emissions by gas chromatography.

(B) Test Method 25 (40 CFR 60, Appendix A) is used for determining total gaseous nonmethane organic emissions as carbon.

(C) Test Methods 25A or 25B (40 CFR 60, Appendix A) are used for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis.

(3) Performance requirements for flares and vapor combustors.

(A) [(1)] For flares, Test Method 22 (40 CFR [Code of Federal Regulations] 60, Appendix A) is used for visual determination of fugitive emissions from material sources and smoke emissions. [from flares;]

(B) [(2)] For flares, additional test method requirements are [for flares] described in 40 CFR [Code of Federal Regulations] 60.18(f). [;]

(C) For flares in the Beaumont/Port Arthur, Dallas/Fort Worth, and Houston/Galveston areas, the performance test requirements of 40 CFR 60.18(b) shall apply.

(D) For vapor combustors, the owner or operator may consider the unit to be a flare and meet the performance test requirements of 40 CFR 60.18(b) rather than the procedures of paragraphs (1) and (2) of this section.

(E) Compliance with the requirements of 40 CFR 60.18(b) will be considered to demonstrate compliance with the emission specifications and control efficiency requirements of §115.121 and §115.122 of this title.

[(3) Test Methods 1-4 (40 Code of Federal Regulations 60, Appendix A) for determining flow rate, as necessary;]

[(4) Test Method 18 (40 Code of Federal Regulations 60, Appendix A) for determining gaseous organic compound emissions by gas chromatography;]

[(5) Test Method 25 (40 Code of Federal Regulations 60, Appendix A) for determining total gaseous nonmethane organic emissions as carbon;]

[(6) Test Methods 25A or 25B (40 Code of Federal Regulations 60, Appendix A) for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis; or]

(4) [(7)] Minor modifications. Minor [minor] modifications to these test methods may be used, if approved by the executive director.

(5) Alternate test methods. Test methods other than those specified in paragraphs (1) - (3) of this section may be used if validated by 40 CFR 63, Appendix A, Test Method 301 (effective December 29, 1992). For the purposes of this paragraph, substitute "executive director" each place that Test Method 301 references "administrator."

[(b) For Nueces and Victoria Counties, compliance with §115.121(b) of this title shall be determined by applying the following test methods, as appropriate:]

[(1) Test Method 22 (40 Code of Federal Regulations 60, Appendix A) for visual determination of fugitive emissions from material sources and smoke emissions from flares;]

[(2) additional test method requirements for flares described in 40 Code of Federal Regulations 60.18(f);]

[(3) Test Methods 1-4 (40 Code of Federal Regulations 60, Appendix A) for determining flow rate, as necessary;]

[(4) Test Method 18 (40 Code of Federal Regulations 60, Appendix A) for determining gaseous organic compound emissions by gas chromatography;]

[(5) Test Method 25 (40 Code of Federal Regulations 60, Appendix A) for determining total gaseous nonmethane organic emissions as carbon;]

[(6) Test Methods 25A or 25B (40 Code of Federal Regulations 60, Appendix A) for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis; or]

[(7) minor modifications to these test methods approved by the executive director.]

*§115.126. Monitoring and Recordkeeping Requirements.*

[(a)] The [For the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/ Galveston areas, the] owner or operator of any facility which emits volatile organic compounds (VOC) through a stationary vent in Aransas, Bexar, Calhoun, Matagorda, Nueces, San Patricio, Travis, and Victoria Counties or in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas shall maintain the following information [records] at the facility for at least two years. The owner or operator [and] shall make the information [such records] available upon request to representatives of the executive director, EPA, or any local air pollution control agency having jurisdiction in the area [upon request]. [These records shall include, but not be limited to, the following.]

(1) Vapor control systems. For vapor control systems used to control emissions in Victoria County and in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas from vents subject to [Records for each vent required to satisfy] the provisions of §115.121 [§115.121(a)(1)-(3)] of this title (relating to Emission Specifications) , records of appropriate parameters to demonstrate compliance, [shall be sufficient to demonstrate the proper functioning of applicable control equipment to design specifications,] including:

(A) continuous monitoring and recording of :

*(i)* the exhaust gas temperature immediately downstream of a direct-flame incinerator;

*(ii)* [(B)] [continuous monitoring of] the inlet and outlet gas temperatures [upstream and downstream] of a catalytic incinerator or chiller;

*(iii)* [(C)] [continuous monitoring of] the exhaust gas VOC concentration of any carbon adsorption system, as defined in §101.1 of this title (relating to Definitions); and

*(iv)* the exhaust gas temperature immediately downstream of a vapor combustor. Alternatively, the owner or operator of a vapor combustor may consider the unit to be a flare and meet the requirements specified in 40 Code of Federal Regulations (CFR) 60.18(b) and Chapter 111 of this title (relating to Control of Air Pollution from Visible Emissions and Particulate Matter) for flares;

(B) in the Beaumont/Port Arthur, Dallas/Fort Worth, and Houston/Galveston areas, the requirements specified in 40 CFR 60.18(b) and Chapter 111 of this title for flares; and

(C) for vapor control systems other than those specified in subparagraphs (A) and (B) of this paragraph, records of appropriate operating parameters.

(2)[(D)] Test results. A record of the results of any testing [of any vent] conducted [at an affected facility] in accordance with [the provisions specified in] §115.125 [§115.125(a)] of this title (relating to Testing Requirements).

(3) [(2)] Records for exempted vents. Records for each vent exempted from control requirements in accordance with §115.127 [§115.127(a)] of this title (relating to Exemptions) shall be sufficient to demonstrate compliance with applicable exemption limits, including:

(A) the pounds of ethylene emitted per 1,000 pounds of low-density polyethylene produced;

(B) the combined weight of VOC of each vent gas stream on a daily basis; and

(C) the concentration [true partial pressure] of VOC in each vent gas stream on a daily basis. [; and]

[(D) the results of any testing of any vent conducted at an affected facility in accordance with the provisions specified in this section.]

(4) [(3)] Alternative records for exempted vents. As an alternative to the requirements of paragraph (3) [(2)] of this section [subsection], records for each vent exempted from control requirements in accordance with §115.127 [§115.127(a)] of this title and having a VOC emission rate or concentration less than 50% of the applicable exemption limits at maximum actual operating conditions shall be sufficient to demonstrate continuous compliance with the applicable exemption limit. These records shall include complete information from either test results or appropriate calculations which clearly documents that the emission characteristics at maximum actual operating conditions are less than 50% of the applicable exemption limits. This documentation shall include the operating parameter levels that occurred during any testing, and the maximum levels feasible for the process.

(5) [(4)] Bakeries. For bakeries subject to [affected by] §115.122(a)(3)(A) - (B) of this title (relating to Control Requirements), the following additional requirements apply.

(A) The owner or operator of each bakery in the Houston/Galveston area with a total weight of VOC emitted from all bakery ovens on the property, when uncontrolled, equal to or greater than 25 tons per calendar year, shall submit a control plan no later than March 31, 2001, to the executive director, the appropriate regional office, and any local air pollution control program with jurisdiction. The plan shall demonstrate that the overall emission reduction from the uncontrolled VOC emission rate of the oven(s) will be at least 80% by December 31, 2001. At a minimum, the control plan shall include the emission point number (EPN) and the facility identification number (FIN) of each bakery oven and any associated control device, a plot plan showing the location, EPN, and FIN of each bakery oven and any associated control device, and the 2000 VOC emission rates (consistent with the bakery's 2000 emissions inventory). The projected 2002 VOC emission rates

shall be calculated in a manner consistent with the 2000 emissions inventory.

[~~(A) The owner or operator of each bakery in the Dallas/Fort Worth area with a total weight of VOC emitted from all bakery ovens on the property, when uncontrolled, equal to or greater than 50 tons per calendar year, shall submit an initial control plan no later than March 31, 2000, to the executive director, the appropriate regional office, and any local air pollution control program with jurisdiction which demonstrates that the overall reduction of VOC emissions from the bakery's 1990 baseline emissions inventory will be at least 80% by December 31, 2000. At a minimum, the control plan shall include the emission point number (EPN) and the facility identification number (FIN) of each bakery oven and any associated control device, a plot plan showing the location, EPN, and FIN of each bakery oven and any associated control device, and the 1990 VOC emission rates (consistent with the bakery's 1990 emissions inventory). The projected 2000 VOC emission rates shall be calculated in a manner consistent with the 1990 emissions inventory.~~]

[~~(B) In order to document continued compliance with §115.122(a)(3) of this title, the owner or operator of each bakery specified in clauses (i) and (ii) of this subparagraph shall submit an annual report no later than March 31 of each year to the executive director, the appropriate regional office, and any local air pollution control program with jurisdiction which demonstrates the overall reduction of VOC emissions from the bakery's 1990 baseline emissions inventory during the preceding calendar year. At a minimum, the report shall include the EPN and FIN of each bakery oven and any associated control device, a plot plan showing the location, EPN, and FIN of each bakery oven and any associated control device, and the VOC emission rates. The emission rates for the proceeding calendar year shall be calculated in a manner consistent with the 1990 emissions inventory.~~]

*[~~(i) The owner or operator of each bakery in the Houston/Galveston area with VOC emissions, when uncontrolled, equal to or greater than 25 tons per calendar year, shall submit an annual report which demonstrates that the overall reduction of VOC emissions from the bakery's 1990 baseline emissions inventory during the preceding calendar year is at least 30% after May 31, 1996.~~]*

*[~~(ii) Beginning in 2002, the owner or operator of each bakery in the Dallas/Fort Worth area with VOC emissions, when uncontrolled, equal to or greater than 50 tons per calendar year, shall submit an annual report which demonstrates that the overall reduction of VOC emissions from the bakery's 1990 baseline emissions inventory during the preceding calendar year is at least 80% after December 31, 2000.~~]*

(B) [~~(C)~~] All representations in [~~initial~~] control plans [~~and annual reports~~] become enforceable conditions. It shall be unlawful for any person to vary from such representations if the variation will cause a change in the identity of the specific emission sources being controlled or the method of control of emissions unless the owner or operator of the bakery submits a revised control plan to the executive director, the appropriate regional office, and any local air pollution control program with jurisdiction within 30 days of the change. All control plans [~~and reports~~] shall include documentation that the overall emission reduction from the uncontrolled VOC emission rate of the bakery's oven(s) [~~of VOC emissions from the bakery's 1990 baseline emissions inventory~~] continues to be at least the specified percentage reduction [~~30%~~]. The emission rates shall be calculated in a manner consistent with the most recent [~~1990~~] emissions inventory.

(6) [~~(5)~~] Bakeries (contingency measures). For bakeries subject to [~~affected by~~] §115.122(a)(3)(C) and (D) of this title, the following additional requirements apply.

(A) No later than six months after the commission publishes notification in the *Texas Register* as specified in §115.129(d) or (e) [~~§115.129(a)(4)~~] of this title (relating to Counties and Compliance Schedules), the owner or operator of each bakery shall submit an initial control plan to the executive director, the appropriate regional office, and any local air pollution control program with jurisdiction which demonstrates that the overall reduction of VOC emissions from the bakery's 1990 [~~baseline~~] emissions inventory will be at least 30%. At a minimum, the control plan shall include the EPN and the FIN of each bakery oven and any associated control device, a plot plan showing the location, EPN, and FIN of each bakery oven and any associated control device, and the 1990 VOC emission rates (consistent with the bakery's 1990 emissions inventory). The projected VOC emission rates shall be calculated in a manner consistent with the 1990 emissions inventory.

(B) In order to document continued compliance with §115.122(a)(3) of this title, the owner or operator of each bakery shall submit an annual report no later than March 31 of each year to the executive director, the appropriate regional office, and any local air pollution control program with jurisdiction which demonstrates that the overall reduction of VOC emissions from the bakery's 1990 [~~baseline~~] emissions inventory during the preceding calendar year is at least 30%. At a minimum, the report shall include the EPN and FIN of each bakery oven and any associated control device, a plot plan showing the location, EPN, and FIN of each bakery oven and any associated control device, and the VOC emission rates. The emission rates for the proceeding calendar year shall be calculated in a manner consistent with the 1990 emissions inventory.

(C) All representations in [~~initial~~] control plans and annual reports become enforceable conditions. It shall be unlawful for any person to vary from such representations if the variation will cause a change in the identity of the specific emission sources being controlled or the method of control of emissions unless the owner or operator of the bakery submits a revised control plan to the executive director, the appropriate regional office, and any local air pollution control program with jurisdiction within 30 days of the change. All control plans and reports shall include documentation that the overall reduction of VOC emissions from the bakery's 1990 [~~baseline~~] emissions inventory continues to be at least 30%. The emission rates shall be calculated in a manner consistent with the 1990 emissions inventory.

(7) [~~(6)~~] Additional flare requirements. The owner or operator of a facility that uses a flare to meet the requirements of §115.122(a)(2) of this title shall install, calibrate, maintain, and operate according to the manufacturer's specifications, a heat-sensing device, such as an ultraviolet beam sensor or thermocouple, at the pilot light to indicate continuous presence of a flame.

[~~(b) For Victoria County, the owner or operator of any facility which emits VOC through a stationary vent shall maintain records at the facility for at least two years and shall make such records available to representatives of the executive director, EPA, or any local air pollution control agency having jurisdiction in the area upon request. These records shall include, but not be limited to, the following.~~]

[~~(1) Records for each vent required to satisfy the provisions of §115.121(b) of this title shall be sufficient to demonstrate the proper functioning of applicable control equipment to design specifications, including:~~]

[~~(A) continuous monitoring of the exhaust gas temperature immediately downstream of a direct-flame incinerator;~~]

[~~(B) continuous monitoring of temperatures upstream and downstream of a catalytic incinerator or chiller;~~]

[(C) continuous monitoring of the exhaust gas VOC concentration of any carbon adsorption system, as defined in §101.1 of this title;]

[(D) the results of any testing of any vent conducted at an affected facility in accordance with the provisions specified in §115.125(b) of this title.]

[(2) Records for each vent exempted from control requirements in accordance with §115.127(b) of this title shall be sufficient to demonstrate compliance with applicable exemption limits, including:]

[(A) the pounds of ethylene emitted per 1,000 pounds of low-density polyethylene produced;]

[(B) the combined weight of VOC of each vent gas stream on a daily basis;]

[(C) the true partial pressure of VOC in each vent gas stream on a daily basis; and]

[(D) the results of any testing of any vent conducted at an affected facility in accordance with the provisions specified in this section.]

[(3) As an alternative to the requirements of paragraph (2) of this subsection, records for each vent exempted from control requirements in accordance with §115.127(b) of this title and having a VOC emission rate or concentration less than 50% of the applicable exemption limits at maximum actual operating conditions shall be sufficient to demonstrate continuous compliance with the applicable exemption limit. These records shall include complete information from either test results or appropriate calculations which clearly documents that the emission characteristics at maximum actual operating conditions are less than 50% of the applicable exemption limits. This documentation shall include the operating parameter levels that occurred during any testing, and the maximum levels feasible for the process.]

*§115.127. Exemptions.*

(a) For all persons in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas, the following exemptions apply.

(1) (No change.)

(2) The following vent gas streams are exempt from the requirements of §115.121(a)(1) of this title:

(A) (No change.)

(B) a vent gas stream specified in §115.121(a)(1) of this title with a concentration of VOC less than 612 parts per million by volume (ppmv) [0.009 pounds per square inch absolute (psia) true partial pressure (612 parts per million (ppm))];

(C) until April 15, 2001, for facilities which have been assigned the code number 26 as described in the document Standard Industrial Classification (SIC) Manual, 1972, as amended by the 1977 Supplement, a vent gas stream specified in §115.121(a)(1) of this title with a concentration of VOC less than 30,000 ppmv [0.44 psia true partial pressure (30,000 ppm)];

(D) - (E) (No change.)

(3) The following vent gas streams are exempt from the requirements of §115.121(a)(2)(B) - (E) of this title:

(A) (No change.)

(B) a vent gas stream from any air oxidation synthetic organic chemical manufacturing process with a concentration of VOC less than 612 ppmv [0.009 pounds psia true partial pressure (612 ppm))]; and

(C) a vent gas stream from any liquid phase polypropylene manufacturing process, any liquid phase slurry high-density polyethylene manufacturing process, and any continuous polystyrene manufacturing process with a concentration of VOC less than 408 ppmv [0.006 psia true partial pressure (408 ppm)].

(4) For synthetic organic chemical manufacturing industry (SOCMI) reactor processes and distillation operations:

(A) - (B) (No change.)

(C) Any reactor process or distillation operation vent gas stream with a flow rate less than 0.011 standard cubic meters per minute or a VOC concentration less than 500 ppmv [parts per million by volume] is exempt from the requirements of §115.121(a)(2)(A) of this title.

(D) - (E) (No change.)

(5) - (7) (No change.)

(8) As an alternative to complying with the requirements of this division (relating to Vent Gas Control) (or, in the case of bakeries, as an alternative to complying with the requirements of §115.121(a)(1) and §115.122(a)(1) of this title) for a source that is addressed by a Chapter 115 contingency rule (i.e., one in which Chapter 115 requirements are triggered for that source by the commission publishing notification in the *Texas Register* that implementation of the contingency rule is necessary), the owner or operator of that source may instead choose to comply with the requirements of the contingency rule as though the contingency rule already had been implemented for that source. The owner or operator of each source choosing this option shall submit written notification to the executive director and any local air pollution control program with jurisdiction. When the executive director and the local program (if any) receive such notification, the source will then be considered subject to the contingency rule as though the contingency rule already had been implemented for that source.

(b) For all persons in Nueces and Victoria Counties, the following exemptions apply.

(1) (No change.)

(2) The following vent gas streams are exempt from the requirements of §115.121(b) of this title:

(A) (No change.)

(B) a vent gas stream with a concentration of the VOC or classes of compounds specified in §115.121(b)(2) and (3) of this title less than 30,000 ppmv [0.44 psia true partial pressure (30,000 ppm)].

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

(c) For all persons in Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties, the following exemptions apply.

(1) The following vent gas streams are exempt from the requirements of §115.121(c)(1) of this title:

(A) - (B) (No change.)

(C) a vent gas stream having a concentration of the VOC specified in §115.121(c)(1)(B) and (C) of this title less than 30,000 ppmv [0.44 psia true partial pressure (30,000 ppm)].

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

*§115.129. Counties and Compliance Schedules.*

(a) The owner or operator of each vent gas stream in Aransas, Bexar, Brazoria, Calhoun, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Matagorda, Montgomery, Nueces, Orange, San Patricio, Tarrant, Travis, Victoria,

and Waller Counties shall continue to comply with this division (relating to Vent Gas Control) as required by §115.930 of this title (relating to Compliance Dates). [~~All affected persons in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas shall be in compliance with this undesignated head (relating to Vent Gas Control) in accordance with the following schedules:~~]

[~~(1) All affected synthetic organic chemical manufacturing industry reactor process or distillation operations in Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties shall be in compliance with §115.121(a)(2)(A) of this title (relating to Emission Specifications) as soon as practicable, but no later than November 15, 1996.~~]

(b) [~~(2)~~] The owner or operator of each bakery [~~All affected bakeries~~] in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties shall comply [~~be in compliance~~] with §§115.121(a)(3), 115.122(a)(3), and 115.126(5) [~~115.126(a)(4), and 115.127(a)(5)~~] of this title (relating to Emission Specifications; Control Requirements; and Monitoring and Recordkeeping Requirements [~~; and Exemptions~~]) as soon as practicable, but no later than December 31, 2001 [~~May 31, 1996~~].

(c) [~~(3)~~] The owner or operator of each bakery [~~All bakeries~~] in Collin, Dallas, Denton, and Tarrant Counties subject to [~~affected by~~] §115.122(a)(3)(B) of this title shall comply [~~be in compliance~~] with §§115.121(a)(3), 115.122(a)(3), and 115.126(5) [~~115.126(a)(4), and 115.127(a)(5)~~] of this title as soon as practicable, but no later than December 31, 2000 [~~May 31, 1996~~].

(d) [~~(4)~~] The owner or operator of each bakery [~~All bakeries~~] in Collin, Dallas, Denton, and Tarrant Counties subject to [~~affected by~~] §115.122(a)(3)(C) of this title shall comply [~~be in compliance~~] with §§115.121(a)(3), 115.122(a)(3)(C), and 115.126(6) [~~115.126(a)(5), and 115.127(a)(5)~~] of this title as soon as practicable, but no later than one year, after the commission publishes notification in the *Texas Register* of its determination that this contingency rule is necessary as a result of failure to attain the national ambient air quality standard (NAAQS) for ozone by the attainment deadline or failure to demonstrate reasonable further progress as set forth in the FCAA [~~1990 Amendments to the Federal Clean Air Act (FCAA)~~], §172(c)(9).

(e) [~~(5)~~] The owner or operator of each bakery [~~All bakeries~~] in El Paso County subject to [~~affected by~~] §115.122(a)(3)(D) of this title shall comply [~~be in compliance~~] with §§115.121(a)(3), 115.122(a)(3)(D), and 115.126(6) [~~115.126(a)(5), and 115.127(a)(5)~~] of this title as soon as practicable, but no later than one year, after the commission publishes notification in the *Texas Register* of its determination that this contingency rule is necessary as a result of failure to attain the NAAQS for ozone by the attainment deadline or failure to demonstrate reasonable further progress as set forth in [~~the 1990 Amendments to~~] the FCAA, §172(c)(9).

(f) The owner or operator of each flare in Brazoria, Chambers, Collin, Dallas, Denton, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties which is used to comply with the requirements of §115.121 and/or §115.122 of this title shall comply with §115.125(3)(C) and §115.126(1)(B) of this title (relating to Testing Requirements; and Monitoring and Recordkeeping Requirements) as soon as practicable, but no later than December 31, 2001.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005637
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## DIVISION 6. BATCH PROCESSES

### 30 TAC §§115.161, 115.162, 115.164 - 115.167, 115.169

STATUTORY AUTHORITY

The amendments are proposed under the Texas Health and Safety Code, Texas Clean Air Act, (TCAA), §382.011, concerning General Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.017, concerning Rules, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and §382.012, concerning State Air Control Plan, which requires the commission to develop plans for protection of the state's air.

The amendments implement the Texas Health and Safety Code, TCAA, §§382.011, 382.012, and 382.017.

*§115.161. Applicability.*

(a) The provisions of §§115.162 - 115.167 of this title (relating to Control Requirements; Alternate Control Requirements; Determination of Emissions and Flow Rates; Approved Test Methods and Testing Requirements; Monitoring and Recordkeeping Requirements; and Exemptions) apply to vent gas streams at batch process operations in the Beaumont/Port Arthur and Houston/Galveston areas [~~area~~], as defined in §115.10 of this title (relating to Definitions), under the following Standard Industrial Classification (SIC) codes:

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

(b) (No change.)

*§115.162. Control Requirements.*

The owner or operator of each batch process operation in the Beaumont/Port Arthur and Houston/Galveston areas [~~area~~] shall comply with the following control requirements.

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

*§115.164. Determination of Emissions and Flow Rates.*

The owner or operator of each batch process operation in the Beaumont/Port Arthur and Houston/Galveston areas [~~area~~] shall determine the mass emissions and flow rates as follows.

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

*§115.165. Approved Test Methods and Testing Requirements.*

The owner or operator of each batch process operation in the Beaumont/Port Arthur and Houston/Galveston areas [~~area~~] shall comply with the following.

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

*§115.166. Monitoring and Recordkeeping Requirements.*

The owner or operator of each batch process operation in the Beaumont/Port Arthur and Houston/Galveston areas [~~area~~] shall maintain the following information for at least two years at the plant, as defined

by its air quality account number. The owner or operator shall make the information available upon request to representatives of the executive director, EPA, or any local air pollution control agency having jurisdiction in the area:

(1) Vapor control systems. For vapor control systems used to control emissions from batch process [~~volatile organic compounds (VOC) transfer~~] operations, records of appropriate parameters to demonstrate compliance, including:

(A) continuous monitoring and recording of:

*(i) - (ii)* (No change.)

*(iii)* for an absorber, either:

*(I)* (No change.)

*(II)* the concentration level of volatile organic compounds (VOC) [~~VOC~~] exiting the recovery device based on a detection principle such as infrared, photoionization, or thermal conductivity;

*(iv) - (vii)* (No change.)

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

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

*§115.167. Exemptions.*

The following exemptions apply [~~in the Beaumont/Port Arthur area~~].

(1) Batch process operations at an account which has total volatile organic compound (VOC) emissions (determined before control but after the last recovery device) of less than the following rates [~~100 tons per year~~] from all stationary emission sources included in the account are exempt from the requirements of this division (relating to Batch Processes), except for §115.161(b) of this title (relating to Applicability) : [~~.~~]

(A) 100 tons per year (tpy) in the Beaumont/Port Arthur area; and

(B) 25 tpy in the Houston/Galveston area.

(2) The following are exempt from the requirements of this division, except for §115.164 and §115.166(2) and (3) of this title (relating to Determination of Emissions and Flow Rates; and Monitoring and Recordkeeping Requirements):

(A) - (B) (No change.)

*§115.169. Counties and Compliance Schedules.*

(a) The owner or operator of each batch process operation in Hardin, Jefferson, and Orange Counties shall be in compliance with this division (relating to Batch Processes) as soon as practicable, but no later than December 31, 2001. All batch process operations subject to this division in Hardin, Jefferson, and Orange Counties shall continue to comply with the requirements of Division 2 of this subchapter (relating to Vent Gas Control) until these batch process operations are in compliance with the requirements of this division.

(b) The owner or operator of each batch process operation in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties shall be in compliance with this division (relating to Batch Processes) as soon as practicable, but no later than December 31, 2002. All batch process operations subject to this division in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties shall continue to comply with the requirements of Division 2 of this subchapter (relating to Vent Gas Control) until these batch process operations are in compliance with the requirements of this division.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005636
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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# SUBCHAPTER C. VOLATILE ORGANIC COMPOUND TRANSFER OPERATIONS

## DIVISION 1. LOADING AND UNLOADING OF VOLATILE ORGANIC COMPOUNDS

**30 TAC §§115.211, 115.212, 115.216**

STATUTORY AUTHORITY

The amendments are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.011, concerning General Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.017, concerning Rules, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and §382.012, concerning State Air Control Plan, which requires the commission to develop plans for protection of the state's air.

The proposed amendments implement the Texas Health and Safety Code, TCAA, §§382.011, 382.012, and 382.017.

*§115.211. Emission Specifications.*

The owner or operator of each gasoline terminal [~~and gasoline bulk plant~~] in the covered attainment counties and in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas, as defined in §115.10 of this title (relating to Definitions), shall ensure that volatile organic compound (VOC) emissions from the vapor control system vent at gasoline terminals do not exceed the following rates:

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

*§115.212. Control Requirements.*

(a) The owner or operator of each volatile organic compound (VOC) transfer operation, transport vessel, and marine vessel in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas shall comply with the following control requirements.

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

(3) Leak-free requirements. All land-based [~~loading and unloading of~~] VOC transfer to or from transport vessels shall be conducted such that:

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

(4) - (7) (No change.)

(b) The owner or operator of each land-based VOC transfer operation and transport vessel in the covered attainment counties shall comply with the following control requirements.

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

(3) Leak-free requirements. All land-based [~~loading and unloading of~~] VOC transfer to or from transport vessels shall be conducted such that:

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

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

*§115.216. Monitoring and Recordkeeping Requirements.*

The owner or operator of each volatile organic compound (VOC) loading or unloading operation in the covered attainment counties or in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston areas shall maintain the following information for at least two years at the plant, as defined by its air quality account number. The owner or operator shall make the information available upon request to representatives of the executive director, EPA, or any local air pollution control agency having jurisdiction in the area.

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

(3) Land-based VOC transfer to or from transport vessels.

(A) A daily record of:

*(i)* the identification number of each tank-truck tank for which annual leak testing is required under §115.214(a)(1)(C) or (b)(1)(C) of this title (relating to Inspection Requirements);

*(ii)* (No change.)

*(iii)* the date of the last leak testing of each tank-truck tank as required by §115.214(a)(1)(C) or (b)(1)(C) of this title [~~(relating to Inspection Requirements)~~].

(B) - (E) (No change.)

(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 August 11, 2000.

TRD-200005635
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## DIVISION 4. CONTROL OF VEHICLE REFUELING EMISSIONS (STAGE II) AT MOTOR VEHICLE FUEL DISPENSING FACILITIES

**30 TAC §115.240**

STATUTORY AUTHORITY

The new section is proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.011, concerning General Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.017, concerning Rules, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and §382.012, concerning State Air Control Plan, which requires the commission to develop plans for protection of the state's air.

The proposed new section implements the Texas Health and Safety Code, TCAA, §§382.011, 382.012, and 382.017.

*§115.240. Stage II Vapor Recovery Definitions.*

The following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this division are found in §115.10 of this title (relating to Definitions), §101.1 of this title (relating to Definitions), and §3.2 of this title (relating to Definitions).

(1) Independent small business marketer of gasoline - A person engaged in the marketing of gasoline who owns the dispensing equipment at a motor vehicle fuel dispensing facility and receives at least 50% of his annual income from the marketing of gasoline. A person is not an independent small business marketer of gasoline if such person:

(A) is a refiner; or

(B) controls (i.e., owns more than 50% of a business or corporation's stock), is controlled by, or is under common control with, a refiner; or

(C) is otherwise directly or indirectly affiliated with a refiner or with a person who controls, is controlled by, or is under common control with a refiner (unless the sole affiliation is by means of a supply contract or an agreement or contract to use a trademark, trade name, service mark, or other identifying symbol or name owned by such refiner or any such person).

(2) Owner or operator of a motor vehicle fuel dispensing facility - Any person who owns, leases, operates, or controls the motor vehicle fuel dispensing facility.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005634
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## SUBCHAPTER E. SOLVENT-USING PROCESS DIVISION 3. FLEXOGRAPHIC AND ROTOGRAVURE PRINTING

**30 TAC §115.430**

STATUTORY AUTHORITY

The new section is proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.011, concerning General Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's

air; §382.017, concerning Rules, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and §382.012, concerning State Air Control Plan, which requires the commission to develop plans for protection of the state's air.

The proposed new section implements the Texas Health and Safety Code, TCAA, §§382.011, 382.012, and 382.017.

*§115.430. Flexographic and Rotogravure Printing Definitions.*

The following words and terms, when used in this division, shall have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this division are found in §115.10 of this title (relating to Definitions), §101.1 of this title (relating to Definitions), and §3.2 of this title (relating to Definitions).

(1) Flexographic printing process - A method of printing in which the image areas are raised above the non-image areas, and the image carrier is made of an elastomeric material.

(2) Packaging rotogravure printing - Any rotogravure printing upon paper, paper board, metal foil, plastic film, or any other substrate which is, in subsequent operations, formed into packaging products or labels.

(3) Publication rotogravure printing - Any rotogravure printing upon paper which is subsequently formed into books, magazines, catalogues, brochures, directories, newspaper supplements, or other types of printed materials.

(4) Rotogravure printing - The application of words, designs, and/or pictures to any substrate by means of a roll printing technique which involves a recessed image area. The recessed area is loaded with ink and pressed directly to the substrate for image transfer.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005633
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## DIVISION 4. OFFSET LITHOGRAPHIC PRINTING

### 30 TAC §115.449

STATUTORY AUTHORITY

The amendment is proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.011, concerning General Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.017, concerning Rules, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and §382.012, concerning State Air Control Plan, which requires the commission to develop plans for protection of the state's air.

The proposed amendment implements the Texas Health and Safety Code, TCAA, §§382.011, 382.012, and 382.017.

*§115.449. Counties and Compliance Schedules.*

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

(d) In Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, all offset lithographic printing presses on a property which, when uncontrolled, emit a combined weight of VOC equal to or greater than 25 tons per calendar year, shall be in compliance with §§115.442, 115.443, 115.445, and 115.446 of this title as soon as practicable, but no later than December 31, 2002.

(e) [~~(d)~~] In Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, all offset lithographic printing presses on a property which, when uncontrolled, emit a combined weight of VOC less than 25 tons per calendar year, shall be in compliance with §§115.442, 115.443, 115.445, and 115.446 of this title as soon as practicable, but no later than one year, after the commission publishes notification in the *Texas Register* of its determination that this contingency rule is necessary as a result of failure to attain the NAAQS for ozone by the attainment deadline or failure to demonstrate reasonable further progress as set forth in [~~the 1990 Amendments to~~] the FCAA, §172(c)(9).

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005632
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## SUBCHAPTER J. ADMINISTRATIVE PROVISIONS
## DIVISION 4. EMISSIONS TRADING

### 30 TAC §115.950

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §115.950, Emissions Trading. This amendment is also proposed as a revision to the Texas state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

Section 115.950 currently refers to 30 TAC §101.29, Emissions Credit Banking and Trading, as a method of meeting emission requirements of Chapter 115. In concurrent rulemaking, §101.29 would be repealed and its requirements transferred and amended in new Chapter 101, Subchapter H, Divisions 1 and 4. This rulemaking would amend §115.950 to cite the correct cross-reference. The amended section would require the user of credits to obtain additional emission reduction credits or achieve lower actual emissions if new lower volatile organic compound (VOC) emission specifications are established by future amendments to this chapter.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION BY SECTION DISCUSSION

Section 115.950 would be amended to change the title to "Use of Emissions Credits for Compliance" from "Emissions Trading" to more clearly reflect the language in §115.950, which discusses how to use emission reduction credits for alternative compliance, not how to trade emission reduction credits.

The proposed §115.950(a) removes the reference to §101.29 and corrects the reference to Chapter 101, Subchapter H, Division 1, Emission Reduction Credit Banking and Trading, or Division 4, Discrete Emission Reduction Banking and Trading. In addition, the amendment clarifies that emission reduction credits (ERCs), mobile emission reduction credits (MERCs), discrete emission reduction credit (DERCs), or mobile discrete emission reduction credit (MDERCs) may be used to meet any of the requirements of Chapter 115. The term "RC" refers to an ERC, MERC, DERC, or MDERC.

The proposed §115.950(b) adds language requiring that owners or operators using Chapter 101, Subchapter H, Division 1 or Division 4 to meet the emission control requirements of Chapter 115 must obtain additional RCs or reduce actual emissions if any lower VOC emission specification is established by future amendments to Chapter 115.

FISCAL NOTE: COST TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for each year of the first five-year period the proposed amendment is in effect, there will be no fiscal implications for any unit of state and local government as a result of administration or enforcement of the proposed amendment.

The proposed amendment will achieve administrative consistency with amendments to Chapter 101 proposed in concurrent rulemaking by correcting a cross-reference, and repealing and transferring requirements relating to Emission Credit Banking and Trading.

The proposed amendment does not add regulatory requirements, but is being proposed to allow compliance flexibility in meeting current or future VOC emission limitations. The proposed amendment clarifies that ERCs, MERCs, DERCs, or MDERCs may be used to meet any of the requirements for meeting emission requirements. Additionally, the proposed amendment adds language to describe how owners or operators using emission credit banking and trading to meet the emission control requirements must obtain additional emission credits or reduce actual emissions if any lower VOC emission specification is established by future amendments.

PUBLIC BENEFIT AND COSTS

Mr. Davis also has determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of implementing the amendment will be the increased compliance with VOC emissions limitations through increased rule flexibility.

There are no anticipated fiscal impacts to persons and businesses as a result of implementation of the proposed amendment, because the proposed action is administrative in nature. The proposed amendment will correct a cross-reference with Chapter 101, clarify the use of ERCs, MERCs, DERCs, and MERCs, and will add language specifying that owners must obtain additional emission credits or lower actual emissions if stricter VOC requirements are implemented through future amendments.

SMALL AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications for small or micro-businesses as a result of administration or enforcement of the proposed amendment. The proposed action is administrative in nature. The proposed amendment will correct a cross reference with Chapter 101, clarify the use of ERCs, MERCs, DERCs, and MERCs, and will add language specifying that owners must obtain additional emission credits or lower actual emissions if stricter VOC requirements are implemented through future amendments to Chapter 115.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225. The commission has determined that the proposed amendment to Chapter 115 does not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225. "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 commission is proposing the amendment to achieve administrative consistency with amendments to Chapter 101 proposed in concurrent rulemaking. The proposed amendment to Chapter 115 does not add regulatory requirements, but is proposed to allow compliance flexibility in meeting current or future VOC emission limitations in Chapter 115. In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b), because the proposed rule does not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under the Federal Clean Air Act (FCAA), §7409, and therefore meet a federal requirement. States are primarily responsible for ensuring attainment and maintenance of NAAQS once EPA has established those standards. Under the FCAA, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through a control program directed to sources of the pollutants involved. This proposal is not an express requirement of state law, but

was developed specifically in order to meet the air quality standards established under federal law as NAAQS, as authorized under the TCAA, §382.012 (concerning State Air Control Plan). This proposal is intended to help bring the HGA ozone nonattainment area into compliance. The proposed amendments do not exceed a standard set by federal law, exceed an express requirement of state law unless specifically required by federal law, nor exceed a requirement of a delegation agreement. The proposed amendments were not developed solely under the general powers of the agency, but were specifically developed to meet the air quality standards established under federal law as NAAQS. The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission has completed a takings impact assessment for the proposed rule. The following is a summary of that assessment. The commission is proposing the amendment to achieve administrative consistency with amendments to Chapter 101 proposed in concurrent rulemaking. The proposed amendment to Chapter 115 does not add regulatory requirements, but is proposed to allow compliance flexibility in meeting current or future VOC emission limitations in Chapter 115. The proposed amendment does not affect private real property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, the proposed section does not meet the definition of a takings under Texas Government Code, §2007.002(5).

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2) relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the proposed rule is consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. The proposed amendment to Chapter 115 does not add regulatory requirements, but is proposed to allow compliance flexibility in meeting current or future VOC emission limitations in Chapter 115. Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMIT PROGRAM

Sources that currently have §115.590 listed in their federal operating permit would not be required to amend the permit in response to this amendment. However those sources that wish to use RCs to comply with this chapter must revise their operating permit, consistent with the process in 30 TAC Chapter 122, to include the revised §115.590 requirements for each emission unit affected by §115.590 at their site.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearings, 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to siprules@tnrcc.state.tx.us. All comments should reference Rule Log Number 1998-089-101-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Matthew R. Baker at (512) 239-1091 or Beecher Cameron at (512) 239-1495.

STATUTORY AUTHORITY

The amendment is proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA, and 42 United States Code, §7410(a)(2)(A), which requires SIPs to

include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed amendment implements TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; and §382.012, relating to State Air Control Plan.

*§115.950. Use of Emissions Credits for Compliance [~~Emissions Trading~~].*

(a) An owner or operator may meet the emission control requirements of this chapter, in whole or in part, by obtaining emission reduction credits (ERCs), mobile emission reduction credits (MERCs), [~~or~~] discrete emission reduction credits (DERCs), or mobile discrete emission reduction credits (MDERCs) in accordance with this section and Chapter 101, Subchapter H, Division 1 of this title (relating to Emission Credit Banking and Trading) or Chapter 101, Subchapter H, Division 4 of this title (relating to Discrete Emission Reduction Banking and Trading). For the purposes of this section, the term "RC" refers to an ERC, MERC, DERC, or MDERC, whichever is applicable. [~~§101.29 of this title (relating to Emission Credit Banking and Trading)~~].

(b) Any lower volatile organic compound (VOC) emission specification established under this chapter for the unit or units using RCs shall require the user of the RCs to obtain additional RCs in accordance with Chapter 101, Subchapter H, Division 1 of this title or Chapter 101, Subchapter H, Division 4 of this title and/or otherwise reduce emissions prior to the effective date of such rule change. The owner or operator of the unit(s) currently using RCs shall calculate the necessary emission reductions per unit as follows.
Figure: 30 TAC §115.950(b)

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005657
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-1966

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## CHAPTER 117. CONTROL OF AIR POLLUTION FROM NITROGEN COMPOUNDS

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §117.10, concerning Definitions; §§117.101, 117.103, 117.105, 117.106, 117.108, 117.111, 117.113, 117.116, 117.119, and 117.121, concerning Utility Electric Generation in Ozone Nonattainment Areas; §117.138, concerning System Cap; §§117.201, 117.203, 117.205 - 117.208, 117.211, 117.213, 117.216, 117.219, and 117.221, concerning Industrial, Commercial, and Institutional Sources in Ozone Nonattainment Areas; and §117.510 and §117.520, concerning Administrative Provisions. The commission also proposes new §117.114 and §117.214, concerning Emission Testing and Monitoring for the Houston/Galveston Attainment Demonstration; §117.210, concerning System Cap; and §117.534, concerning Compliance Schedule for Boilers, Process Heaters, and Stationary Engines at Minor Sources. The commission also proposes new §§117.471, 117.473, 117.475, 117.478, and 117.479 in Subchapter D, to be added as a new Division 2, concerning Boilers, Process Heaters, and Stationary Engines at Minor Sources. The proposed revisions to Chapter 117 and to the state implementation plan (SIP) would require a wide variety of stationary sources of nitrogen oxides ($NO_x$) emissions in the Houston/Galveston (HGA) ozone nonattainment area to meet new emission specifications and other requirements in order to reduce $NO_x$ emissions and ozone air pollution.

The affected equipment types and processes include electric utility boilers and stationary gas turbines; industrial, commercial, and institutional (ICI) boilers and stationary gas turbines; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and associated carbon monoxide (CO) boilers and furnaces); pulping liquor recovery furnaces, lime kilns, lightweight aggregate kilns, heat treating furnaces, reheat furnaces, magnesium chloride fluidized bed dryers, incinerators, and hazardous waste-fired boilers and industrial furnaces (BIF units). The commission proposes these amendments to Chapter 117, concerning Control of Air Pollution from Nitrogen Compounds, and to the SIP as essential components of and consistent with the SIP that Texas is required to develop under the Federal Clean Air Act (FCAA) Amendments of 1990 (42 United States Code (USC)), §7410, to demonstrate attainment of the National Ambient Air Quality Standard (NAAQS) for ozone. In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and 42 USC, §7511a(d), requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas such as HGA. Another purpose of these proposed revisions is to ensure that reasonably available control technology (RACT) requirements, as required by 42 USC, §7511a(f), are applied to major $NO_x$ sources in HGA which are not subject to the previous $NO_x$ RACT rules.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the 1990 Amendments to the FCAA (42 USC), and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The HGA area, defined by Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC §7410. On January 4, 1995, the state submitted the first of its Post-1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary $NO_x$ waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the $NO_x$ waiver were based on early base case episodes which marginally exhibited model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the Coastal Oxidant Assessment for Southeast

Texas (COAST) study. The commission believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, EPA policy regarding SIP elements and timelines went through changes. Two national programs in particular resulted in changing deadlines and requirements. The first of these programs was the Ozone Transport Assessment Group. This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in this study, and it has been concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that has impacted the SIP planning process is the revision to the national ozone standard. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, that standard would continue to apply until it is attained. The FCAA requires that HGA attain the one-hour standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to the EPA on May 19, 1998 a revision to the HGA SIP which contained the following elements in response to EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and $NO_x$ reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the commission eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and $NO_x$ necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or $NO_x$ reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of $NO_x$ reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of $NO_x$ reductions needed for attainment; to adopt the majority of the $NO_x$ necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-99 ROP plan by December 31, 2000; to perform a mid- course review by May 1, 2004; and to perform modeling of mobile source emissions using the EPA mobile source emissions model (MOBILE6), to revise the on-road mobile source budget as needed, and to submit the revised budget within 24 months of the model's release. In addition, if a conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 release, the state will revise the motor vehicle emissions budget (MVEB) so that the conformity analysis and the SIP MVEB are calculated on the same basis.

The emission reduction requirements included as part of this SIP revision represent substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, have worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area have formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

The current SIP revision contains rules, enforceable commitments, and photochemical modeling analyses in support of the

HGA ozone attainment demonstration. In addition, this SIP contains post- 1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contains enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

In order for the state to have an approvable attainment demonstration, EPA has indicated that the state must adopt those strategies modeled in the November 15, 1999 submittal and then adopt sufficient controls to close the remaining gap in $NO_x$ emissions.

The Houston nonattainment area will need to ultimately reduce $NO_x$ more than 750 tons per day (tpd) to reach attainment with the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of point source $NO_x$ rules will contribute to attainment and maintenance of the one-hour ozone standard in the HGA area. Point source $NO_x$ rules also should contribute to a successful demonstration of transportation conformity in the HGA area.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

The attainment demonstration modeling produces a target emission rate of about 66.7 tons of $NO_x$ per day in 2007 from industrial point sources. The staff analyzed the most recent available point source $NO_x$ emissions inventory, from 1997, categorizing the emitting sources by equipment type to identify how to reasonably obtain the necessary reductions. In the Tables and Graphics section of this issue of the *Texas Register*, the table titled "Potential $NO_x$ Emission Reductions by Point Source Category for Houston/Galveston Nonattainment Area Counties" indicates the relative proportion of emissions according to equipment category.

Figure 1: 30 TAC Chapter 117 - Preamble

Another table in the Tables and Graphics section of this issue of the *Texas Register*, titled "Subcategories - Point Source Potential $NO_x$ Emission Reductions by Subcategory for Houston/Galveston Nonattainment Area Counties," further breaks down the equipment categories and indicates the estimated $NO_x$ emission reductions which would result from implementation of the proposed Chapter 117 rules.

Figure 2: 30 TAC Chapter 117 - Preamble

The tables show that emission reductions approaching the tpd rate required by the attainment demonstration necessitate further reductions from essentially all categories, including electric utility boilers and stationary gas turbines; ICI boilers and stationary gas turbines; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and CO boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating furnaces; reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and BIF units.

To develop the information in this table and analyze the reductions obtainable by potential $NO_x$ emission rate limits (in pound per million British thermal units (lb/MMBtu) heat input, gram per horsepower-hour (g/hp-hr), etc.), commission staff gathered the emission rate factors used to calculate 1997 ozone season emissions for the major $NO_x$ sources in HGA. In January 2000, commission staff sent out a rate data survey to major $NO_x$ sources in HGA and made follow-up requests in an attempt to fill in missing rate data. In situations where the major $NO_x$ sources did not or could not provide rate data, commission staff estimated the missing rate data from available data for similar equipment. Commission staff also conducted a quality assurance analysis of the 1997 emissions inventory in order to correctly classify equipment into the various categories shown in the table. The information was compiled in a spreadsheet, allowing reductions from a rate limit applied to an equipment category to be calculated either as a number of tons of $NO_x$ per day reduced or as a percentage reduction from the category.

The commission staff then evaluated the emission reductions that would be achieved by applying various attainment demonstration emission rate limits to the equipment categories. Because some $NO_x$ emission sources simply can not be reasonably controlled (for example, flares), it is necessary that the larger emission categories, especially electric utility boilers, stationary gas turbines, heaters, engines, and ICI boilers, achieve more than a 90% reduction in order for the overall emission reductions from $NO_x$ point sources to meet the 90% goal that modeling has shown is necessary for HGA to be able to demonstrate attainment of the ozone NAAQS. Through an iterative process, the commission staff developed emission rate limits for the major $NO_x$ point source categories which approach the maximum practicable emission reductions for these sources and, while technically challenging to meet, are a necessary and essential component of the HGA Attainment Demonstration SIP, being noticed for public hearings and comment concurrently in a separate section of this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

The primary purpose of the proposed revisions to Chapter 117 and to the SIP is to establish new emission limits for the ozone attainment demonstrations. However, another purpose of these proposed revisions is to ensure that RACT requirements are applied to major $NO_x$ sources in HGA, as required by 42 USC, §7511a(f). The current $NO_x$ RACT limits in §117.105, concerning Emission Specifications for Reasonably Available Control Technology (RACT), and §117.205, concerning Emission Specifications for Reasonably Available Control Technology (RACT), apply to certain boilers, process heaters, and stationary internal combustion engines and stationary gas turbines. The proposed revisions will establish emission limits for boilers; process heaters and furnaces; stationary internal combustion engines and stationary gas turbines; duct burners used in turbine exhaust ducts; fluid catalytic cracking units (including catalyst regenerators and associated CO boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating furnaces; reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and BIF units which are currently exempt from the $NO_x$ RACT limits in §117.105 and §117.205. While the proposed attainment demonstration emission limits are more stringent than RACT, these limits will nevertheless also fulfill the $NO_x$ RACT requirements of 42 USC, §7511a(f), for major sources in HGA which are not subject to the previous $NO_x$ RACT rules.

The proposed changes to §117.10, concerning Definitions, revise the definition of "low annual capacity factor boiler, process heater, or gas turbine supplemental waste heat recovery unit" by changing the order of "commercial, institutional, or industrial" to "industrial, commercial, or institutional" for consistency with the title of this division. The proposed changes to §117.10 also add a definition of "electric generating facility (EGF)" which is consistent with the corresponding definition in §117.330(12), concerning Definitions. Subsequent definitions in §117.10 are renumbered to accommodate the proposed new definition of "electric generating facility (EGF)."

In addition, the proposed changes to §117.10 revise the definitions of "boiler or steam generator," "electric power generating system," "industrial boiler or steam generator," "large DFW system," "process heater," "small DFW system," "unit," and "utility boiler or steam generator" by deleting the superfluous term "steam generator" since a steam generator is simply a boiler and is already addressed by this term in the Chapter 117 rules.

The proposed changes to §117.10 also revise the definition of "unit" to broaden its applicability. Currently, this definition includes boilers, process heaters, stationary gas turbines, and stationary internal combustion engines. Because the emission reductions approaching the tpd emission rate required by the attainment demonstration necessitate further reductions from essentially all categories, the proposed revisions broaden the applicability of the definition of unit to include any other stationary source of $NO_x$ at a major source. Finally, the proposed changes to §117.10 revise the renumbered §117.10(34) to define "predictive emissions monitoring system (PEMS)" rather than "predictive emission monitoring system (PEMS)" for consistency with the definition of "continuous emissions monitoring system (CEMS)" in the renumbered §117.10(10) and the usage of these terms in the rules.

The proposed changes to §117.101, concerning Applicability, delete the superfluous term "steam generator" since a steam generator is simply a boiler and is already addressed by this term in the Chapter 117 rules, and renumber the paragraphs accordingly. The proposed changes to §117.101 also revise a reference in the renumbered §117.101(3) from "gas turbines" to "stationary gas turbines" for consistency with the definition of this term in the renumbered §117.10(38), and update a reference to the renumbered §117.10(12).

The proposed changes to §117.103, concerning Exemptions, revise §117.103(a) to specify the exemptions from the RACT requirements. The units which are exempt from RACT are those currently exempt under this subsection from the entire division. However, the revised language states that these units are exempt from the specific sections for which these units would otherwise be subject, rather than from the entire division. Although this would appear to narrow the scope of the exemptions, it is not expected to add any additional requirements because other sections in this division generally do not apply to these units (except as specified in §117.113, concerning Continuous Demonstration of Compliance). In addition, the proposed changes to §117.103 revise §117.103(a)(2) to delete the superfluous term "steam generator" since a steam generator is simply a boiler and is already addressed by this term in the Chapter 117 rules.

A proposed new §117.103(b) specifies that stationary gas turbines and engines which are used solely to power other engines or gas turbines during start-ups are exempt from the attainment demonstration requirements of §§117.106, concerning Emission Specifications for Attainment Demonstrations; 117.108, concerning System Cap; and 117.113, except as may be specified in §117.113(i). The attainment demonstration exemptions do not include the RACT exemptions for new units placed into service after November 15, 1992; utility boilers, and auxiliary steam boilers with an annual heat input less than or equal to $2.2(10^{11})$ Btu per year; and stationary gas turbines and engines which operate less than 850 hours per year, because emission reductions from essentially all categories are necessary to approach the tpd emission rate required by the attainment demonstration. Finally, subsections are given titles (catchlines) to identify the topics covered.

Because the attainment demonstration exemptions do not include the RACT exemptions for new units placed into service after November 15, 1992, the title of Subchapter B, concerning Combustion at Existing Major Sources, is proposed to be changed to Combustion at Major Sources.

The existing §117.103(b) includes an exemption from the oil-fired RACT emission limits during emergency conditions which necessitate oil firing. The proposed changes to §117.103 renumber this exemption as §117.103(c), break it into paragraphs to make the text more readable, and revise it to include exemption from the emission limits of §117.106, concerning Emission Specifications for Attainment Demonstrations, and §117.108. This revision is proposed in order to address concerns regarding times of natural gas curtailments, which are typically a cold weather issue. Although the system cap is less likely to be exceeded under natural gas curtailment conditions because the 30-day average winter peak electric demand is not as great as the summer 30-day peak demand, extensive oil firing due to an emergency condition could cause exceedances of the cap. The proposed broadening of the exemption in the renumbered §117.103(c) will address this concern.

The proposed new §117.103(d) exempts from the requirements of Chapter 117 all combustion units which would meet the requirements of a standard permit currently being developed for electricity-generating combustion units rated at less than ten megawatts (MW) in capacity and which emit no more than 0.015 lb $NO_x$/MMBtu heat input. The commission is proposing this exemption to facilitate the distributed generation of electricity through authorization of relatively small electricity-producing units.

The proposed changes to §117.105 revise §117.105(a) - (d) and (h) to delete the superfluous term "steam generator" since a steam generator is simply a boiler and is already addressed by this term in the Chapter 117 rules. In addition, the proposed changes to §117.105 correct the title of §117.510 in §117.105(k)(2). The proposed changes to §117.105 also add a new §117.105(l) which specifies that after the applicable attainment demonstration SIP compliance date(s), the RACT emission specifications will no longer apply to equipment for which §117.106, concerning Emission Specifications for Attainment Demonstrations, has established more stringent emission limits. This will avoid any potential conflicts of RACT limits and the new more stringent attainment demonstration limits.

The proposed changes to §117.106 specify new $NO_x$ limits for electric utility boilers located in HGA. The proposed limits are essential components of and consistent with the HGA Attainment Demonstration SIP, being noticed for public hearings and comment concurrently in a separate section of this issue of the *Texas Register*. The proposed emission limits and ozone attainment demonstration SIP are required by 42 USC, §7410 and §7511a, which require states to submit SIPs to the EPA which contain

enforceable measures to achieve the NAAQS. The process by which the emission limits were developed is described in the Background and Summary of the Factual Basis for the Proposed Rules section of this preamble.

The proposed revisions to §117.106(a) and (b) abbreviate the term "pound per million Btu," correct a typographical error in "Beaumont/Port Arthur," and reorganize the syntax of these sentences for consistency with the proposed new §117.106(c).

The proposed $NO_x$ emission limits for electric utility boilers located in HGA are being added as a new §117.106(c) and are based on a daily rate for electric utility boilers. The 24-hour emission limit in both $NO_x$ RACT and these rules is designed to limit the amount of $NO_x$ allowed in a 24-hour period, in order to control peak ozone, which forms on a daily cycle. The emission limits of §117.106(c) also apply as specified in §117.108 and in the emissions banking and trading program of Chapter 101, Subchapter H, Division 3, concerning Mass Emissions Cap and Trade Program, being noticed for public hearings and comment concurrently in this issue of the *Texas Register*.

The proposed limits of §117.106(c) for electric utility boilers in HGA are part of a larger set of emission reduction measures for the HGA Attainment Demonstration SIP. The larger context of development of the proposed $NO_x$ emission limit for electric utility boilers in HGA is discussed in the Background and Summary of the Factual Basis for the Proposed Rules section of this preamble. The proposed emission limits of 0.010 lb $NO_x$/MMBtu heat input for gas- fired boilers, 0.030 lb $NO_x$/MMBtu heat input for oil- or coal-fired, tangential-fired boilers, 0.030 lb $NO_x$/MMBtu heat input for oil- or coal-fired, wall-fired boilers, 0.010 lb $NO_x$/MMBtu heat input for auxiliary boilers with a maximum rated capacity equal to or greater than 100 MMBtu/hr, 0.015 lb $NO_x$/MMBtu heat input for auxiliary boilers with a maximum rated capacity equal to or greater than 40 MMBtu/hr but less than 100 MMBtu/hr, and 0.036 lb $NO_x$ per MMBtu heat input (or alternatively, 30 parts per million by volume (ppmv) $NO_x$, at 3.0% oxygen ($O_2$), dry basis) for auxiliary boilers with a maximum rated capacity less 40 MMBtu/hr will achieve a 93% emission reduction and generate an estimated 184.26 tpd $NO_x$ reductions from HGA electric utility boiler emissions. The proposed 93% $NO_x$ reduction is expected to necessitate combustion controls and flue gas cleanup on many of the boilers at electric utilities in the HGA area.

The proposed emission limits of 0.015 lb $NO_x$/MMBtu heat input for stationary gas turbines will achieve a 91% emission reduction in conjunction with the proposed emission limit of 0.015 lb $NO_x$ per MMBtu heat input for stationary gas turbines and duct burners in §117.206(c)(11) and (12), respectively, concerning Emission Specifications for Attainment Demonstrations, and generate an estimated total of 141.00 tpd $NO_x$ reductions from these units in HGA, based on the 1997 emissions inventory. The proposed 91% $NO_x$ reduction is expected to necessitate combustion controls and flue gas cleanup on many of the stationary gas turbines in the HGA area.

The existing §117.106(c) and (d) are proposed to be renumbered as §117.106(d) and (e). The proposed revisions to the renumbered §117.106(d) make applicable in HGA the ammonia and CO emission limits in order to address pollutants which may increase as an incidental result of compliance with the proposed $NO_x$ limits. The CO and ammonia limits are the limits which are applicable in Beaumont/Port Arthur (BPA) and Dallas/Fort Worth (DFW). This ammonia limit of ten ppmv is lower than the existing RACT limit of §117.105(j). The lower ammonia limit is supported by information from selective catalytic reduction (SCR) vendors and ammonia test data for gas-fired boilers using SCR, not available when the original $NO_x$ RACT rules were adopted in 1993. The test data are reported in Table 2-5 of *Status Report on $NO_x$ Control Technologies and Cost Effectiveness for Utility Boilers*, issued by the Northeast States for Coordinated Air Use Management (NESCAUM) and the Mid-Atlantic Regional Air Management Association (MARAMA) (June 1998) (will be referred to as NESCAUM). It is desirable to minimize ammonia emissions because ammonia emissions create fine particulate matter, another form of air pollution. The commission proposes to exclude these related pollutant limits from the attainment demonstration SIP, in order to simplify the approval process for alternative emission specification under §107.121. This step will eliminate the need for case-specific SIP revisions by the EPA to complete the approval of an alternate CO or ammonia limit.

The revisions to the renumbered §117.106(e) specify that in HGA, the utility owner or operator may not use the trading option in §117.570. This is necessary to ensure that any trading that occurs is done under the emissions banking and trading program of Chapter 101, Subchapter H, Division 3, being noticed for public hearings and comment concurrently in this issue of the *Texas Register*. The owners and operators of the equipment addressed by these proposed Chapter 117 revisions will be required to use the compliance flexibility provided by the proposed Chapter 101 mass emissions cap and trade program, which will allow compliance to be established through the use of surplus reductions created from other sources. Units which meet the definition of EGF are required to use both the system cap specified in §117 and the mass emissions cap and trade program in Chapter 101, Subchapter H, Division 3 to comply with the $NO_x$ emission specifications of §117.106(c).

Section §117.106(e) also does not allow the use of §117.107 as an alternative for complying with the §117.106 emission specifications for attainment demonstrations. Section 117.107 emission averaging does not address the effects of activity level, and may not produce the intended reductions that would be achieved with direct compliance by all units or flexible compliance with an emission cap. Under §117.107, higher emissions will result if units selected for less control are subsequently operated more, or if units selected for more control are subsequently operated less. The proposed §117.106 emission limits will necessitate installation of flue gas cleanup emission controls on a number of units. As a result, these units are likely to have higher operating costs than units operating with only combustion controls, creating an economic incentive to operate the best-controlled units less and to produce greater emissions.

The proposed changes to §117.108 require the owner or operator of each EGF in HGA to comply with the daily and 30-day system cap emission limitations of the existing system cap. The proposed changes to §117.108 also revise §117.108(a) - (i) and (k) by replacing references to "utility boiler" with the term "EGF." In addition, the proposed changes to §117.108 revise §117.108(b) by updating the reference to the definition of "electric power generating system" in the renumbered §117.10(12).

The proposed changes to §117.108 also revise §117.108(e)(4) to replace a reference to testing in a non-existent rule with a reference to the maximum block one-hour emission rate as measured by the 30-day test. In addition, the proposed changes to §117.108 revise §117.108(f) by correcting the title in the reference to §117.119, concerning Notification, Recordkeeping, and Reporting Requirements.

Finally, the proposed changes to §117.108 revise §117.108(i), which specifies that an EGF which is permanently retired or decommissioned and rendered inoperable may be included in the source cap emission limit, to state that in HGA the permanent shutdown must have occurred after January 1, 2000. Because §117.108(c)(1) specifies 1997, 1998, and 1999 for calculating the emissions cap, it is necessary for the shutdown to occur after this period.

Currently, EGFs in DFW may comply with §117.106 through compliance with the daily and 30-day system cap available under §117.108. The commission solicits comments concerning the possibility of adding flexibility for these EGFs by allowing trading between different electric power generating systems in DFW in order to meet the system cap of §117.108. Any such flexibility would necessitate separate rulemaking to establish the mechanism for trading between different electric power generating systems in DFW.

The proposed changes to §117.111, concerning Initial Demonstration of Compliance, correct the sentence structure of §117.111(a) by changing "be tested" to "test the units." The proposed changes to §117.111 also correct the title of §117.510 in §117.111(a)(3), and revise §117.111(d)(3) by replacing the term "utility boilers" with "EGFs" for consistency with the corresponding changes to §117.108.

The proposed changes to §117.113, concerning Continuous Demonstration of Compliance, revise a reference in §117.113(f)(2)(A)(ii) from "United States Environmental Protection Agency" to "EPA" because this abbreviation is defined in Chapter 3, concerning Definitions.

The proposed changes to §117.113 also revise the catchline in §117.113(g) to clarify that these subsections apply to the $NO_x$ RACT emission specifications of §117.105, and revise references in §117.113(g)(1) and (2) from "gas turbine" to "stationary gas turbine" for consistency with the definition of this term in §117.10(37).

In addition, the proposed changes to §117.113 add a new §117.113(h)(2) which specifies the totalizing fuel flow meter requirements for units at major $NO_x$ sources in HGA which are subject to §117.106. All units which are listed in §117.101 will be subject to the totalizing fuel flow meter requirements because knowledge of the fuel usage is critical in determining the emission allocations for the proposed Chapter 101 mass emissions cap and trade program. The existing §117.113(h)(1) - (3) is being renumbered as §117.113(h)(1)(A) - (C) to accommodate the new §117.113(h)(2).

The proposed changes to §117.113 also revise §117.113(i) to reflect the addition of the new §117.103(b). This revision will ensure that stationary gas turbines and engines which were required to install run time meters under the existing RACT requirements will continue to utilize those existing run time meters.

In addition, the proposed changes to §117.113 also revise §117.113(k) (being renumbered as §117.113(k)(1)) to specify that this subparagraph only applies to units in BPA or DFW, or to units in HGA which are subject to the $NO_x$ RACT emission specifications of §117.105. A new §117.113(k)(2) specifies that for units in HGA which are subject to the attainment demonstration emission specifications of §117.106(c), the methods required in §117.113 and §117.114 shall be used in conjunction with the requirements of Chapter 101, Subchapter H, Division 3 to determine compliance. The new §117.113(k)(2) further specifies that for enforcement purposes, the executive director may also use other commission compliance methods to determine whether the source is in compliance with applicable emission specifications.

Finally, the proposed revisions to the catchlines in §117.113(l) clarify that this subsection applies to the $NO_x$ RACT emission specifications of §117.105.

The proposed new §117.114 applies to units in HGA which are subject to the attainment demonstration limits of §117.106(c) and specifies monitoring and testing requirements. The proposed new §117.114(a) requires monitoring for $NO_x$, CO, and fuel flow as specified in §117.113(a) - (f) and (g). The proposed new §117.114(b) requires testing of each unit which is subject to the emission limits of §117.106(c). The testing requirements are consistent with the testing previously required of these units for $NO_x$ RACT under §117.111.

Regarding emission allowances for the proposed Chapter 101 mass emissions cap and trade program, the proposed §117.114(c) specifies that the $NO_x$ testing and monitoring data specified in §117.114(a) and (b), together with the level of activity, as defined in §101.350, concerning Definitions, are used to establish the emission factor for the mass emissions cap and trade program. For units without CEMS or PEMS, retesting is required after any modifications which could increase the $NO_x$ emission rate, but is optional after any modifications which could decrease the $NO_x$ emission rate, including, but not limited to, installation of post-combustion controls, low-$NO_x$ burners, low excess air operation, staged combustion (for example, overfire air), flue gas recirculation (FGR), and fuel-lean and conventional (fuel-rich) reburn. The $NO_x$ emission rate determined by the retesting establishes a new emission factor which must be used instead of the previously determined emission factor for the proposed Chapter 101 mass emissions cap and trade program.

The proposed changes to §117.116, concerning Final Control Plan Procedures for Attainment Demonstration Emission Specifications, revise the requirements in §117.116(a)(1), (2), and (5) to apply to auxiliary boilers and stationary gas turbines in HGA and, in conjunction with these changes, revise §117.116(a) to refer to units listed in §117.101, rather than to utility boilers listed in §117.101. While this change broadens the scope of the final control plan procedures, it will not add any requirements to auxiliary boilers and stationary gas turbines in BPA and DFW because the proposed changes to §117.116(a)(1), (2), and (5) specify that these paragraphs only apply to utility boilers in BPA and DFW. In addition, the remaining paragraphs in §117.116 do not apply to auxiliary boilers and stationary gas turbines in BPA and DFW.

The proposed changes to §117.116 also revise §117.116(a)(1) to reference the Chapter 101 mass emissions cap and trade program being proposed concurrently in this issue of the *Texas Register*. This revision is necessary because the owners and operators of the equipment addressed by these proposed Chapter 117 revisions will be required to use the compliance flexibility provided by the proposed Chapter 101 mass emissions cap and trade program, which will allow compliance to be established through the use of surplus reductions created from other sources.

In addition, the proposed changes to §117.116 also revise §117.116(a)(3) and (4) to add a reference to the requirements of §117.114.

The proposed changes to §117.119 revise a reference in §117.119(a) from "Unites States Environmental Protection

Agency" (which should have been "United States Environmental Protection Agency") to "EPA" because this abbreviation is defined in Chapter 3, concerning Definitions; and correct the reference in §117.119(a) to §101.11 to reflect the recent title change of this section from "Exemptions from Rules and Regulations" to "Demonstrations." (See the July 14, 2000 issue of the *Texas Register* (25 TexReg 6727)). The proposed changes to §117.110 also revise a reference in §117.119(d)(1)(A) from "gas turbines" to "stationary gas turbines" for consistency with the definition of this term in §117.10(37).

The proposed changes to §117.121, concerning Alternative Case Specific Specifications, update a reference to the existing §117.106(c) which is being renumbered as §117.106(d) and revise a reference from "United States Environmental Protection Agency" to "EPA" because this abbreviation is defined in Chapter 3, concerning Definitions.

The proposed changes to §117.138, concerning System Cap, revise §117.138(b) to update a reference to the renumbered §117.10(12).

The proposed changes to §117.201, concerning Applicability, generalize the applicability by deleting the references to size cutoffs and adding the following to the list of units which are subject to this division: fluid catalytic cracking units (including CO boilers, CO furnaces, and catalyst regenerator vents); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating furnaces; reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; BIF units which were regulated as existing facilities by the EPA at 40 Code of Federal Regulations (CFR) Part 266, Subpart H (as was in effect on June 9, 1993); and duct burners used in turbine exhaust ducts. It is necessary to generalize the applicability since the HGA Attainment Demonstration SIP rules include units which are presently excluded from §117.201. These changes do not broaden the scope of the existing rules in BPA or HGA due to corresponding exemptions already in, or being added to, §117.203, concerning Exemptions, and §117.205(h) which are described later in this preamble. Finally, the proposed changes to §117.201 revise §117.201(1) by changing the order of "commercial, institutional, or industrial" to "industrial, commercial, or institutional" for consistency with the title of this division. Units used to produce steam for the purpose of generating electricity, but which are not owned or operated by a municipality or Public Utility Commission of Texas regulated utility, are included in the applicability of §117.201, rather than §117.101.

The proposed changes to §117.203 move the existing exemptions into a new subsection (a) and add a new exemption for heat treating furnaces and reheat furnaces as new §117.203(a)(3), with an expiration of this exemption in HGA for units rated at 20 MMBtu/hr or greater after the appropriate compliance date(s) for §117.206(c) specified in §117.520, concerning Compliance Schedule for Commercial, Institutional, and Industrial Combustion Sources in Ozone Nonattainment Areas. The expiration of this exemption in HGA for certain units is necessary for consistency with the proposed §117.206(c)(14), which establishes emission limits for these units in HGA.

In addition, the exemption in the existing §117.203(3) for electric utility power generating boilers is proposed for deletion. Although this change would appear to narrow the scope of the exemptions, it is not expected to add any additional requirements to these units in BPA and DFW because other sections in this division do not apply to these units. The requirements for units in HGA which are not subject to §117.106 will parallel the requirements of §117.206.

Further, the proposed changes to the renumbered §117.203(a)(4) and (5) specify that the exemptions for incinerators, fume abaters, pulping liquor recovery furnaces, dryers, kilns, and ovens in HGA no longer apply after the appropriate compliance date(s) for §117.206 specified in §117.520.The revisions to the renumbered §117.203(a)(4) and (5) are necessary for consistency with the proposed §117.206(c)(12) - (16), which establish emission limits for certain units in these categories in HGA.

The proposed changes to §117.203 also add a new §117.203(a)(9) which exempts boilers and process heaters with a maximum rated capacity of 2.0 MMBtu/hr or less. This exemption level is proposed because units with a maximum rated capacity of 2.0 MMBtu/hr or less are already regulated under Subchapter D, Division 1, concerning Water Heaters, Small Boilers, and Process Heaters.

In addition, the proposed changes to §117.203 add a new §117.203(b) which specifies that the exemptions in §117.203(a)(1), (2), (6)(B), (7), and (8)(A) no longer apply in HGA after the appropriate compliance date(s) for emission specifications for attainment demonstrations specified in §117.520.The expiration of these exemptions in HGA for certain units is necessary for consistency with the proposed §117.206(c), which establishes emission limits for these units in HGA.

The proposed new §117.203(c) exempts from the requirements of Chapter 117 all combustion units which would meet the requirements of a standard permit currently being developed for electricity-generating combustion units rated at less than ten MW in capacity and which emit no more than 0.015 lb $NO_x$/MMBtu heat input. The commission is proposing this exemption to facilitate the distributed generation of electricity through authorization of relatively small electricity-producing units.

The proposed changes to §117.205 revise §117.205(b)(6) to include an equation for calculating an emission limitation for each rolling 30-day period for cases when gas fired boilers or process heaters at times also fire gaseous fuel which contain more than 50% hydrogen by volume. The equation uses a time weighted average to incorporate the two emission limits, from combusting two types of gaseous fuels, into one emission limitation for each rolling 30-day average. This proposed change is based on a rule interpretation (Code Number R7-205.001) made by the agency's Air Rule Interpretation Team.

The proposed changes to §117.205 also revise §117.205(b)(7) by changing references from "continuous emission monitors" to "continuous emissions monitoring system" and from "predictive emission monitors" to "predictive emissions monitoring system" for consistency with the definitions of these terms in §117.10(9) and (33), respectively.

In addition, the proposed changes to §117.205 revise §117.205(c) to allow stationary gas turbines equipped with CEMS or PEMS for CO to meet the CO limit on a rolling 24-hour average, rather than on a one-hour average. This revision is consistent with the corresponding CO limit for boilers and process heaters in §117.205(f).

The proposed changes to §117.205 also revise §117.205(h)(1) by changing the order of "commercial, institutional, or industrial"

to "industrial, commercial, or institutional" for consistency with the title of this division.

Additionally, the proposed changes to §117.205 revise the language for fluid catalytic cracking units and duct burners in §117.205(h)(4) and (5) for consistency with the corresponding language in §117.201(4) and (6). The proposed changes to §117.205 also add new paragraphs (8) - (11) for new units placed into service after November 15, 1992; ICI boilers and process heaters with a maximum rated capacity of less than 40 MMBtu per hour; stationary gas turbines and engines which are demonstrated to operate less than 850 hours per year (based on a rolling 12-month average); and stationary internal combustion engines with a horsepower (hp) rating of less than 150 hp and 300 hp in HGA and BPA, respectively.

Finally, the proposed changes to §117.205, add a new §117.205(i) which specifies that after the applicable attainment demonstration SIP compliance date, the RACT emission specifications will no longer apply to equipment for which §117.206 has established a more stringent emission limit. This will avoid any potential conflicts of RACT limits and the new more stringent attainment demonstration limits.

The proposed changes to §117.206(a) and (b) revise references to subsections (d) and (e), which should have been (e) and (f), to subsections (f) and (g) to accommodate the new §117.206(c) described in the following paragraph. In addition, the proposed changes to §117.206(b)(2) abbreviate the terms "horsepower" and "carbon monoxide."

The proposed changes to §117.206, add a new §117.206(c) which specifies $NO_x$ limits for boilers, process heaters, stationary internal combustion engines, stationary gas turbines, fluid catalytic cracking units (including CO boilers, CO furnaces, and catalyst regenerator vents), BIF units, duct burners used in turbine exhaust ducts, pulping liquor recovery furnaces, lime kilns, lightweight aggregate kilns, heat treating furnaces, reheat furnaces, magnesium chloride fluidized bed dryers, and incinerators at major sources of $NO_x$ in HGA. For units in HGA, the emission limits in the new §117.206(c) will be used in the proposed Chapter 101, Subchapter H, Division 3, to establish emission allocations and shall be the lower of any applicable permit limit or the emission limits described in the following paragraphs.

The proposed limits are essential components of and consistent with the HGA Attainment Demonstration SIP, being noticed for public hearings and comment concurrently in a separate section of this issue of the *Texas Register*. The proposed emission limits and ozone attainment demonstration SIP are required by 42 USC, §7410 and §7511a, which require states to submit SIPs to the EPA which contain enforceable measures to achieve the NAAQS. The proposed revisions to §117.206 also update cross-references and renumber subsequent subsections to accommodate the new emission specifications within the section. The process by which the emission limits were developed is described in the Background and Summary of the Factual Basis for the Proposed Rules section of this preamble.

The proposed emission limits in §117.206(c)(1) of 0.010 lb $NO_x$ per MMBtu heat input for gas-fired boilers with a maximum rated capacity equal to or greater than 100 MMBtu/hr; 0.015 lb $NO_x$ per MMBtu heat input for gas-fired boilers with a maximum rated capacity equal to or greater than 40 MMBtu/hr, but less than 100 MMBtu/hr; and 0.036 lb $NO_x$ per MMBtu heat input (or alternatively, 30 ppmv $NO_x$, at 3.0% $O_2$, dry basis) for gas-fired boilers with a maximum rated capacity less 40 MMBtu/hr will achieve a 92% $NO_x$ emission reduction from ICI boilers and generate an estimated 57.26 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The proposed emission limit in §117.206(c)(2) of ten ppmv $NO_x$ (at 0.0% $O_2$, dry basis) for fluid catalytic cracking units (including CO boilers, CO furnaces, and catalyst regenerator vents) will achieve a 90% $NO_x$ emission reduction and generate an estimated 13.44 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The proposed emission limit in §117.206(c)(3) of 0.015 lb $NO_x$ per MMBtu heat input for BIF units will achieve an 81% $NO_x$ emission reduction and generate an estimated 9.95 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The proposed emission limit in §117.206(c)(4) of 0.057 lb $NO_x$ per MMBtu heat input for coke-fired boilers will achieve a 90% $NO_x$ emission reduction and generate an estimated 10.44 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The proposed emission limit in §117.206(c)(5) of 0.020 lb $NO_x$ per MMBtu heat input for wood fuel-fired boilers will achieve a 90% $NO_x$ emission reduction and generate an estimated 0.91 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The proposed emission limit in §117.206(c)(6) of 0.089 lb $NO_x$ per MMBtu heat input for rice hull-fired boilers will achieve a 90% $NO_x$ emission reduction and generate an estimated 0.46 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The proposed emission limit in §117.206(c)(7) of 2.0 lb $NO_x$ per 1,000 gallons of oil burned for oil-fired boilers will achieve a 90% $NO_x$ emission reduction and generate an estimated 0.13 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The proposed emission limits in §117.206(c)(8) of 0.010 lb $NO_x$ per MMBtu heat input for process heaters with a maximum rated capacity equal to or greater than 100 MMBtu/hr; 0.015 lb $NO_x$ per MMBtu heat input for process heaters with a maximum rated capacity equal to or greater than 40 MMBtu/hr, but less than 100 MMBtu/hr; and 0.036 lb $NO_x$ per MMBtu heat input (or alternatively, 30 ppmv $NO_x$, at 3.0% $O_2$, dry basis) for process heaters with a maximum rated capacity less 40 MMBtu/hr will achieve an 88% $NO_x$ emission reduction from process heaters and generate an estimated 96.56 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The proposed emission limits for stationary reciprocating internal combustion engines in §117.206(c)(9) are: 0.17 g $NO_x$/hp-hr for gas-fired engines at sites with a total hp rating of 3,000 hp or more in 1997 or later; 0.50 g $NO_x$/hp-hr for gas-fired engines at sites with a total hp rating of less than 3,000 hp in 1997 or later; 0.50 g $NO_x$/hp-hr for existing dual-fuel, stationary reciprocating internal combustion engines; and 0.17 g $NO_x$/hp-hr for dual-fuel, stationary reciprocating internal combustion engines initially placed into service after December 31, 2000. These emission limits will achieve a 94% $NO_x$ emission reduction and generate an estimated 78.50 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The proposed emission limits for stationary gas turbines in §117.206(c)(10) and duct burners used in turbine exhaust ducts in §117.206(c)(11) of 0.015 lb $NO_x$ per MMBtu heat input will achieve a 91% $NO_x$ emission reduction in conjunction with the proposed emission limit of 0.015 lb $NO_x$ per MMBtu heat input for stationary gas turbines in §117.106(c)(3) and generate an estimated total of 141.00 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The proposed emission limit for pulping liquor recovery furnaces in §117.206(c)(12) of 0.050 lb $NO_x$ per MMBtu heat input will achieve a 64% $NO_x$ emission reduction and generate an estimated 1.09 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The proposed emission limits for kilns in §117.206(c)(13) of 0.66 lb $NO_x$ per ton of calcium oxide (CaO) for lime kilns and 0.76 lb $NO_x$ per ton of product for lightweight aggregate kilns will achieve a 39% $NO_x$ emission reduction from the kiln category and generate an estimated 0.30 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The proposed emission limits for heat treating furnaces and reheat furnaces in §117.206(c)(14) of 0.087 lb $NO_x$ per MMBtu heat input for heat treating furnaces and 0.062 lb $NO_x$ per MMBtu heat input for reheat furnaces will achieve a 35% $NO_x$ emission reduction from the steel furnace category and generate an estimated 0.39 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The proposed emission limit for magnesium chloride fluidized bed dryers in §117.206(c)(15) of a 90% reduction from the emission factor used to calculate the 1997 ozone season daily $NO_x$ emissions will achieve a 41% $NO_x$ emission reduction from the dryer category and generate an estimated 0.95 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The proposed emission limit for incinerators in §117.206(c)(16) of a 90% reduction from the emission factor used to calculate the 1997 ozone season daily $NO_x$ emissions will achieve a 61% $NO_x$ emission reduction and generate an estimated 3.62 tpd $NO_x$ reductions in HGA, based on the 1997 emissions inventory.

The $NO_x$ emission limit averaging times for BPA and DFW in the renumbered §117.206(d)(1) are consistent with the averaging times for $NO_x$ RACT compliance, in §117.205(b)(7). Units with $NO_x$ emission monitors are capable of tracking emissions over time, and are allowed to demonstrate compliance on a 30-day average in BPA and DFW under this subsection. The proposed changes to §117.206 also revise §117.206(d)(1)(A) by changing references from "continuous emission monitors" to "continuous emissions monitoring system" and from "predictive emission monitors" to "predictive emissions monitoring system" for consistency with the definitions of these terms in §117.10(9) and (33), respectively. For HGA, a new §117.206(d)(2) specifies that the averaging time for the attainment demonstration emission limits shall be as specified in the mass emissions cap and trade program of Chapter 101, Subchapter H, Division 3, except that EGFs shall also comply with the daily and 30-day system cap emission limitations of §117.210, concerning System Cap.

The emission limits of the renumbered §117.206(e) address pollutants which may increase as an incidental result of compliance with the proposed $NO_x$ limits. The CO limit is consistent with the existing CO limit of §117.205(f) for RACT because nothing in these rules necessitates changing the existing limit. In rulemaking adopted on April 19, 2000, the commission intended to change the proposed ammonia limit of five ppm to ten ppm in the renumbered §117.205(e)(2) but inadvertently did not change the rule language. (See the May 5, 2000 issue of the *Texas Register* (25 TexReg 4146).) The proposed change to the renumbered §117.206(e)(2) makes this correction. The ammonia limit of ten ppm is lower than the existing limit of §117.205(g) and is supported by information from SCR vendors and ammonia test data for gas-fired boilers using SCR, not available when the original $NO_x$ RACT rules were adopted in 1993. The test data are reported in Table 2-5 of NESCAUM. It is desirable to minimize ammonia emissions because ammonia emissions create fine particulate matter, another form of air pollution. The commission is not including these related pollutant limits in the attainment demonstration SIP, in order to simplify the approval process for alternative emission specification under §107.221. This step will eliminate the need for case-specific SIP revisions to complete the approval of an alternate CO or ammonia limit.

With the exception of the availability of alternative CO and ammonia limits through §117.221, the revisions to the renumbered §117.206(f) specify that an owner or operator in HGA may not use the alternative plant-wide emission specifications in §117.207, the alternative case-specific specifications of §117.221, the source cap in §117.223, or the trading option in §117.570, except that EGFs shall also comply with the daily and 30-day system cap emission limitations of §117.210 of this title. This is necessary to ensure that any trading that occurs is done under the Chapter 101 mass emissions cap and trade program being noticed for public hearings and comment concurrently in this issue of the *Texas Register*. The owners and operators of the equipment addressed by these proposed Chapter 117 revisions will be required to use the compliance flexibility provided by the proposed Chapter 101 mass emissions cap and trade program, which will allow compliance to be established through the use of surplus reductions created from other sources.

In addition, the proposed changes to §117.206 also revise the renumbered §117.206(g) to make the exemptions of §117.206(g)(1) and (2) unavailable in HGA for consistency with the applicability of §117.206(c). The proposed changes to the renumbered §117.206(g)(1) also change the order of "commercial, institutional, or industrial" to "industrial, commercial, or institutional" for consistency with the title of this division.

The proposed changes to §117.207, concerning Alternative Plant-wide Emission Specifications, update cross-references to renumbered rules. The proposed changes to §117.207 also revise §117.207(b)(1) by changing references from "continuous emission monitors" to "continuous emissions monitoring system" and from "predictive emission monitors" to "predictive emissions monitoring system" for consistency with the definitions of these terms in §117.10(9) and (33), respectively. In addition, the proposed changes to §117.207(f) change references to §117.206(e), which should have been §117.206(f), to §117.206(g) to account for the subsection renumbering in §117.206. The proposed changes to §117.207 also revise references in §117.207(f)(1) from "gas turbines" and "engines" to "stationary gas turbines" and "stationary internal combustion engines" for consistency with the definition of these terms in §117.10(37) and (38), respectively.

Finally, the proposed changes to §117.207(f)(4) delete the superfluous term "steam generator" since a steam generator is simply a boiler and is already addressed by this term in the Chapter 117 rules, and revise a reference from "United States Environmental Protection Agency" to "EPA" because this abbreviation is defined in Chapter 3, concerning Definitions.

The proposed changes to §117.208, concerning Operating Requirements, correct the format of references to §§117.205 - 117.207 and 117.223 for consistency with *Texas Register* formatting requirements, and revise a reference in §117.208(d)(4) from "gas turbines" to "stationary gas turbines" for consistency with the definition of this term in §117.10(37).

The proposed new §117.210 establishes a system cap for units which generate electricity, but which will be subject to §117.206 rather than §117.106. The proposed new §117.210, would create a flexible method of complying with the $NO_x$ emission specifications proposed in §117.206 for units which meet the definition of EGF. The proposed section is patterned on the existing source cap compliance option in §117.108 for electric utilities. The proposed system cap sets limits on total pounds of $NO_x$ allowed to be emitted by EGFs which will not be subject to §117.106. A cap has the advantage over rate-based standards of allowing the source owner to control the activity levels of the regulated equipment as a means of compliance. This means that a company's compliance measures may include installing less extensive emission controls on a piece of equipment and choosing to operate it less, or upgrading its efficiency to require less fuel firing.

The proposed changes to §117.211, concerning Initial Demonstration of Compliance, revise §117.211(e)(5) by revising a reference from "United States Environmental Protection Agency" to "EPA" because this abbreviation is defined in Chapter 3, concerning Definitions.

The proposed changes to §117.213, concerning Continuous Demonstration of Compliance, add a new §117.213(a)(1)(B) which specifies the totalizing fuel flow meter requirements for units at major $NO_x$ sources in HGA which are subject to §117.206. All units which are listed in §117.201 will be subject to the totalizing fuel flow meter requirements because knowledge of the fuel usage is critical in determining the emission allocations for the proposed Chapter 101 mass emissions cap and trade program. The existing §117.213(a)(1)(A) - (D) is being renumbered as §117.213(a)(1)(A)(i) - (iv) to accommodate the new §117.213(a)(1)(B).

The proposed changes to §117.213 also revise the renumbered §117.213(a)(1)(A)(ii) (currently §117.213(a)(1)(B)) to reflect the renumbering of §117.203(6) and (8) as §117.203(a)(6) and (8) and the addition of the new §117.205(h)(10) - (11), and revise §117.213(b)(2)(A) and §117.213(c)(2)(A) to reflect the addition of the new §117.205(h)(8) - (11). The existing requirement in §117.213(b) for $O_2$ monitors on certain boilers and process heaters will continue to apply to these sources in HGA after the emission specifications of §117.206(c) supersede those of §117.205.

In addition, the proposed changes to §117.213 also add new §117.213(c)(G) - (I) to specify that the requirement to install a CEMS or PEMS $NO_x$ monitor applies to the following units in HGA: lime kilns, lightweight aggregate kilns, and units with a rated heat input greater than or equal to 100 MMBtu/hr which are subject to §117.206(c). The existing requirement in §117.213(c) for $NO_x$ monitors on certain boilers, process heaters, stationary gas turbines, and units which use a chemical reagent for reduction of $NO_x$ will continue to apply to these sources in HGA after the emission specifications of §117.206(c) supersede those of §117.205. Similarly, the existing requirement in §117.213(d) - (f) for CO monitoring, CEMS, and PEMS will continue to apply to these sources in HGA after the emission specifications of §117.206(c) supersede those of §117.205.

The proposed changes to §117.213 also revise §117.213(c)(1)(F) and (2)(A), and (k) (being renumbered as §117.213(k)(1)) to specify that these rules only apply to units in BPA or DFW, or to units in HGA which are subject to the $NO_x$ RACT emission specifications of §117.205. A new §117.213(k)(2) specifies that for units in HGA which are subject to the attainment demonstration emission specifications of §117.206(c), the methods required in §117.213 and §117.214 shall be used in conjunction with the requirements of Chapter 101, Subchapter H, Division 3 to determine compliance. The new §117.213(k)(2) further specifies that for enforcement purposes, the executive director may also use other commission compliance methods to determine whether the source is in compliance with applicable emission specifications.

In addition, the proposed changes to §117.213 revise a reference in §117.213(h) from "gas turbines" to "stationary gas turbines" for consistency with the definition of this term in §117.10(37); and revise §117.213(i) to reflect the renumbering of §117.203(6)(B) as §117.203(a)(6)(B).

Finally, the proposed revisions to the catchlines in §117.213(l) and (m) clarify that these subsections apply to the $NO_x$ RACT emission specifications of §117.205.

The proposed new §117.214 applies to units in HGA which are subject to the attainment demonstration limits of §117.206(c) and specifies monitoring and testing requirements. The proposed new §117.214(a) requires monitoring for $NO_x$, CO, and fuel flow as specified in §117.213(a) and (c) - (f). The proposed new §117.214(b) requires testing of each unit which is subject to the emission limits of §117.106(c). The testing requirements are consistent with the testing previously required of these units for $NO_x$ RACT under §117.211.

Regarding emission allowances for the proposed Chapter 101 mass emissions cap and trade program, the proposed §117.214(c) specifies that the $NO_x$ testing and monitoring data specified in §117.214(a) and (b), together with the level of activity, as defined in §101.350, are used to establish the emission factor for the mass emissions cap and trade program. For units without CEMS or PEMS, retesting is required after any modifications which could increase the $NO_x$ emission rate, but is optional after any modifications which could decrease the $NO_x$ emission rate, including, but not limited to, installation of post-combustion controls, low-$NO_x$ burners, low excess air operation, staged combustion (for example, overfire air), FGR, and fuel-lean and conventional (fuel-rich) reburn. The $NO_x$ emission rate determined by the retesting establishes a new emission factor which must be used instead of the previously determined emission factor for the proposed Chapter 101 mass emissions cap and trade program.

The proposed changes to §117.216, concerning Final Control Plan Procedures for Attainment Demonstration Emission Specifications, revise §117.216(a)(1) to reference the proposed system cap of 117.210 and the Chapter 101 mass emissions cap and trade program being proposed concurrently in this issue of the *Texas Register*. This revision is necessary because the owners and operators of the equipment addressed by these proposed Chapter 117 revisions will be required to use the compliance flexibility provided by the proposed Chapter 101 mass emissions cap and trade program, which will allow compliance to be established through the use of surplus reductions created from other sources.

The proposed changes to §117.219, concerning Notification, Recordkeeping, and Reporting Requirements, amend §117.219(a) by correcting the reference to §101.11 to reflect the recent title change of this section from "Exemptions from Rules and Regulations" to "Demonstrations." (See the July 14, 2000 issue of the *Texas Register* (25 TexReg 6727)).

The proposed changes to §117.219 also replace the term "performance evaluation" with "relative accuracy test audit" in §117.219(b)(2) to more accurately describe the CEMS or PEMS performance evaluation; and replace the term "executive director" with "appropriate regional office" in §117.219(c) to more precisely specify where at the agency the test results are to be sent.

In addition, the proposed changes to §117.219 revise references in §117.219(d)(1)(A) and the renumbered §117.219(f)(4) from "gas turbine" to "stationary gas turbine" for consistency with the definition of this term in §117.10(37).

The proposed changes to §117.219 also revise a reference in the renumbered §117.219(f)(3) from "internal combustion engine" to "stationary internal combustion engine" for consistency with the definition of this term in §117.10(38), and revise a reference in the renumbered §117.219(f)(4) from "gas turbine" to "stationary gas turbine" for consistency with the definition of this term in §117.10(37).

In addition, the proposed revisions to §117.219(f) also renumber paragraphs (1 ) - (8) as (2) - (9) to accommodate the new §117.219(f)(1), and add a new §117.219(f)(1) in order to specify that records of annual fuel usage shall be kept for each unit subject to the totalizing fuel flow meter requirements of §117.213(a). Finally, the proposed changes to the renumbered §117.219(f)(3)(A)(i) correct a typographical error in a reference to §117.208(d)(7).

The proposed changes to §117.221, concerning Alternative Case Specific Specifications, revise §117.221(a) to reflect the renumbering of §117.206(d) as §117.206(e), and revise a reference in §117.211(b) from "United States Environmental Protection Agency" to "EPA" because this abbreviation is defined in Chapter 3, concerning Definitions.

The proposed requirements of §117.471, concerning Applicability; §117.473, concerning Exemptions; §117.475, concerning Emission Specifications; §117.478, concerning Operating Requirements; and §117.479, concerning Monitoring, Recordkeeping, and Reporting Requirements, apply to stationary reciprocating internal combustion engines, boilers, and process heaters located in HGA at stationary sources of $NO_x$ which are not major sources of $NO_x$. Therefore, a new Division 2, concerning Boilers, Process Heaters, and Stationary Engines at Minor Sources, is being added to Subchapter D, concerning Small Combustion Sources.

The proposed limits are essential components of and consistent with the HGA Attainment Demonstration SIP, being noticed for public hearings and comment concurrently in a separate section of this issue of the *Texas Register*. The proposed emission limits and ozone attainment demonstration SIP are required by 42 USC, §7410 and §7511a, which require states to submit SIPs to the EPA which contain enforceable measures to achieve the NAAQS. The process by which the emission limits were developed is described in the Background and Summary of the Factual Basis for the Proposed Rules section of this preamble.

The proposed new §117.471 specifies that the new Division 2, concerning Boilers, Process Heaters, and Stationary Engines at Minor Sources, which is being added to Subchapter D, concerning Small Combustion Sources, applies to stationary reciprocating internal combustion engines, boilers, and process heaters located in HGA at a stationary source of $NO_x$ which is not a major source of $NO_x$.

The proposed new §117.473 exempts boilers and process heaters with a maximum rated capacity of 2.0 MMBtu/hr or less. This exemption level is proposed because units with a maximum rated capacity of 2.0 MMBtu/hr or less are already regulated under Subchapter D, Division 1, concerning Water Heaters, Small Boilers, and Process Heaters.

In addition, the following engines are exempt in the proposed new §117.473: engines used in research and testing; engines used for purposes of performance verification and testing; engines used solely to power other engines or gas turbines during start-ups; engines operated exclusively for firefighting and/or flood control; engines used in response to and during the existence of any officially declared disaster or state of emergency; and engines used directly and exclusively by the owner or operator for agricultural operations necessary for the growing of crops or raising of fowl or animals. This exemption is consistent with the exemption in the renumbered §117.203(3) which is available for stationary sources of $NO_x$ which are major sources of $NO_x$. The proposed new §117.473 also exempts stationary reciprocating internal combustion engines with a hp rating of 50 hp or less.

In addition, the proposed new §117.473 establishes an exemption for certain boilers and process heaters located at any stationary source of $NO_x$ which is not subject to Chapter 101, Subchapter H, Division 3. The boilers and process heaters qualify for this exemption if the maximum rated capacity is greater than 2.0 MMBtu/hr and less than 5.0 MMBtu/hr and the annual heat input is less than or equal to 1.8 ($10^9$) Btu per calendar year; or if the maximum rated capacity is equal to or greater than 5.0 MMBtu/hr and the annual heat input is less than or equal to 9.0 ($10^9$) Btu per calendar year. However, the totalizing fuel flow requirements of §117.479(a), (d), and (g)(1) will apply to these exempted units in order to document that the annual heat input conditions of the exemption are met.

The proposed new §117.473(c) exempts from the requirements of Chapter 117 all combustion units which would meet the requirements of a standard permit currently being developed for electricity-generating combustion units rated at less than ten MW in capacity and which emit no more than 0.015 lb $NO_x$/MMBtu heat input. The commission is proposing this exemption to facilitate the distributed generation of electricity through authorization of relatively small electricity-producing units.

The proposed new §117.475 establishes a proposed emission limit of 0.036 lb $NO_x$ per MMBtu heat input (or alternatively, 30 ppmv $NO_x$, at 3.0% $O_2$, dry basis) for boilers and process heaters in HGA at non-major stationary sources of $NO_x$. The proposed new §117.475 also establishes a proposed emission limit of 0.50 g $NO_x$/hp-hr for gas-fired stationary reciprocating internal combustion engines in HGA at non-major stationary sources of $NO_x$.

The proposed new §117.478 specifies techniques to be used to minimize $NO_x$ emissions. The proposed §117.478(b)(1) requires boilers to be operated with $O_2$, CO, or fuel trim. Such systems can pay for themselves with fuel savings while reducing $NO_x$ due to low excess air operation and reduced firing. Fuel trim has been demonstrated as an effective control technique for natural gas fired boilers operating with FGR to achieve compliance with a 30 ppmv $NO_x$ limit.

The proposed new §117.478(b)(2) requires operation of boilers and process heaters equipped with forced FGR such that the proportional design rate of FGR is maintained over the operating range.

The proposed new §117.478(b)(3) requires operation of any post combustion controls such that the injection rate of the reducing agent (i.e., ammonia or urea) is maintained to limit $NO_x$ concentrations to no more than the $NO_x$ concentrations achieved at maximum rated capacity.

The proposed new §117.478(b)(4) requires engines controlled with nonselective catalytic reduction (NSCR) to be operated with an air-fuel ratio (AFR) controller which operates on exhaust $O_2$ or CO.

The proposed new §117.478(b)(5) requires engines to be checked for proper operation measuring and recording $NO_x$ and CO emissions at least quarterly and as soon as practicable after each occurrence of engine maintenance which may reasonably be expected to increase emissions, $O_2$ sensor replacement, or catalyst cleaning or catalyst replacement. The proposed new §117.478(b)(5) allows the use of stain tube indicators specifically designed to measure $NO_x$ concentrations, provided a hot air probe or equivalent device is used to prevent error due to high stack temperature, and three sets of concentration measurements are made and averaged. The proposed new §117.478(b)(5) allows the use of portable $NO_x$ analyzers.

The proposed new §117.479 specifies the monitoring, recordkeeping, and reporting requirements for boilers, process heaters, and engines which are subject to the emission specifications of §117.475.

The proposed new §117.479(a) requires installation of totalizing fuel flow meters because knowledge of the fuel usage is critical in determining the $NO_x$ emission rate as well as the emission allocations for the proposed Chapter 101 mass emissions cap and trade program.

The proposed new §117.479(b) does not require $O_2$ monitors, but instead specifies that if an owner or operator installs an $O_2$ monitor, then the criteria in §117.213(e) is the appropriate guidance for the location and calibration of the monitor.

The proposed new §117.479(c) does not require $NO_x$ monitors, but instead specifies that if an owner or operator installs a $NO_x$ monitor, then it must meet the CEMS or PEMS requirements of §117.213(e) or (f).

The proposed new §117.479(d) specifies that monitors must be installed on the schedule specified in §117.534.

The proposed new §117.479(e) specifies the testing requirements for boilers, process heaters, and engines which are subject to the emission limits of §117.475. These requirements are based upon the existing requirements of §117.211. The proposed §117.479 also specifies that for units without CEMS or PEMS, retesting is required after any modifications which could increase the $NO_x$ emission rate, but is optional after any modifications which could decrease the $NO_x$ emission rate, including, but not limited to, installation of post-combustion controls, low-$NO_x$ burners, low excess air operation, staged combustion (for example, overfire air), FGR, and fuel-lean and conventional (fuel-rich) reburn. The $NO_x$ emission rate determined by the retesting establishes a new emission factor which must be used instead of the previously determined emission factor for the proposed Chapter 101 mass emissions cap and trade program.

The proposed new §117.479(f) specifies that the $NO_x$ testing and monitoring data specified in §117.479(a) - (e), together with the level of activity, as defined in §101.350, are used to establish the emission factor for the proposed Chapter 101 mass emissions cap and trade program.

The proposed new §117.479(g) specifies the records to be used to demonstrate compliance with the emission limits of §117.475.

The proposed changes to §117.510, concerning Compliance Schedule for Utility Electric Generation, revise §117.510(c) to create separate paragraphs in this subsection addressing compliance schedules for the $NO_x$ RACT rules and the proposed emission specifications for attainment demonstrations. The commission is proposing a staged four-year implementation schedule for compliance with the new HGA emission specifications. First, one-third of the total reductions required to comply with the attainment demonstration emission specifications is required by December 31, 2002. The second one-third of the reductions is required by December 31, 2003. The final one-third of the reductions is required by December 31, 2004. A combination of combustion controls and flue gas cleanup controls will be necessary on many units.

The proposed revisions to §117.510(b)(2) modify the compliance schedule for utility boilers in DFW by allowing exclusion of boilers which are to be retired and decommissioned before May 1, 2005 from the calculation of the emission reductions to be made by May 1, 2003. This two-year compliance schedule extension will avoid the costs associated with installation of controls which would be used for a relatively short period of time, yet still achieve the necessary emission reductions before the critical 2005 ozone season. To qualify for this compliance date extension, a boiler must be designated by the Public Utility Commission of Texas to be necessary to operate for reliability of the electric system, and the owner must provide the executive director an enforceable written commitment by May 1, 2003 to retire and permanently decommission the boiler by May 1, 2005.

In addition, the proposed changes to §117.510 add the missing word "in" to §117.510(a)(2)(E)(iii) and (F) and the renumbered §117.510(b)(2)(A)(v)(III) and (vi). The proposed changes to §117.510 also make a variety of minor punctuation corrections throughout the section. Finally, the proposed changes to §117.510 revise §117.510(a)(2)(A)(i) and the renumbered §117.510(b)(2)(A)(i)(I) by replacing a reference to the effective date of these rules with the actual effective date, May 11, 2000.

The proposed changes to §117.520, concerning Compliance Schedule for Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas, revise §117.520(c) to create separate paragraphs in this subsection addressing compliance schedules for the $NO_x$ RACT rules and the proposed emission specifications for attainment demonstrations. The commission is proposing a staged four-year implementation schedule for compliance with the new HGA emission specifications. First, one-third of the total reductions required to comply with the attainment demonstration emission specifications is required by December 31, 2002. The second one-third of the reductions is required by December 31, 2003. The final one-third of the reductions is required by December 31, 2004. A combination of combustion controls and flue gas cleanup controls will be necessary on many units.

In addition, the proposed changes to §117.520 add the missing word "in" to §117.520(a)(3)(B)(v) and (E)(iii) and the renumbered §117.510(b)(2)(A)(v)(III) and (vi). The proposed changes to §117.520 also revise §117.520(a), (b), and (c) by changing the order of "commercial, institutional, or industrial" to "industrial, commercial, or institutional" for consistency with the title of this division. Finally, the proposed changes to §117.520 revise §117.520(a)(3)(A)(i) by replacing a reference to the effective date of this rule with the actual effective date, May 11, 2000.

The proposed new §117.534 specifies the compliance schedule for boilers, process heaters, and stationary engines at minor sources in HGA.

PUBLIC UTILITY REGULATORY ACT DETERMINATION

As described earlier in this preamble, the commission proposes these revisions to Chapter 117 and the SIP in order to reduce $NO_x$ emissions and demonstrate attainment in the HGA ozone nonattainment area. Accordingly, the commission makes the following determination, as required by the Public Utility Regulatory Act (PURA), Texas Utilities Code (TUC), §39.263(c)(1)(A) and §39.263(c)(3): reductions of $NO_x$ made in compliance with this rulemaking are hereby determined to be an essential component in achieving compliance with the NAAQS for ground-level ozone; and the amount and location of reductions of $NO_x$ emissions resulting from this rulemaking are hereby determined to be consistent with the air quality goals and policies of the commission.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMIT PROGRAM

Since Chapter 117 is an applicable requirement under 30 TAC Chapter 122, owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise their operating permit to include the revised Chapter 117 requirements for each emission unit affected by the revisions to Chapter 117 at their site.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

John Davis, Technical Specialist in the Strategic Planning and Appropriations Section, has determined that for the first five-year period the proposed amendments are in effect, there will be no significant fiscal implications for most units of state government and most units of local government as a result of administration or enforcement of the proposed amendments. However, there will be significant fiscal implications to the University of Houston and Baylor College of Medicine because they will be required to install emission controls on stationary sources of $NO_x$ emissions as a result of the proposed rules.

The proposed amendments would require a wide variety of stationary sources of $NO_x$ emissions in HGA to meet new emission specifications and other requirements in order to reduce $NO_x$ emissions and ozone air pollution. The affected equipment types and processes include electric utility boilers and stationary gas turbines; ICI boilers; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and associated CO boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating and reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and BIF units.

These standards and specifications are part of the strategy to reduce emissions of $NO_x$ necessary for the counties in the HGA ozone nonattainment area to be able to demonstrate attainment with the NAAQS for ozone. The proposed amendments are a necessary and essential component of the proposed HGA Attainment Demonstration SIP. A SIP is a plan developed for any region where existing (measured and estimated) ambient levels of pollutant exceeds the levels specified in a national standard. The plan sets forth a control strategy that provides emission reductions necessary for attainment and maintenance of the national standards.

For sources with a design capacity to emit $NO_x$ in amounts greater than or equal to ten tons per year (tpy), the commission is proposing a staged four-year implementation schedule for compliance with the new HGA emission specifications. First, one-third of the total reductions required to comply with the attainment demonstration emission specifications are required by December 31, 2002. The second one-third of the reductions are required by December 31, 2003. The final one-third of the reductions are required by December 31, 2004. For sources with a design capacity to emit $NO_x$ in amounts less than ten tpy, the final compliance date is December 31, 2002.

Most of the sources which will have to comply with the proposed rules are currently subject to air permits and are already being inspected for compliance. Consequently, only a limited number of additional facilities will need to be inspected for compliance with the proposed amendments. The commission anticipates that enforcement of these rules will not significantly increase the number of facilities currently inspected by the state and local governments.

The commission estimates that there may be other state and local government facilities affected by the proposed amendments that have not been identified in this fiscal note. State and local government facilities with equipment affected by the proposed amendments would be required to adhere to the proposed standards. Costs to those units would be similar as presented in this fiscal note.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that four ICI boilers at the Baylor College of Medicine and three ICI boilers at the University of Houston and will be affected by the proposed amendments. The ICI boilers at the Baylor College of Medicine have a maximum capacity less than 40 MMBtu/hr. The new $NO_x$ emission standard for this type of boiler is 0.036 lb/MMBtu. It is estimated that the these boilers will have to reduce emissions by 0.01 tpd through the use of combustion modifications, such as low-$NO_x$ burners (LNB) or FGR. Total capital costs for the combustion modifications are estimated at $3,100 per MMBtu/hr, and the annual costs are estimated at $600 per MMBtu/hr. These cost estimates were derived from cost models on page E-23 of EPA's alternative control techniques (ACT) document, *Alternative Control Techniques Document -- $NO_x$ Emissions from Industrial/Commercial/Institutional (ICI) Boilers*. Total capital costs for the Baylor College of Medicine ICI gas-fired boilers are approximately $257,000 with an annual cost of $52,200. The average capital cost for each affected boiler is approximately $65,000 with an average annual cost of $13,000. Cost effectiveness for the proposed emission reductions is approximately $15,000 per ton of $NO_x$ reduced.

The three ICI boilers at the University of Houston are larger units, with capacities greater than 40 MMBtu/hr but less than 100 MMBtu/hr. The new $NO_x$ emission standard for this type of boiler is 0.015 lb/MMBtu. It is estimated that these ICI boilers will have to reduce emissions by 0.04 tpd through the use of SCR. In order to determine costs related to these ICI boilers, a spreadsheet provided by NESCAUM was used. This spreadsheet determines SCR costs based on the capacity of the affected unit. Capital costs for SCR on these boilers ranges from $70/kilowatt (kW) to $76/kW. Total capital costs for the University of Houston as a result of the proposed amendments are approximately $1.4 million with an annual cost of $384,000. The average capital cost for each affected boiler is approximately $467,000 with an average annual cost of $128,000.

Cost effectiveness for the proposed emission reductions is approximately $27,000 per ton of $NO_x$ reduced.

PUBLIC BENEFIT AND COSTS

Mr. Davis has also determined that for each year of the first five years the proposed amendments to Chapter 117 are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be a reduction of public exposure to $NO_x$ emitted from affected stationary sources, a reduction of ground-level ozone in ozone nonattainment areas, and conformance with the requirements of the FCAA, 42 USC, §§7410, 7502(a)(2), and 7511a(d) and (f).

The proposed amendments would require a wide variety of stationary sources of $NO_x$ emissions in HGA to meet new emission specifications and other requirements in order to reduce $NO_x$ emissions and ozone air pollution. The affected equipment types and processes include electric utility boilers and stationary gas turbines; ICI boilers; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and associated CO boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating furnaces; reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and BIF units.

The proposed amendments do not specify a particular control technology to achieve the emission limits and there are a variety of control technologies or combinations of control technologies which may be used to comply, depending on the specific circumstances of each affected source. In addition, the Chapter 101 mass emissions cap and trade program being proposed concurrently in this issue of the *Texas Register* establishes compliance flexibility through a mass emissions cap and trade program, which allows compliance to be established through the use of surplus reductions created from other sources.

There may be individual sources for which the equipment actual control costs are higher than those identified in this cost note. The numbers of sources affected by these rules are approximations which do not include all new sources which have been placed into service after 1997. Because these new sources have been permitted under rules which require the new emissions to be offset from existing sources, the counted number of sources will not vary significantly because of offsetting source shutdowns from obsolete equipment. The commission anticipates costs for units not addressed in this fiscal note would be similar to the overall findings of this analysis. Additionally, the commission has included cost for units affected by the proposed amendments that did not report any emission rate data for 1997. No rate data could indicate the unit has been shut down; however, for the purpose of this note, costs were estimated for these units and included in the overall total.

The proposed emission limit for electric utility boilers is 0.010 lb $NO_x$/MMBtu heat input for gas-fired boilers and auxiliary steam boilers, 0.030 lb $NO_x$/MMBtu heat input for oil- or coal-fired, tangential-fired boilers, and 0.030 lb $NO_x$/MMBtu heat input for oil- or coal-fired, wall-fired boilers. The proposed 93% emission reduction, calculated from the average emissions of the electric utility boilers in the area during the baseline period, is expected to necessitate combustion modifications and SCR on the affected electric utility boilers.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that 25 utility boilers and seven auxiliary boilers in HGA will be affected by the proposed amendments. It is estimated that these boilers will be required to reduce $NO_x$ emissions by 184.26 tpd (67,255 tpy). Capital cost of the utility boiler combustion modifications is estimated at $10/kW for the gas-fired combustion modifications, and $5/kW for the coal-fired modifications. The costs of SCR for the coal and gas-fired utility boilers are estimated from the cost models contained in Appendix D of *Status Report on $NO_x$ Control Technologies and Cost Effectiveness for Utility Boilers*, issued by NESCAUM (June 1998). In addition, the catalyst cost for the coal fired boilers was estimated from discussions with engineers familiar with SCR application, and the catalyst cost for gas-fired boilers was estimated based on more specific cost information from gas-fired installation in the Los Angeles area, as identified in the May 5, 2000 issue of the *Texas Register* (25 TexReg 4157). It is estimated that the cost of $NO_x$ reduction for the electric utility power boilers will range between approximately $1,000 to $8,000 per ton of $NO_x$ reduced. There are two utility systems affected by the proposed amendments. Total capital cost for the first utility system with 10,069 MW of electric generating capacity is $528 million with an increased annual cost of $88 million. This utility system has a mixture of gas- and coal-fired boilers. The average capital cost to gas-fired boilers in this utility system is $16 million with an average increased annual cost of $2.6 million. The average capital cost for coal-fired boilers in this system is $54 million with an average increased annual cost of $9.2 million. Total capital costs for the second utility system with 532 MW of capacity are $24 million with an increased annual cost of $5 million. The average capital cost for boilers in the smaller utility system is $12 million with an average increased annual cost of $2.3 million.

The proposed emission limits for gas-fired ICI boilers are 0.010 lb $NO_x$ per MMBtu heat input for boilers with a maximum rated capacity equal to or greater than 100 MMBtu/hr; 0.015 lb $NO_x$ per MMBtu heat input for boilers with a maximum rated capacity equal to or greater than 40 MMBtu/hr, but less than 100 MMBtu/hr; and 0.036 lb $NO_x$ per MMBtu heat input (or alternatively, 30 ppmv $NO_x$, at 3.0% $O_2$, dry basis) for boilers with a maximum rated capacity less 40 MMBtu/hr. The proposed 92% $NO_x$ emission reduction from ICI boilers is expected to necessitate SCR and combustion modifications.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that 235 gas- fired ICI boilers with a maximum rated capacity less 40 MMBtu/hr in HGA will be affected by the proposed amendments. The commission estimates that these boilers will be required to reduce $NO_x$ emissions by 0.99 tpd (361 tpy) through the use of combustion modifications. Total capital costs for the combustion modifications are estimated at $3,100 per MMBtu/hr and the annual costs are estimated at $600 per MMBtu/hr. These cost estimates were derived from cost models on page E-23 of EPA's *Alternative Control Techniques Document -- $NO_x$ Emissions from Industrial/Commercial/Institutional (ICI) Boilers*. Total capital costs for ICI gas- fired boilers rated at 40 MMBtu/hr or less in HGA are approximately $8.1 million with an increased annual cost of $1.6 million. The average capital costs for boilers in this category are approximately $41,000 with an average increased annual cost of $8,300. Cost effectiveness for the proposed emission reductions from the affected boilers in this category is approximately $4,500 per ton of $NO_x$ reduced.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that 90 gas-fired ICI boilers with a maximum rated capacity equal to or greater than 40 MMBtu/hr, but less than 100 MMBtu/hr in HGA will be affected by the proposed amendments. The commission estimates that these boilers will

be required to reduce $NO_x$ emissions by 3.03 tpd (1,106 tpy) through the use of SCR. The costs of SCR for these ICI boilers were estimated from a spreadsheet provided by NESCAUM. Capital costs for SCR on the affected boilers range from $68/kW to $80/kW. Total capital costs for ICI boilers with a maximum rated capacity equal to or greater than 40 MMBtu/hr, but less than 100 MMBtu/hr in HGA are approximately $38 million with an increased annual cost of approximately $11 million. The average capital costs for boilers in this category are approximately $467,000 with an average increased annual cost of $135,000. Cost effectiveness for the proposed emission reductions from the affected boilers in this category is approximately $10,000 per ton of $NO_x$ reduced.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that 180 gas- fired ICI boilers with a maximum rated capacity equal to or greater than 100 MMBtu/hr in HGA will be affected by the proposed amendments. The commission estimates that these boilers will be required to reduce $NO_x$ emissions by 53.24 tpd (19,433 tpy) through the use of SCR and combustion modifications. The costs of SCR for these ICI boilers were estimated from the NESCAUM spreadsheet, and combustion modification costs were estimated to be $10/kW. Capital costs for SCR on the affected boilers range from $49/kW to $80/kW. Total capital costs for ICI boilers with a maximum rated capacity equal to or greater than 100 MMBtu/hr in HGA are approximately $354 million with an increased annual cost of approximately $76 million. The average capital cost for boilers in this category is approximately $1.9 million with an average increased annual cost of $421,000. Cost effectiveness for the proposed emission reductions from the affected boilers in this category is approximately $4,000 per ton of $NO_x$ reduced.

The proposed emission limit for coke-fired boilers is 0.057 lb $NO_x$ per MMBtu heat input. The proposed 90% emission reduction is expected to necessitate SCR on the affected coke- fired boilers. Based upon an analysis of the 1997 emission inventory database, it is anticipated that one coke-fired ICI boiler in HGA will be affected by the proposed amendments. The commission estimates that this boiler will be required to reduce $NO_x$ emissions by 10.44 tpd (3,811 tpy) through the use of SCR. The costs of SCR for this ICI boiler were estimated from a spreadsheet provided by NESCAUM. Capital costs for SCR on the affected boiler are estimated to be $85/kW. Total capital costs for this coke-fired boiler are approximately $15 million with an increased annual cost of approximately $2.8 million. Cost effectiveness for the proposed emission reductions from this boiler is approximately $728 per ton of $NO_x$ reduced.

The proposed emission limit for wood fuel-fired boilers is 0.020 lb $NO_x$ per MMBtu heat input. The proposed 90% emission reduction is expected to necessitate SCR on the affected wood-fired boilers. Based upon an analysis of the 1997 emission inventory database, it is anticipated that three wood-fired ICI boilers in HGA will be affected by the proposed amendments. The commission estimates that these boilers will be required to reduce $NO_x$ emissions by 0.91 tpd (332 tpy) through the use of SCR and combustion modifications. The smallest of the three wood-fired boilers is a four MMBtu/hr unit. There are no cost estimates available for SCR installed on units of this size. Based on the NESCAUM spreadsheet, the overall capital costs would exceed $100/kW to install SCR on this unit; therefore, the owner or operator of this unit may decide to install combustion modifications and purchase allowances in order to meet required emission limits. The commission estimates the combustion modifications would cost approximately $31/kW. This estimate was derived from costs associated with a 17 MMBtu/hr watertube gas-fired boiler equipped with LNB and FGR which is listed in EPA's *Alternative Control Techniques Document -- $NO_x$ Emissions from Industrial/Commercial/Institutional (ICI) Boilers*. The costs of SCR for the two remaining wood-fired ICI boilers were estimated from a spreadsheet provided by NESCAUM. Capital costs for SCR on the two remaining boilers are approximately $55/kW and $71/kW. Total capital costs for the three wood-fired ICI boilers are approximately $3.5 million with an increased annual cost of approximately $825,000. The average capital cost for the larger two boilers is approximately $1.7 million with an average increased annual cost of $411,000. Cost effectiveness for the proposed emission reductions from the affected boilers in this category is approximately $2,525 per ton of $NO_x$ reduced.

The proposed emission limit for rice hull-fired boilers is 0.089 lb $NO_x$ per MMBtu heat input. The proposed 90% emission reduction is expected to necessitate SCR on the one rice hull-fired boiler contained in the inventory; however, according to agency records this boiler is currently shut down and there are no plans to reactivate this boiler. Consequently, the total annual fiscal impact for rice hull- fired boilers in HGA is assumed to be zero.

The proposed emission limit for oil-fired boilers is 2.0 lb $NO_x$ per 1,000 gallons of oil burned. The proposed 90% emission reduction is expected to necessitate SCR on the affected oil-fired boilers. Based upon an analysis of the 1997 emission inventory database, it is anticipated that three oil-fired ICI boilers will be affected by the proposed amendments. The commission estimates that these boilers will be required to reduce $NO_x$ emissions by 0.13 tpd (47 tpy) through the use of SCR and combustion modifications. Two of the units are low capacity three MMBtu/hr and eight MMBtu/hr boilers. There are no cost estimates available for SCR installed on units of this size. Based on the NESCAUM spreadsheet, the overall capital costs would exceed $90/kW to install SCR on these units; therefore, the owner or operator of these units may decide to install combustion modifications and purchase allowances in order to meet required emission limits. The commission estimates the combustion modifications would cost approximately $31/kW. This estimate was derived from costs associated with a 17 MMBtu/hr watertube gas-fired boiler equipped with LNB and FGR which is listed in EPA's *Alternative Control Techniques Document -- $NO_x$ Emissions from Industrial/Commercial/Institutional (ICI) Boilers*. The costs of SCR on the remaining boilers were estimated from spreadsheets provided by NESCAUM. Capital costs for SCR on the third oil-fired boiler are approximately $72/kW. Total capital costs for affected oil-fired ICI boilers in HGA is approximately $472,000 with an increased annual cost of approximately $135,000. Cost effectiveness for the proposed emission reductions from the affected boilers in this category is approximately $2,900 per ton of $NO_x$ reduced.

The commission estimates the total capital costs for the 513 identified ICI boilers affected by the proposed amendments are approximately $419 million with an annualized cost of $95 million. The overall estimated cost effectiveness for the proposed emission reductions for ICI boilers is approximately $3,800 per ton of $NO_x$ reduced.

The proposed emission limit for fluid catalytic cracking units (including CO boilers, CO furnaces, and catalyst regenerator vents) is ten ppmv $NO_x$ (at 0.0% $O_2$, dry basis). The proposed 90% emission reduction is expected to necessitate SCR on the affected fluid catalytic cracking units (FCCUs).

Based upon an analysis of the 1997 emission inventory database, it is anticipated that 14 FCCUs at nine refineries in HGA will be affected by the proposed amendments. The commission estimates that these units will be required to reduce $NO_x$ emissions by 13.44 tpd (4,906 tpy) through the use of SCR. The costs of SCR for these FCCUs were estimated from a spreadsheet provided by NESCAUM. Capital costs for SCR on the affected FCCUs range from $46/kW to $60/kW. Total capital costs for affected FCCUs in HGA are approximately $38.5 million with an increased annual cost of approximately $8.6 million. The average capital costs for units in this category are approximately $2.7 million with an average increased annual cost of $616,000. Cost effectiveness for the proposed emission reductions from the affected FCCUs is approximately $1,800 per ton of $NO_x$ reduced.

The proposed emission limit for pulping liquor recovery furnaces is 0.050 lb $NO_x$ per MMBtu heat input. The proposed 64% $NO_x$ emission reduction is expected to necessitate SNCR on the affected pulping liquor recovery furnaces.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that three pulping liquor recovery furnaces at two pulp mills in HGA will be affected by the proposed amendments. It is estimated that these units will be required to reduce $NO_x$ emissions by 1.09 tpd (398 tpy). Using the total annual cost estimates for SNCR for several types of wood-fired boilers in EPA's *Alternative Control Techniques Document -- $NO_x$ Emissions from Industrial/Commercial/Institutional (ICI) Boilers*, it is estimated that the cost effectiveness will range from approximately $2,000 to $4,500 per ton of $NO_x$ reduced. The total annual fiscal impact for pulping liquor recovery furnaces in HGA is approximately $850,000 to $1.7 million per year.

The proposed emission limits for kilns are 0.66 lb $NO_x$ per ton of CaO for lime kilns and 0.76 lb $NO_x$ per ton of product for lightweight aggregate kilns. The proposed 39% $NO_x$ emission reduction from the kiln category is expected to necessitate combustion controls (such as LNB, or mid-kiln firing and staged combustion) on the affected kilns.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that two lime kilns at two pulp mills and three lightweight aggregate kilns at one lightweight aggregate plant in HGA will be affected by the proposed amendments. It is estimated that these units will be required to reduce $NO_x$ emissions by 0.30 tpd (110 tpy). Based on vendor quotes, installations of staged combustion technology would cost approximately $225,000 per kiln, with estimated annual operating costs of $10,000. Total capital costs for affected kilns in HGA are approximately $1.1 million with an increased annual cost of $125,000. Cost effectiveness for the proposed emission reductions from affected kilns is approximately $1,141 per ton of $NO_x$ reduced.

The proposed emission limits for heat treating and reheat furnaces are 0.087 lb $NO_x$ per MMBtu heat input for heat treating furnaces and 0.062 lb $NO_x$ per MMBtu heat input for reheat furnaces. The proposed 35% $NO_x$ emission reduction from the steel furnace category is expected to necessitate combustion controls (such as LNB) on the affected furnaces.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that two heat treating furnaces and seven reheat furnaces at one steel processing plant in HGA will be affected by the proposed amendments. It is estimated that these units will be required to reduce $NO_x$ emissions by 0.39 tpd (142 tpy). Annual costs for combustion controls on these units was derived from Tables 7 and 8 on page 85 of the State and Territorial Air Pollution Program Administrators (STAPPA)/Association of Local Air Pollution Control Officials (ALAPCO) document titled *Controlling Nitrogen Oxides Under the Clean Air Act: A Menu of Options*. Based on the source, annualized costs for the installation of LNB on the affected heat treat furnaces would be approximately $70,000 and $35,000 for the reheat furnaces. The estimated total increased annual costs for affected furnaces are $385,000. Cost effectiveness for the proposed emission reductions from affected furnaces is approximately $2,705 per ton of $NO_x$ reduction.

The proposed emission limit for magnesium chloride fluidized bed dryers is a 90% reduction from 1997 ozone season daily $NO_x$ emissions. The proposed 41% $NO_x$ emission reduction from the dryer category would be expected to necessitate SCR on the one affected dryer; however, this dryer is currently shut down. According to the company, there are no plans to reactivate this dryer. Consequently, the total annual fiscal impact for dryers in HGA is assumed to be zero.

The proposed emission limit for incinerators is a 90% reduction from 1997 ozone season daily $NO_x$ emissions. The proposed 61% $NO_x$ emission reduction from this emission category is expected to necessitate SCR on the affected incinerators.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that 23 incinerators at 16 refineries, chemical plants, and hazardous waste disposal operations in HGA will be affected by the proposed amendments. It is estimated that these units will be required to reduce $NO_x$ emissions by 3.62 tpd (1,321 tpy). The costs of SCR for these incinerators were estimated from a spreadsheet provided by NESCAUM. Capital costs for SCR on the affected incinerators are estimated to range from $49/kW to $72/kW. Total capital costs for these incinerators are approximately $28 million with an increased annual cost of approximately $6.3 million. The average capital cost for units in this category is approximately $1.2 million with an average increased annual cost of $272,000. Cost effectiveness for the proposed emission reductions from affected incinerators is approximately $4,800 per ton of $NO_x$ reduced.

The proposed emission limit for BIF units is 0.015 lb $NO_x$ per MMBtu heat input. The proposed 81% emission reduction is expected to necessitate SCR on the affected BIF units. The proposed emission limit reflects the installation of post-combustion controls, but not combustion controls, because combustion controls potentially could affect the VOC destruction efficiency when these units are burning waste-derived fuel. At the very least, installation of combustion controls potentially could trigger the requirements for a relatively costly trial burn.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that 41 BIF units at 15 refineries and chemical plants in HGA will be affected by the proposed amendments. It is estimated that these units will be required to reduce $NO_x$ emissions by 9.95 tpd (3,632 tpy). The costs of SCR for these units was estimated from the NESCAUM spreadsheet for units with a capacity greater than 40 MMBtu/hr. The cost for SCR on a 50 MMBtu/hr gas-fired boiler, as documented in the STAPPA/ALAPCO document titled *Controlling Nitrogen Oxides Under the Clean Air Act: A Menu of Options*, was used for units with a capacity less than 40 MMBtu/hr. Capital costs for SCR installed on BIF units less than 40 MMBtu/hr are estimated to be $6,420 per MMBtu/hr with an annual cost of $1,510 per MMBtu/hr. Capital costs for the larger units would range from $49/kW to $65/kW. Total capital costs affected BIF units in HGA

are approximately $45 million with an increased annual cost of approximately $10.7 million. The average capital costs for units in this category are approximately $1.1 million with an average increased annual cost of $256,000. Cost effectiveness for the proposed emission reductions from affected BIF units is approximately $3,000 per ton of $NO_x$ reduced.

The proposed emission limits for gas-fired process heaters are 0.010 lb $NO_x$ per MMBtu heat input for units with a maximum rated capacity equal to or greater than 100 MMBtu/hr; 0.015 lb $NO_x$ per MMBtu heat input for units with a maximum rated capacity equal to or greater than 40 MMBtu/hr, but less than 100 MMBtu/hr; and 0.036 lb $NO_x$ per MMBtu heat input (or alternatively, 30 ppmv $NO_x$, at 3.0% $O_2$, dry basis) for units with a maximum rated capacity less 40 MMBtu/hr. The proposed 88% $NO_x$ emission reduction is expected to necessitate SCR on many affected process heaters and combustion controls on smaller affected process heaters.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that 726 process heaters with a maximum rated capacity less 40 MMBtu/hr in HGA will be affected by the proposed amendments. The commission estimates that these process heaters will be required to reduce $NO_x$ emissions by 4.33 tpd (1,580 tpy) through the use of combustion modifications such as LNB. Based on cost estimates found on page 49, Table 4 in the STAPPA/ALAPCO document titled *Controlling Nitrogen Oxides Under the Clean Air Act: A Menu of Options*, the commission estimates that the capital costs to install LNB on these process heaters are approximately $3,280 per MMBtu/hr with an annualized cost of approximately $560 per MMBtu/hr. The total capital costs for process heaters with a maximum rated capacity less than 40 MMBtu/hr are approximately $22.3 million with an increased annual cost of approximately $4 million. The average capital cost for units in this category is approximately $32,000 with an average increased annual cost of $5,700. The cost effectiveness for the proposed emission reductions from affected process heaters in this category is approximately $2,510 per ton of $NO_x$ reduced.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that 216 process heaters with a maximum rated capacity greater than 40 MMBtu/hr, but less than 100 MMBtu/hr, in HGA will be affected by the proposed amendments. The commission estimates that these process heaters will be required to reduce $NO_x$ emissions by 12.84 tpd (4,686 tpy) through the use of SCR and combustion modifications. The costs of SCR for these incinerators were estimated from a spreadsheet provided by NESCAUM. Capital costs for SCR on the affected incinerators are estimated to range from $68/kW to $80/kW. Combustion modifications are estimated to cost $28/kW based on cost estimates found on page 49, Table 4 in the STAPPA/ALAPCO document titled *Controlling Nitrogen Oxides Under the Clean Air Act: A Menu of Options*. The total capital costs for process heaters with a maximum rated capacity greater than 40 MMBtu/hr, but less than 100 MMBtu/hr, are approximately $95 million with an increased annual cost of approximately $27 million. The average capital cost for units in this category is approximately $429,000 with an average increased annual cost of $120,000. The cost effectiveness for the proposed emission reductions from affected process heaters in this category is approximately $5,700 per ton of $NO_x$ reduced.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that 424 process heaters with a maximum rated capacity greater than or equal to 100 MMBtu/hr in HGA will be affected by the proposed amendments. The commission estimates that these process heaters will be required to reduce $NO_x$ emissions by 79.35 tpd (28,963 tpy) through the use of SCR and combustion modifications. The costs of SCR for these process heaters were estimated from a spreadsheet provided by NESCAUM. Capital costs for SCR on the affected process heaters are estimated to range from $68/kW to $80/kW. Combustion modifications are estimated to cost $17/kW based on cost estimates found on page 49, Table 4 in the STAPPA/ALAPCO document titled *Controlling Nitrogen Oxides Under the Clean Air Act: A Menu of Options*. The total capital costs for process heaters with a maximum rated capacity greater than or equal to 100 MMBtu/hr are approximately $596 million with an increased annual cost of approximately $137 million. The average capital cost for units in this category is approximately $1.4 million with an average increased annual cost of $330,000. The cost effectiveness for the proposed emission reductions from affected process heaters in this category is approximately $4,700 per ton of $NO_x$ reduced.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that one oil-fired process heater in HGA will be affected by the proposed amendments. The commission estimates that this process heater will be required to reduce $NO_x$ emissions by 0.04 tpd (15 tpy) through the use of SCR and combustion modifications. Based on cost estimates found on page 50, Table 5 in the STAPPA/ALAPCO document titled *Controlling Nitrogen Oxides Under the Clean Air Act: A Menu of Options*, the commission estimates SCR cost effectiveness will be approximately $2,300 per ton. The cost effectiveness for LNB is approximately $1,300 per ton. The total increased annual cost for this process heater is approximately $54,000.

The commission estimates that the total capital costs for the 1,367 process heaters affected by the proposed amendments are approximately $713 million with an increased annual cost of $168 million. The overall estimated cost effectiveness for the proposed emission reductions from affected process heaters is approximately $4,800 per ton of $NO_x$ reduced.

The proposed emission limits for gas-fired stationary reciprocating internal combustion engines are: 0.17 g $NO_x$/hp-hr at sites with reciprocating gas-fired engine compressors totaling 3,000 hp or more in 1997 or later; 0.50 g $NO_x$/hp-hr at sites with gas-fired compressors totaling less than 3,000 hp in 1997 or later; and 0.50 g $NO_x$/hp-hr for dual-fuel, reciprocating engines.

The emission inventory indicates 38 sites in 1997 had gas-fired compressor engines totaling more than 3,000 hp. These locations include sixteen upstream gas plants or compressor stations, nine gas transmission or gas storage stations, seven chemical plants, four oil refineries, and two oil terminals.

The proposed limit of 0.17 g $NO_x$/hp-hr at large compressor sites is expected to necessitate replacement with electric motors. The limit is approximately equal to the projected emission rate from electric generating facilities after the addition of Attainment Demonstration SIP $NO_x$ controls. Therefore, either adding emission controls to the engines to meet the limit or converting the site to electric drive would produce similar $NO_x$ reductions. The 3,000 hp or greater site compression threshold is intended to: maximize emission reductions by reducing 90% of the gas compressor engine $NO_x$ according to the more stringent emission limit; include sites with reasonable access to existing transmission lines; exclude smaller sites which are more likely to be located at greater distances from transmission lines; and

avoid new transmission line costs to sites with small electric loads.

Since 1997, two of the 38 sites have been converted to electric drive compressors. The estimated costs of conversion to electric drive for the remaining sites are based on cost for one of these sites, documented in an application for property tax abatement for the pollution control project, filed with the commission in April, 2000. The total capital cost of $32.5 million for 42,500 hp of new electric compressors equates to $714/hp. This does not include the cost of upgraded electric transmission lines to the site, which cost approximately $700,000 per mile. The distance of new transmission lines necessary to deliver the appropriate electrical power to gas plants and compressor stations is estimated to average three miles. Operating cost savings for the project with cost information were estimated to include a reduction of eight full time positions to maintain 24,000 hp of existing gas-fired compressor engines and the value of emission credits from the shutdown of the engines. Energy costs were estimated to remain in balance, in part based on the ability to obtain wholesale electric rates. For this analysis, the annual operating costs will be assumed to remain in balance between energy costs and maintenance and emission credit savings.

An analysis of the inventory indicates about 118 gas-fired engines located at sites with less than 3,000 hp of compressor engines would be subject to the 0.5 g $NO_x$/hp-hr limit. Of these, 12 engines reported emissions less than 0.5 g $NO_x$/hp-hr in 1997. Of the remainder, there appear to be 87 rich-burn engines and 31 lean burn engines.

The proposed limit of 0.50 g $NO_x$/hp-hr for gas-fired engines at sites with gas- fired compressors totaling less than 3,000 hp in 1997 or later is expected to be achieved with a combination of technologies. For rich-burn engines, the existing RACT limit of 2.0 g $NO_x$/hp-hr has been met through application of non-selective catalytic reduction (NSCR) to many engines rated more than 150 hp. Many of these rich-burn engines are currently achieving 0.50 g $NO_x$/hp-hr with NSCR. An additional catalyst module will be necessary for some of the rich burn engines to ensure compliance with the proposed limit. The total annualized cost of an additional catalyst module is estimated at $15/hp, based on vendor information. For lean-burn engines, the anticipated controls necessary to comply are a combination of combustion modifications to limit emissions to 5.0 g $NO_x$/hp-hr or less, and then SCR to achieve the 0.50 g $NO_x$/hp-hr emission limit. Combustion modifications to reduce emissions to 5.0 g $NO_x$/hp-hr or less include low emission retrofits, high energy ignition, and high pressure fuel injection. Low emission combustion costs for this cost note were based on total capital ($315,000 + ($350*HP) and annualized ($71,300 + ($74.8*HP) cost equations on pages 6-33 and 6-38 of EPA's ACT document, *Alternative Control Techniques Document $NO_x$ Emissions from Stationary Reciprocating Internal Combustion Engines*. (EPA-453/R-93-032). Based on an analysis of the emission inventory data, the SCR reductions necessary range from 50% for engines with a current baseline of 1.0 g $NO_x$/hp-hr, to 90% for engines which must initially reduce to 5.0 g $NO_x$/hp-hr with combustion modification. The cost of SCR for gas-fired engines is estimated from the total capital ($310,000 + ($72.7*HP) and annualized ($140,000 + ($40*HP) cost equations on page 6-56 of the ACT document.

An analysis of the inventory indicates one dual-fuel electric generator engine would be subject to the 0.5 g $NO_x$/hp-hr limit. This engine appears to currently operate at approximately 5.0 g $NO_x$/hp-hr, such that a 92% efficient SCR would enable it to comply with the proposed limit without additional combustion modifications. The higher removal efficiency appears feasible because the literature contains examples of SCR operating at 92% removal efficiency on stationary diesel and gas-fired engines. The cost of SCR for the dual-fuel engine is estimated from the total capital ($187,000 + ($98*HP) and annualized ($37,300 + $16.3*HP) cost equations on page 6- 60 of the ACT document.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that approximately 450 stationary gas-fired reciprocating internal combustion engines in HGA will be affected by the proposed amendments. It is estimated that these engines will be required to reduce $NO_x$ emissions by 78.50 tpd. Based on the referenced sources, it is estimated that the cost will range from approximately $50 to $25,000 per ton of $NO_x$ reduced. The total capital cost for gas-fired reciprocating internal combustion engines in HGA is approximately $441 million with an increased annual cost of approximately $63 million per year.

The proposed emission limits for stationary gas turbines and duct burners used in turbine exhaust ducts is 0.015 lb $NO_x$ per MMBtu heat input (about four ppmv, dry at 15% $O_2$). The proposed 92% $NO_x$ emission reduction is expected to necessitate SCR on affected stationary gas turbines and duct burners. In addition, for those gas turbines which are currently not achieving the RACT limit of 42 ppmv, it is anticipated that combustion modifications such as water or steam injection will also be necessary to achieve the proposed emission limits.

Based upon an analysis of the 1997 emission inventory database, it is anticipated that approximately 189 stationary gas turbines and any associated duct burners in HGA will be affected by the proposed amendments. Total annualized costs are estimated from cost tables 6-6, 6-9, 6-10, and 6- 12 of EPA's ACT document, *Alternative Control Techniques Document $NO_x$ Emissions from Stationary Gas Turbines*, (EPA-453/R-93-007). It is estimated that these units will be required to reduce $NO_x$ emissions by 141 tpd (51,465 tpy). It is estimated that the cost effective will range from approximately $1,000 to $25,000 per ton of $NO_x$ reduced, except for peaking gas turbines. For peaking gas turbines, it is estimated that the cost effectiveness will range from approximately $13,000 to $75,000 per ton of $NO_x$ reduced. Using the ACT document, the total capital costs for turbines in this category are approximately $403 million with an increased annual cost of $130 million per year.

Based on an analysis of the 1997 emission inventory database, the proposed continuous monitoring of boilers and heaters with heat input rated greater than or equal to 100 MMBtu/hr will require approximately an additional 300 boilers, heaters, and furnaces to install and operate $NO_x$ CEMS or PEMS. The commission estimates the initial cost of a CEMS which monitors $NO_x$, oxygen, and flow to be approximately $137,400 to $179,600, with total annual costs of $64,800 to $66,000, based upon *U.S. EPA's Continuous Emission Monitoring System Cost Model, Version 3.0*. Based on these figures, the total cost for the additional $NO_x$ CEMS or PEMS would be $54 million with an increased annual cost of approximately $20 million. It should be noted that this cost model provides the initial costs (including capital and installation costs) and annual costs (operating costs) for a single CEMS installed to monitor emissions from one source at a plant. In the cost model's user manual, the EPA notes that the cost model is not intended for use in estimating the costs for multiple CEMS to monitor multiple sources at a plant. Simply multiplying the number of CEMS by the model's result will overestimate the

total cost since some of the costs are not repeated with the addition of a second CEMS or more.

Based on vendor quotes, it appears that the cost of CEMS has been dropping, such that the EPA cost model overestimates both the initial and annual costs. In addition, the proposed rules allow multiple stacks to share one CEMS, as well as allowing PEMS as an alternative to CEMS, which should further reduce the costs of complying with the proposed rules. It is generally recognized that a PEMS, which consists of equipment necessary for the continuous determination and recordkeeping of process gas concentrations and emission rates using process or control device operating parameters measurements and a conversion equation, graph, or computer program to produce results in units of the applicable emission limitation, are generally less expensive than a CEMS. Therefore, the costs estimated by the EPA's cost model could be expected to represent an upper bound of the monitoring costs.

Based on an analysis of the emissions inventory, there are approximately 600 industrial boilers, process heaters and furnaces with rated heat input between two MMBtu/hr and 40 MMBtu/hr, which would require fuel use meters to track annual emissions. Installed costs for fuel flow meters are estimated to range from $3,500 to $10,000 per meter. The total increased annual cost for additional fuel meters in HGA is approximately $0.5 million.

In addition to the direct emission control costs identified in this note, there are additional costs associated with lost production for those sources which will not be able to accommodate the installation of the control equipment during normal equipment outage periods. In some cases, there may be costs of lost production due to additional process outages related to emission control equipment start up.

The total capital cost for all known affected sources in HGA is approximately $2.7 billion with an increased annual cost of approximately $597 million.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

The commission has been unable to identify any small or micro-businesses which would be affected by the proposed amendments. The majority of sites affected by the proposed amendments are large petrochemical and industrial businesses. If there are affected small or micro-businesses, the estimated capital and annualized cost for installing and operating the control technology used for the various types of units in this fiscal note would appear to be a reasonable cost estimate for small or micro-businesses. The proposed amendments would require a wide variety of stationary sources of $NO_x$ emissions in HGA to meet new emission specifications and other requirements in order to reduce $NO_x$ emissions and ozone air pollution. The affected equipment types and processes include electric utility boilers and stationary gas turbines; ICI boilers; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; FCCUs (including catalyst regenerators and associated CO boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating furnaces; reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and BIF units. The proposed amendments do not specify a particular control technology to achieve the emission limits and there may be other control technologies or combinations of control technologies which may be used to comply. In addition, the Chapter 101 mass emissions cap and trade program being proposed concurrently in this issue of the *Texas Register* establishes compliance flexibility through a mass emissions cap and trade program, which allows compliance to be established through the use of surplus reductions created from other sources.

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 meets 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 amendments to Chapter 117 will require emission reductions from electric utility boilers and stationary gas turbines; ICI boilers and stationary gas turbines; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and CO boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating furnaces; reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and BIF units in the HGA ozone nonattainment area. The rules are intended to protect the environment and reduce risks to human health and safety from environmental exposure and may have adverse effects on certain utilities, petrochemical plants, refineries, and other industrial, commercial, or institutional groups, and each group could be considered a sector of the economy. While the proposed amendments are intended to protect the environment, the commission believes they may adversely affect in a material way all sources in the HGA ozone nonattainment area with a potential to emit $NO_x$ in amounts greater than or equal to ten tpy, as well as boilers, heaters, and stationary engines with a potential to emit $NO_x$ in amounts less than ten tpy. These sources comprise sectors of the economy (including petroleum refineries, petrochemical plants, and electric generating plants) in a sector of the state. This is based on the analysis provided elsewhere in this preamble, including the discussion in the Public Benefit and Costs section.

The amendments implement requirements of the FCAA. Under 42 USC, §7410, states are required to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While 42 USC, §7410, does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that the FCAA does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of the FCAA. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program

that meets the requirements of 42 USC, §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislative Session. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed earlier in this preamble, the FCAA does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and 42 USC, §7511a(d), requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas such as HGA. The proposed rules, which reduce ambient $NO_x$ and ozone in HGA, will be submitted to the EPA as one of several measures of the required new attainment demonstrations. These rules will also implement $NO_x$ RACT for major sources in HGA which are not subject to the previous $NO_x$ RACT rules. The FCAA, 42 USC, §7511a(f), requires any moderate, serious, severe, or extreme ozone nonattainment area to implement $NO_x$ RACT, unless a demonstration is made that $NO_x$ reductions would not contribute to or would not be necessary for attainment of the ozone standard. By policy, the EPA requires photochemical grid modeling to demonstrate whether the 42 USC, §7511a(f), $NO_x$ measures would contribute to ozone attainment. The commission has performed photochemical grid modeling which predicts that $NO_x$ emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The 42 USC, §7511a(f), exemption from $NO_x$ measures for HGA expired on December 31, 1997. The expiration of the exemption under 42 USC, §7511a(f), was based on the finding that $NO_x$ reductions in HGA are necessary for attainment of the ozone standard. Therefore, the proposed amendments are necessary components of and consistent with the ozone attainment demonstration SIP for HGA, required by 42 USC, §7410.

The proposed amendments do not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Section 2001.0225 applies only to a major environmental rule the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

As discussed earlier, the proposed amendments implement requirements of the FCAA. There is no contract or delegation agreement that covers the topic that is the subject of this rulemaking. In addition, the proposed changes comply with the requirements of the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §§382.011, 382.012, 382.016, 382.017, 382.018, and 382.051(d). Therefore, these proposed amendments do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor are adopted solely under the general powers of the agency.

The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these sections under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purposes of these amendments are: to develop a new attainment demonstration SIP for the ozone NAAQS for HGA; and to implement $NO_x$ RACT required by 42 USC, §7511a(f), for certain source categories. If adopted, certain sources located in HGA will be required to install new emission control equipment, and implement new operating, reporting, and recordkeeping requirements. Installation of the necessary control equipment could conceivably place a burden on private, real property. Also, Texas Government Code, §2007.003(b)(13), states that Chapter 2007 does not apply to an action that: (1) is taken in response to a real and substantial threat to public health and safety; (2) is designed to significantly advance the health and safety purpose; and (3)does not impose a greater burden than is necessary to achieve the health and safety purpose. Although the rule revisions do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and significantly advance the health and safety purpose. In addition, these amendments to fulfill an obligation mandated by federal law. The proposed amendments will implement requirements of 42 USC, §7410 and

§7511a(f). This action is taken in response to the HGA area exceeding the federal ambient air quality standard for ground-level ozone, which adversely affects public health, primarily through irritation of the lungs. The action significantly advances the health and safety purpose by reducing ambient $NO_x$ and ozone levels in HGA. Attainment of the ozone standard will eventually require substantial $NO_x$ reductions. Any $NO_x$ reductions resulting from the current rulemaking are no greater than what the best scientific research indicates is necessary to achieve the desired ozone levels. However, this rulemaking is only one step among many necessary for attaining the ozone standard.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this rulemaking action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and has determined that this rulemaking action is consistent with the applicable CMP goals and policies. The primary CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations at 40 CFR to protect and enhance air quality in the coastal area. The rules, which require additional reductions of air emissions in HGA, will result in reductions of ambient $NO_x$ and ozone concentrations. The proposed rules are consistent with the applicable CMP policy because they are consistent with Title 40. Title 40, Part 51, sets out requirements for states to prepare, adopt, and submit implementation plans for the attainment of the NAAQS. The adopted rules would be submitted to the EPA under these requirements. Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087; faxed to (512) 239-4808; or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 2000-011H-117-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information or questions concerning this proposal, please contact Randy Hamilton at (512) 239-1512 or Eddie Mack at (512) 239-1488.

## SUBCHAPTER A. DEFINITIONS

### 30 TAC §117.10

STATUTORY AUTHORITY

The amendment is proposed under the Texas Health and Safety Code, TCAA, §382.011, concerning General Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.012, concerning State Air Control Plan, which requires the commission to develop plans for protection of the state's air, such as the SIP; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; §382.017, concerning Rules, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and §382.051(d), concerning Permitting Authority of Board; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Chapter 382.

The proposed amendment implements the Texas Health and Safety Code, TCAA, §§382.011, 382.012, 382.016, 382.017, and 382.051(d).

*§117.10. Definitions.*

Unless specifically defined in the Texas Clean Air Act or Chapter 101 of this title (relating to General Air Quality Rules), the terms in this chapter shall have the meanings commonly used in the field of air pollution control. Additionally, the following meanings apply, unless the context clearly indicates otherwise.

(1) - (5) (No change.)

(6) Boiler [~~or steam generator~~] - Any combustion equipment fired with solid, liquid, and/or gaseous fuel used to produce steam.

(7) - (10) (No change.)

(11) Electric generating facility (EGF) - A facility that generates electric energy for compensation and is owned or operated by a person in this state, including a municipal corporation, electric cooperative, or river authority.

(12) [~~(11)~~] Electric power generating system - One electric power generating system consists of either:

(A) All boilers, [~~steam generators,~~] auxiliary steam boilers, and stationary gas turbines that generate electric energy for compensation; are owned or operated by a municipality or a Public Utility Commission of Texas regulated utility, or any of its successors; and are entirely located in one of the following ozone nonattainment areas:

*(i)* Beaumont/Port Arthur;

*(ii)* Dallas/Fort Worth;

*(iii)* Houston/Galveston; or

(B) All boilers, [~~steam generators,~~] auxiliary steam boilers, and stationary gas turbines that generate electric energy for compensation; are owned or operated by an electric cooperative, independent power producer, municipality, river authority, or public utility, or any of its successors; and are located in Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Parker, Red River, Robertson, Rusk, Titus, Travis, Victoria, or Wharton County.

(13) [~~(12)~~] Functionally identical replacement - A unit that performs the same function as the existing unit which it replaces, with the condition that the unit replaced must be physically removed or rendered permanently inoperable before the unit replacing it is placed into service.

(14) [~~(13)~~] Heat input - The chemical heat released due to fuel combustion in a unit, using the higher heating value of the fuel. This does not include the sensible heat of the incoming combustion air. In the case of carbon monoxide (CO) boilers, the heat input includes the enthalpy of all regenerator off-gases and the heat of combustion of the incoming carbon monoxide and of the auxiliary fuel. The enthalpy change of the fluid catalytic cracking unit regenerator off-gases refers to the total heat content of the gas at the temperature it enters the CO boiler, referring to the heat content at 60 degrees Fahrenheit, as being zero.

(15) [~~(14)~~] High heat release rate - A ratio of boiler design heat input to firebox volume (as bounded by the front firebox wall where the burner is located, the firebox side waterwall, and extending to the level just below or in front of the first row of convection pass tubes) greater than or equal to 70,000 British thermal units (Btu) per hour per cubic foot.

(16) [~~(15)~~] Horsepower rating - The engine manufacturer's maximum continuous load rating at the lesser of the engine or driven equipment's maximum published continuous speed.

(17) [~~(16)~~] Industrial boiler [~~or steam generator~~] - Any combustion equipment, not including utility or auxiliary steam boilers as defined in this section, fired with liquid, solid, or gaseous fuel, that is used to produce steam.

(18) [~~(17)~~] International Standards Organization (ISO) conditions - ISO standard conditions of 59 degrees Fahrenheit, 1.0 atmosphere, and 60% relative humidity.

(19) [~~(18)~~] Large DFW system - All boilers, [~~steam generators,~~] auxiliary steam boilers, and stationary gas turbines that are located in the Dallas/Fort Worth ozone nonattainment area, are part of one electric power generating system, and, on January 1, 2000, had a combined electric generating capacity equal to or greater than 500 megawatts.

(20) [~~(19)~~] Lean-burn engine - A spark-ignited or compression-ignited, Otto cycle, diesel cycle, or two-stroke engine that is not capable of being operated with an exhaust stream oxygen concentration equal to or less than 0.5% by volume, as originally designed by the manufacturer.

(21) [~~(20)~~] Low annual capacity factor boiler, process heater, or gas turbine supplemental waste heat recovery unit - An industrial, [~~A~~] commercial, or institutional [~~, or industrial~~] boiler; process heater; or gas turbine supplemental waste heat recovery unit with maximum rated capacity:

(A) greater than or equal to 40 million Btu per hour (MMBtu/hr), but less than 100 MMBtu/hr and an annual heat input less than or equal to $2.8(10^{11})$ Btu per year (Btu/yr), based on a rolling 12-month average; or

(B) greater than or equal to 100 MMBtu/hr and an annual heat input less than or equal to $2.2(10^{11})$ Btu/yr, based on a rolling 12-month average.

(22) [~~(21)~~] Low annual capacity factor stationary gas turbine or stationary internal combustion engine - A stationary gas turbine or stationary internal combustion engine which is demonstrated to operate less than 850 hours per year, based on a rolling 12-month average.

(23) [~~(22)~~] Low heat release rate - A ratio of boiler design heat input to firebox volume less than 70,000 Btu per hour per cubic foot.

(24) [~~(23)~~] Major source - Any stationary source or group of sources located within a contiguous area and under common control that emits or has the potential to emit:

(A) at least 50 tons per year (tpy) of nitrogen oxides ($NO_x$) and is located in the Beaumont/Port Arthur ozone nonattainment area;

(B) at least 50 tpy of $NO_x$ and is located in the Dallas/Fort Worth ozone nonattainment area;

(C) at least 25 tpy of $NO_x$ and is located in the Houston/Galveston ozone nonattainment area; or

(D) the amount specified in the major source definition contained in the Prevention of Significant Deterioration of Air Quality regulations promulgated by EPA in Title 40 Code of Federal Regulations (CFR) §52.21 as amended June 3, 1993 (effective June 3, 1994) and is located in Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Comal, Ellis, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Hays, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Parker, Red River, Robertson, Rusk, Titus, Travis, Victoria, or Wharton County.

(25) [~~(24)~~] Maximum rated capacity - The maximum design heat input, expressed in MMBtu/hr, unless:

(A) the unit is a boiler, utility boiler, or process heater operated above the maximum design heat input (as averaged over any

one-hour period), in which case the maximum operated hourly rate shall be used as the maximum rated capacity; or

(B) the unit is limited by operating restriction or permit condition to a lesser heat input, in which case the limiting condition shall be used as the maximum rated capacity; or

(C) the unit is a stationary gas turbine, in which case the manufacturer's rated heat consumption at the International Standards Organization (ISO) conditions shall be used as the maximum rated capacity, unless limited by permit condition to a lesser heat input, in which case the limiting condition shall be used as the maximum rated capacity; or

(D) the unit is a stationary, internal combustion engine, in which case the manufacturer's rated heat consumption at Diesel Equipment Manufacturer's Association or ISO conditions shall be used as the maximum rated capacity, unless limited by permit condition to a lesser heat input, in which case the limiting condition shall be used as the maximum rated capacity.

(26) [~~(25)~~] Megawatt (MW) rating - The continuous MW rating or mechanical equivalent by a gas turbine manufacturer at ISO conditions, without consideration to the increase in gas turbine shaft output and/or the decrease in gas turbine fuel consumption by the addition of energy recovered from exhaust heat.

(27) [~~(26)~~] Nitric acid - Nitric acid which is 30% to 100% in strength.

(28) [~~(27)~~] Nitric acid production unit - Any source producing nitric acid by either the pressure or atmospheric pressure process.

(29) [~~(28)~~] Nitrogen oxides ($NO_x$) - The sum of the nitric oxide and nitrogen dioxide in the flue gas or emission point, collectively expressed as nitrogen dioxide.

(30) [~~(29)~~] Parts per million by volume (ppmv) - All ppmv emission limits specified in this chapter are referenced on a dry basis.

(31) [~~(30)~~] Peaking gas turbine or engine - A stationary gas turbine or engine used intermittently to produce energy on a demand basis.

(32) [~~(31)~~] Plant-wide emission limit - The ratio of the total allowable nitrogen oxides mass emissions rate dischargeable into the atmosphere from affected units at a major source when firing at their maximum rated capacity to the total maximum rated capacities for those units.

(33) [~~(32)~~] Plant-wide emission rate - The ratio of the total actual nitrogen oxides mass emissions rate discharged into the atmosphere from affected units at a major source when firing at their maximum rated capacity to the total maximum rated capacities for those units.

(34) [~~(33)~~] Predictive emissions [~~emission~~] monitoring system (PEMS) - The total equipment necessary for the continuous determination and recordkeeping of process gas concentrations and emission rates using process or control device operating parameter measurements and a conversion equation, graph, or computer program to produce results in units of the applicable emission limitation.

(35) [~~(34)~~] Process heater - Any combustion equipment fired with liquid and/or gaseous fuel which is used to transfer heat from combustion gases to a process fluid, superheated steam, or water for the purpose of heating the process fluid or causing a chemical reaction. The term "process heater" does not apply to any unfired waste heat recovery heater that is used to recover sensible heat from the exhaust of any combustion equipment, or to boilers [~~or steam generators~~] as defined in this section.

(36) [~~(35)~~] Rich-burn engine - A spark-ignited, Otto cycle, four-stroke, naturally aspirated or turbocharged engine that is capable of being operated with an exhaust stream oxygen concentration equal to or less than 0.5% by volume, as originally designed by the manufacturer.

(37) [~~(36)~~] Small DFW system - All boilers, [~~steam generators,~~] auxiliary steam boilers, and stationary gas turbines that are located in the Dallas/Fort Worth ozone nonattainment area, are part of one electric power generating system, and, on January 1, 2000, had a combined electric generating capacity less than 500 megawatts.

(38) [~~(37)~~] Stationary gas turbine - Any gas turbine system that is gas and/or liquid fuel fired with or without power augmentation. This unit is either attached to a foundation at a major source or is portable equipment operated at a specific major source for more than 90 days in any 12- month period. Two or more gas turbines powering one shaft shall be treated as one unit.

(39) [~~(38)~~] Stationary internal combustion engine - A reciprocating engine that remains or will remain at a location (a single site at a building, structure, facility, or installation) for more than 12 consecutive months. Included in this definition is any engine that, by itself or in or on a piece of equipment, is portable, meaning designed to be and capable of being carried or moved from one location to another. Indicia of portability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer, or platform. Any engine (or engines) that replaces an engine at a location and that is intended to perform the same or similar function as the engine being replaced is included in calculating the consecutive residence time period. An engine is considered stationary if it is removed from one location for a period and then returned to the same location in an attempt to circumvent the consecutive residence time requirement.

(40) [~~(39)~~] System-wide emission limit - The ratio of the total allowable nitrogen oxides mass emissions rate dischargeable into the atmosphere from affected units in an electric power generating system or portion thereof located within a single ozone nonattainment area when firing at their maximum rated capacity to the total maximum rated capacities for those units. For fuel oil firing, average activity levels shall be used in lieu of maximum rated capacities for the purpose of calculating the system-wide emission limit.

(41) [~~(40)~~] System-wide emission rate - The ratio of the total actual nitrogen oxides mass emissions rate discharged into the atmosphere from affected units in an electric power generating system or portion thereof located within a single ozone nonattainment area when firing at their maximum rated capacity to the total maximum rated capacities for those units. For fuel oil firing, average activity levels shall be used in lieu of maximum rated capacities for the purpose of calculating the system-wide emission rate.

(42) [~~(41)~~] Thirty-day rolling average - An average, calculated for each day that fuel is combusted in a unit, of all the hourly emissions data for the preceding 30 days that fuel was combusted in the unit.

(43) [~~(42)~~] Twenty-four hour rolling average - An average, calculated for each hour that fuel is combusted (or acid is produced, for a nitric or adipic acid production unit), of all the hourly emissions data for the preceding 24 hours that fuel was combusted in the unit.

(44) [~~(43)~~] Unit - A unit consists of either:

(A) for the purposes of §117.105 and §117.205 of this title (relating to Emission Specifications for Reasonably Available

Control Technology) and each requirement of this chapter associated with §117.105 and §117.205 of this title, any [~~Any~~] boiler, [~~steam generator,~~] process heater, stationary gas turbine, or stationary internal combustion engine, as defined in this section; or [~~.~~]

(B) for the purposes of §117.106 and §117.206 of this title (relating to Emission Specifications for Attainment Demonstrations) and each requirement of this chapter associated with §117.106 and §117.206 of this title, any boiler, process heater, stationary gas turbine, or stationary internal combustion engine, as defined in this section, or any other stationary source of nitrogen oxides ($NO_x$) at a major source, as defined in this section.

(45) [~~(44)~~] Utility boiler [~~or steam generator~~] - Any combustion equipment owned or operated by a municipality or Public Utility Commission of Texas regulated utility, fired with solid, liquid, and/or gaseous fuel, used to produce steam for the purpose of generating electricity.

(46) [~~(45)~~] Wood - Wood, wood residue, bark, or any derivative fuel or residue thereof in any form, including, but not limited to, sawdust, sander dust, wood chips, scraps, slabs, millings, shavings, and processed pellets made from wood or other forest residues.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005644
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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# SUBCHAPTER B. COMBUSTION AT MAJOR SOURCES

## DIVISION 1. UTILITY ELECTRIC GENERATION IN OZONE NONATTAINMENT AREAS

**30 TAC §§117.101, 117.103, 117.105, 117.106, 117.108, 117.111, 117.113, 117.114, 117.116, 117.119, 117.121**

STATUTORY AUTHORITY

The amendments and new sections are proposed under the Texas Health and Safety Code, TCAA, §382.011, concerning General Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.012, concerning State Air Control Plan, which requires the commission to develop plans for protection of the state's air, such as the SIP; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; §382.017, concerning Rules, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and §382.051(d), concerning Permitting Authority of Board; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Chapter 382.

The proposed amendments and new sections implement the Texas Health and Safety Code, TCAA, §§382.011, 382.012, 382.016, 382.017, and 382.051(d).

*§117.101. Applicability.*

(a) The provisions of this division (relating to Utility Electric Generation in Ozone Nonattainment Areas) shall apply to the following units used in an electric power generating system, as defined in §117.10(12)(A) [~~§117.10(11)(A)~~] of this title (relating to Definitions), owned or operated by a municipality or a Public Utility Commission of Texas (PUC) regulated utility, or any of their successors, regardless of whether the successor is a municipality or is regulated by the PUC, located within the Beaumont/Port Arthur, Houston/Galveston, or Dallas/Fort Worth ozone nonattainment areas:

(1) (No change.)

[~~(2) steam generators;~~]

(2) [~~(3)~~] auxiliary steam boilers; and

(3) [~~(4)~~] stationary gas turbines.

(b) (No change.)

*§117.103. Exemptions.*

(a) Reasonably available control technology. Units exempted from the provisions of §§117.105, 117.107, and 117.113 of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT); Alternative System-wide Emission Specifications; and Continuous Demonstration of Compliance) [~~this division (relating to Utility Electric Generation in Ozone Nonattainment Areas)~~], except as may be specified in §117.113(h),(i), and (j) [~~§117.113(i)~~] of this title [~~(relating to Continuous Demonstration of Compliance)~~], include the following:

(1) (No change.)

(2) any utility boiler, [~~steam generator,~~] or auxiliary steam boiler with an annual heat input less than or equal to $2.2(10^{11})$ Btu per year; or

(3) (No change.)

(b) Emission specifications for attainment demonstrations. Stationary gas turbines and engines which are used solely to power other engines or gas turbines during start-ups are exempt from the provisions of §§117.106, 117.108, and 117.113 of this title (relating to Emission Specifications for Attainment Demonstrations; System Cap; and Continuous Demonstration of Compliance), except as may be specified in §117.113(i) of this title.

(c) [~~(b)~~] Emission specifications for attainment demonstrations. Emergency fuel oil firing.

(1) The fuel oil firing emission limitations [~~limitation~~] of §§117.105(c), 117.106(a), (b), and (c)(1)(B), 117.107(b), and 117.108 [~~§117.105(c) or §117.107(b)~~] of this title [~~(relating to Emissions Specifications in Ozone Nonattainment Areas and Alternative System-wide Emission Specifications)~~] shall not apply during an emergency operating condition declared by the Electric Reliability Council of Texas or the Southwest Power Pool, or any other emergency operating condition which necessitates oil firing. All findings that emergency operating conditions exist are subject to the approval of the executive director.

(2) The owner or operator of an affected unit shall give the executive director and any local air pollution control agency having

jurisdiction verbal notification as soon as possible but no later than 48 hours after declaration of the emergency. Verbal notification shall identify the anticipated date and time oil firing will begin, duration of the emergency period, affected oil-fired equipment, and quantity of oil to be fired in each unit, and shall be followed by written notification containing this information no later than five days after declaration of the emergency.

(3) The owner or operator of an affected unit shall give the executive director and any local air pollution control agency having jurisdiction final written notification as soon as possible but no later than two weeks after the termination of emergency fuel oil firing. Final written notification shall identify the actual dates and times that oil firing began and ended, duration of the emergency period, affected oil-fired equipment, and quantity of oil fired in each unit.

(d) Distributed generation. Upon issuance of a standard permit by the commission for the distributed generation of electricity, combustion sources registered under that permit are exempt from this chapter.

*§117.105. Emission Specifications for Reasonably Available Control Technology (RACT).*

(a) No person shall allow the discharge into the atmosphere from any utility boiler [~~,steam generator,~~] or auxiliary steam boiler, emissions of nitrogen oxides ($NO_x$) in excess of 0.26 pound per million (MM) Btu heat input on a rolling 24-hour average and 0.20 pound per MMBtu heat input on a 30-day rolling average while firing natural gas or a combination of natural gas and waste oil.

(b) No person shall allow the discharge into the atmosphere from any utility boiler [~~or steam generator~~], $NO_x$ emissions in excess of 0.38 pound per MMBtu heat input for tangentially-fired units on a rolling 24-hour averaging period or 0.43 pound per MMBtu heat input for wall-fired units on a rolling 24-hour averaging period while firing coal.

(c) No person shall allow the discharge into the atmosphere from any utility boiler [~~, steam generator,~~] or auxiliary steam boiler, $NO_x$ emissions in excess of 0.30 pound per MMBtu heat input on a rolling 24-hour averaging period while firing fuel oil only.

(d) No person shall allow the discharge into the atmosphere from any utility boiler [~~, steam generator,~~] or auxiliary steam boiler, $NO_x$ emissions in excess of the heat input weighted average of the applicable emission limits specified in subsections (a) - (c) of this section on a rolling 24-hour averaging period while firing a mixture of natural gas and fuel oil, as follows:

Figure: 30 TAC §117.105(d) (No change.)

(e) - (g) (No change.)

(h) No person shall allow the discharge into the atmosphere from any utility boiler [~~, steam generator,~~] or auxiliary steam boiler subject to the $NO_x$ emission limits specified in subsections (a) - (e)of this section, carbon monoxide (CO) emissions in excess of 400 ppmv at 3.0% $O_2$, dry (or alternatively, 0.30 pound per MMBtu heat input), based on:

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

(i) - (j) (No change.)

(k) For purposes of this subchapter, the following shall apply:

(1) (No change.)

(2) For any unit placed into service after June 9, 1993 and prior to the final compliance date as specified in §117.510 of this title (relating to Compliance Schedule for Utility Electric Generation in Ozone Nonattainment Areas) or approved under the provisions of §117.540 of this title (relating to Phased Reasonably Available Control Technology (RACT)), as functionally identical replacement for an existing unit or group of units subject to the provisions of this chapter, the higher of any permit $NO_x$ emission limit under a permit issued after June 9, 1993 pursuant to Chapter 116 of this title and the emission limits of subsections (a) - (g) of this section shall apply. Any emission credits resulting from the operation of such replacement units shall be limited to the cumulative maximum rated capacity of the units replaced. The inclusion of such new units is an optional method for complying with the emission limitations of §117.107 of this title. Compliance with this paragraph does not eliminate the requirement for new units to comply with Chapter 116 of this title.

(l) This section shall no longer apply:

(1) to any utility boiler in the Beaumont/Port Arthur ozone nonattainment area after the appropriate compliance date(s) for emission specifications for attainment demonstrations given in §117.510(a)(2) of this title;

(2) to any utility boiler in the Dallas/Fort Worth ozone nonattainment area after the appropriate compliance date(s) for emission specifications for attainment demonstrations given in §117.510(b)(2) of this title; and

(3) in the Houston/Galveston ozone nonattainment area after the appropriate compliance date(s) for emission specifications for attainment demonstrations given in §117.510(c)(2) of this title.

*§117.106. Emission Specifications for Attainment Demonstrations.*

(a) Beaumont/Port Arthur [~~Beaumont Port/Arthur~~]. The owner or operator of each [~~No person shall allow the discharge into the atmosphere from any~~] utility boiler located in the Beaumont/Port Arthur ozone nonattainment area [~~,~~] shall ensure that emissions of nitrogen oxides ($NO_x$) do not exceed [~~in excess of~~] 0.10 pound per million Btu (lb/MMBtu) heat input, on a daily average, except as provided in §117.108 of this title (relating to System Cap), or §117.570 of this title (relating to Trading).

(b) Dallas/Fort Worth. The owner or operator of each [~~No person shall allow the discharge into the atmosphere from any~~] utility boiler located in the Dallas/Fort Worth (DFW) ozone nonattainment area [~~,~~] shall ensure that emissions of $NO_x$ do not exceed [~~in excess of~~]: 0.033 lb/MMBtu [~~pound per million Btu~~] heat input from boilers which are part of a large DFW system, and [~~emissions of $NO_x$ in excess of~~] 0.06 lb/MMBtu [~~pound per million Btu~~] heat input from boilers which are part of a small DFW system, on a daily average, except as provided in §117.108 of this title or §117.570 of this title. The annual heat input exemption of §117.103(2) of this title (relating to Exemptions) is not applicable to a small DFW system.

(c) Houston/Galveston. The owner or operator of each utility boiler, auxiliary steam boiler, or stationary gas turbine located in the Houston/Galveston ozone nonattainment area shall ensure that emissions of $NO_x$ do not exceed the lower of any applicable permit limit or the following rates, in lb/MMBtu heat input, on the basis of daily and 30-day averaging periods as specified in §117.108 of this title, and as specified in the emissions banking and trading program of Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program):

(1) utility boilers:

(A) gas-fired, 0.010; and

(B) coal-fired or oil-fired:

*(i)* wall-fired, 0.030; and

*(ii)* tangential-fired, 0.030;

(2) auxiliary steam boilers:

(A) with a maximum rated capacity equal to or greater than 100 MMBtu/hr, 0.010;

(B) with a maximum rated capacity equal to or greater than 40 MMBtu/hr, but less than 100 MMBtu/hr, 0.015; and

(C) with a maximum rated capacity less 40 MMBtu/hr, 0.036 (or alternatively, 30 parts per million by volume (ppmv) $NO_x$, at 3.0% oxygen ($O_2$), dry basis); and

(3) stationary gas turbines, 0.015.

(d) [~~(c)~~] Related emissions. No person shall allow the discharge into the atmosphere from any utility boiler subject to the $NO_x$ emission limits specified in subsections (a), (b), and (c) [~~(b)~~] of this section:

(1) carbon monoxide (CO) emissions in excess of 400 ppmv [~~parts per million by volume (ppmv)~~] at 3.0% $O_2$ [~~oxygen~~], dry (or alternatively, 0.30 lb/MMBtu[~~pound per MMBtu~~] heat input), based on:

(A) a one-hour average for units not equipped with continuous emissions monitoring systems (CEMS) or predictive emissions monitoring systems (PEMS) for CO; or

(B) a rolling 24-hour averaging period for units equipped with CEMS or PEMS for CO; and

(2) ammonia emissions in excess of 10 ppmv, based on a block one-hour averaging period.

(e) [~~(d)~~] Compliance flexibility.

(1) In the Beaumont/Port Arthur and Dallas/Fort Worth ozone nonattainment areas, an [~~An~~] owner or operator may use either of the following alternative methods of compliance with the $NO_x$ emission specifications of this section:

(A) §117.108 of this title [~~(relating to System Cap)~~]; or

(B) §117.570 of this title (relating to Trading).

(2) An owner or operator may petition the executive director for an alternative to the CO or ammonia limits of this section in accordance with §117.121 of this title (relating to Alternative Case Specific Specifications).

(3) Section 117.107 of this title (relating to Alternative System-wide Emission Specifications) and §117.121 of this title are not alternative methods of compliance with the $NO_x$ emission specifications of this section.

(4) In the Houston/Galveston ozone nonattainment area, an owner or operator may not use the alternative methods specified in §117.570 of this title to comply with the $NO_x$ emission specifications of this section. In addition, the following requirements apply.

(A) For units which meet the definition of electric generating facility (EGF), the owner or operator must use both the alternative methods specified in §117.108 of this title and the mass emissions cap and trade program in Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) to comply with the $NO_x$ emission specifications of this section.

(B) For units which do not meet the definition of EGF, the owner or operator must use the mass emissions cap and trade program in Chapter 101, Subchapter H, Division 3 of this title to comply with the $NO_x$ emission specifications of this section.

*§117.108. System Cap.*

(a) An owner or operator of an electric generating facility (EGF) in the Beaumont/Port Arthur or Dallas/Fort Worth ozone nonattainment areas may achieve compliance with the nitrogen oxides ($NO_x$) emission limits of §117.106 of this title (relating to Emission Specifications for Attainment Demonstrations) by achieving equivalent $NO_x$ emission reductions obtained by compliance with a daily and 30-day system cap emission limitation in accordance with the requirements of this section. An owner or operator of an electric generating facility in the Houston/Galveston ozone nonattainment area must comply with a daily and 30-day system cap emission limitation in accordance with the requirements of this section.

(b) Each EGF [~~utility boiler~~] within an electric power generating system, as defined in §117.10 (12)(A) [~~§117.10 (11)(A)~~] of this title (relating to Definitions), that would otherwise be subject to the $NO_x$ emission rates of §117.106 of this title must be included in the system cap.

(c) The system cap shall be calculated as follows.

(1) A rolling 30-day average emission cap shall be calculated using the following equation. [~~:~~]
Figure: 30 TAC §117.108(c)(1)

(2) A maximum daily cap shall be calculated using the following equation. [~~:~~]
Figure: 30 TAC §117.108(c)(2) (No change.)

(3) Each EGF [~~utility boiler~~] in the system cap shall be subject to the emission limits of both paragraphs (1) and (2) of this subsection at all times.

(d) The $NO_x$ emissions monitoring required by §117.113 of this title (relating to Continuous Demonstration of Compliance) for each EGF [~~utility boiler~~] in the system cap shall be used to demonstrate continuous compliance with the system cap.

(e) For each operating EGF [~~utility boiler~~], the owner or operator shall use one of the following methods to provide substitute emissions compliance data during periods when the $NO_x$ monitor is off-line:

(1) if the $NO_x$ monitor is a continuous emissions monitoring system (CEMS):

(A) subject to 40 Code of Federal Regulations (CFR) 75, use the missing data procedures specified in 40 CFR 75, Subpart D (Missing Data Substitution Procedures); or

(B) (No change.)

(2) (No change.)

(3) if the $NO_x$ monitor is a predictive emissions monitoring system (PEMS):

(A) use the methods specified in 40 CFR 75, Subpart D; or

(B) (No change.)

(4) if the methods specified in paragraphs (1) - (3) of this subsection are not used, the owner or operator must use the maximum block one-hour emission rate as measured by the 30-day testing [~~conducted in accordance with §117.111(e) of this title (relating to Initial Demonstration of Compliance)~~].

(f) The owner or operator of any EGF [~~utility boiler~~] subject to a system cap shall maintain daily records indicating the $NO_x$ emissions and fuel usage from each EGF [~~utility boiler~~] and summations of total $NO_x$ emissions and fuel usage for all EGFs [~~utility boilers~~] under the system cap on a daily basis. Records shall also be retained in accordance with §117.119 of this title (relating to Notification, Recordkeeping [~~Record keeping~~], and Reporting Requirements).

(g) The owner or operator of any EGF [~~utility boiler~~] subject to a system cap shall report any exceedance of the system cap emission limit within 48 hours to the appropriate regional office. The owner or operator shall then follow up within 21 days of the exceedance with a written report to the regional office which includes an analysis of the cause for the exceedance with appropriate data to demonstrate the amount of emissions in excess of the applicable limit and the necessary corrective actions taken by the company to assure future compliance. Additionally, the owner or operator shall submit semiannual reports for the monitoring systems in accordance with §117.119 of this title.

(h) The owner or operator of any EGF [~~utility boiler~~] subject to a system cap shall demonstrate initial compliance with the system cap in accordance with the schedule specified in §117.510 of this title (relating to Compliance Schedule for Utility Electric Generation in Ozone Nonattainment Areas).

(i) For the Beaumont/Port Arthur and Dallas/Fort Worth ozone nonattainment areas, an EGF [~~A utility boiler~~] which is permanently retired or decommissioned and rendered inoperable may be included in the source cap emission limit, provided that the permanent shutdown occurred after January 1, 1999. For the Houston/Galveston ozone nonattainment area, an EGF which is permanently retired or decommissioned and rendered inoperable may be included in the source cap emission limit, provided that the permanent shutdown occurred after January 1, 2000. The source cap emission limit is calculated in accordance with subsection (b) of this section.

(j) (No change.)

(k) For the purposes of determining compliance with the source cap emission limit, the contribution of each affected EGF [~~utility boiler~~] that is operating during a startup, shutdown, or upset period shall be calculated from the $NO_x$ emission rate measured by the $NO_x$ monitor, if operating properly. If the $NO_x$ monitor is not operating properly, the substitute data procedures identified in subsection (e) of this section must be used. If neither the $NO_x$ monitor nor the substitute data procedure are operating properly, the owner or operator must use the maximum daily rate measured during the initial demonstration of compliance, unless the owner or operator provides data demonstrating to the satisfaction of the executive director and the EPA that actual emissions were less than maximum emissions during such periods.

*§117.111. Initial Demonstration of Compliance.*

(a) The owner or operator of all units which are subject to the emission limitations of this division (relating to Utility Electric Generation in Ozone Nonattainment Areas) must test the units [~~be tested~~] as follows.

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

(3) Testing shall be performed in accordance with the schedules specified in §117.510 of this title (relating to Compliance Schedule for [~~For~~] Utility Electric Generation in Ozone Nonattainment Areas).

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

(d) Initial compliance with the emission specifications of this division for units operating with CEMS or PEMS in accordance with §117.113 of this title shall be demonstrated after monitor certification testing using the $NO_x$ CEMS or PEMS as follows:

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

(3) For EGFs [~~utility boilers~~] complying with §117.108 of this title (relating to System Cap), a rolling 30-day average of total daily pounds of $NO_x$ emissions from the EGFs [~~utility boilers~~] are monitored (or calculated in accordance with §117.108(e) of this title) for 30 successive system operating days and the 30-day average emission rate is used to determine compliance with the $NO_x$ emission limit. The 30-day average emission rate is calculated as the average of all daily emissions data recorded by the monitoring and recording system during the 30-day test period. There must be no exceedances of the maximum daily cap during the 30-day test period.

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

*§117.113. Continuous Demonstration of Compliance.*

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

(f) PEMS requirements. The owner or operator of any PEMS used to meet a pollutant monitoring requirement of this section must comply with the following. The required PEMS and fuel flow meters shall be used to demonstrate continuous compliance with the emission limitations of this division.

(1) (No change.)

(2) Monitor diluent, either oxygen or carbon dioxide:

(A) using a CEMS

*(i)* (No change.)

*(ii)* with a similar alternative method approved by the executive director and EPA [~~the United States Environmental Protection Agency~~]; or

(B) (No change.)

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

(g) Stationary gas [~~Gas~~] turbine monitoring for $NO_x$ RACT. The owner or operator of each stationary gas turbine subject to the emission specifications of §117.105 of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT)), instead of monitoring emissions in accordance with the monitoring requirements of 40 CFR 75, may comply with the following monitoring requirements:

(1) for stationary gas turbines rated less than 30 megawatt (MW) or peaking gas turbines (as defined in §117.10 of this title) which use steam or water injection to comply with the emission specifications of §117.105(g) of this title:

(A) - (B) (No change.)

(2) for stationary gas turbines subject to the emission specifications of §117.105(f) of this title, install, calibrate, maintain and operate a CEMS or PEMS in compliance with this section.

(h) Totalizing fuel flow meters. The owner or operator of units listed in this subsection shall install, calibrate, maintain, and operate totalizing fuel flow meters to individually and continuously measure the gas and liquid fuel usage. A computer which collects, sums, and stores electronic data from continuous fuel flow meters is an acceptable totalizer. The units are:

(1) for units which are subject to §117.105 of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT)), and for units in the Beaumont/Port Arthur (BPA) and Dallas/Fort Worth (DFW) ozone nonattainment areas which are subject to §117.106 of this title (relating to Emission Specifications for Attainment Demonstrations):

(A) [~~(1)~~] any unit subject to the emission specifications of this division;

(B) [~~(2)~~] any stationary gas turbine with an MW rating greater than or equal to 1.0 MW operated more than 850 hours per year (hr/yr); and

(C) [~~(3)~~] any unit claimed exempt from the emission specifications of this division using the low annual capacity factor exemption of §117.103(a)(2) of this title (relating to Exemptions); and [~~.~~]

(2) for units in the Houston/Galveston ozone nonattainment area ozone nonattainment area which are subject to §117.106 of this title:

(A) utility boilers;

(B) auxiliary steam boilers; and

(C) stationary gas turbines.

(i) Run time meters. The owner or operator of any stationary gas turbine using the exemption of §117.103(a)(3) or (b) of this title shall record the operating time with an elapsed run time meter approved by the executive director.

(j) (No change.)

(k) Data used for compliance.

(1) After the initial demonstration of compliance required by §117.111 of this title (relating to Initial Demonstration of Compliance) the methods required in this section shall be used to determine compliance with the emission specifications of §117.105 or §117.106(a) or (b) of this title [~~this division~~]. Compliance with the emission limitations may also be determined at the discretion of the executive director using any commission compliance method.

(2) For units subject to the emission specifications of §117.106(c) of this title, the methods required in this section and §117.114 of this title (relating to Emission Testing and Monitoring for the Houston/Galveston Attainment Demonstration) shall be used in conjunction with the requirements of Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) to determine compliance. For enforcement purposes, the executive director may also use other commission compliance methods to determine whether the source is in compliance with applicable emission limitations.

(l) Enforcement of $NO_x$ RACT limits. If compliance with §117.105 of this title is selected, no unit subject to §117.105 of this title shall be operated at an emission rate higher than that allowed by the emission specifications of §117.105 of this title. If compliance with §117.107 of this title is selected, no unit subject to §117.107 of this title shall be operated at an emission rate higher than that approved by the executive director pursuant to §117.115(b) of this title (relating to Final Control Plan Procedures).

*§117.114. Emission Testing and Monitoring for the Houston/Galveston Attainment Demonstration.*

(a) Monitoring requirements. The owner or operator of units which are subject to the emission limits of §117.106(c) of this title (relating to Emission Specifications for Attainment Demonstrations) must comply with the following monitoring requirements.

(1) The nitrogen oxides ($NO_x$) monitoring requirements of §117.113(a), (c), and (d)- (f) of this title (relating to Continuous Demonstration of Compliance) apply.

(2) The carbon monoxide (CO) monitoring requirements of §117.113(b) of this title apply.

(3) The totalizing fuel flow meter requirements of §117.113(h) of this title apply.

(4) Installation of monitors shall be performed in accordance with the schedule specified in §117.510(c)(2) of this title (relating to Compliance Schedule for Utility Electric Generation in Ozone Nonattainment Areas).

(b) Testing requirements. The owner or operator of units which are subject to the emission limits of §117.106(c) of this title must test the units as specified in §117.111 of this title (relating to Initial Demonstration of Compliance).

(c) Emission allowances.

(1) The $NO_x$ testing and monitoring data of subsections (a) and (b) of this section, together with the level of activity, as defined in §101.350 of this title (relating to Definitions), shall be used to establish the emission factor for calculating actual emissions for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(2) For units not operating with continuous emissions monitoring system (CEMS) or predictive emissions monitoring system (PEMS), the following apply.

(A) Retesting as specified in subsection (b) of this section is required within 60 days after any modification which could reasonably be expected to increase the $NO_x$ emission rate.

(B) Retesting as specified in subsection (b) of this section may be conducted at the discretion of the owner or operator after any modification which could reasonably be expected to decrease the $NO_x$ emission rate, including, but not limited to, installation of post-combustion controls, low-$NO_x$ burners, low excess air operation, staged combustion (for example, overfire air), flue gas recirculation (FGR), and fuel-lean and conventional (fuel-rich) reburn.

(C) The $NO_x$ emission rate determined by the retesting shall establish a new emission factor to be used to calculate actual emissions instead of the previously determined emission factor used to calculate actual emissions for compliance with Chapter 101, Subchapter H, Division 3 of this title.

(3) The emission factor in paragraph (1) or (2) of this subsection is multiplied by the unit's level of activity to determine the unit's actual emissions for compliance with Chapter 101, Subchapter H, Division 3 of this title.

*§117.116. Final Control Plan Procedures for Attainment Demonstration Emission Specifications.*

(a) The owner or operator of units [~~utility boilers~~] listed in §117.101 of this title (relating to Applicability) at a major source of nitrogen oxides ($NO_x$) shall submit to the executive director a final control report to show compliance with the requirements of §117.106 of this title (relating to Emission Specifications for Attainment Demonstrations). The report must include:

(1) the section under which $NO_x$ compliance is being established for the utility boilers (and, in the Houston/Galveston ozone nonattainment area, auxiliary boilers and stationary gas turbines) within the electric generating system, either:

(A) - (B) (No change.)

(C) §117.570 of this title (relating to Trading); or

(D) Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program);

(2) the methods of control of $NO_x$ emissions for each utility boiler (and, in the Houston/Galveston ozone nonattainment area, auxiliary boilers and stationary gas turbines) [~~unit~~];

(3) the emissions measured by testing required in §117.111 or §117.114 of this title (relating to Initial Demonstration of Compliance; and Emission Testing and Monitoring for the Houston/Galveston Attainment Demonstration);

(4) the submittal date, and whether sent to the Austin or the regional office (or both), of any compliance stack test report or relative accuracy test audit report required by §117.111 or §117.114 of this title which is not being submitted concurrently with the final compliance report; and

(5) the specific rule citation for any utility boiler (and, in the Houston/Galveston ozone nonattainment area, auxiliary boilers and stationary gas turbines) with a claimed exemption from the emission specification of §117.106 of this title.

(b) (No change.)

(c) The report must be submitted by the applicable date specified for final control plans in §117.510 of this title (relating to Compliance Schedule for [~~For~~] Utility Electric Generation in Ozone Nonattainment Areas). The plan must be updated with any emission compliance measurements submitted for units using continuous emissions monitoring system or predictive emissions monitoring system and complying with the system cap rolling 30-day average emission limit, according to the applicable schedule given in §117.510 of this title.

*§117.119. Notification, Recordkeeping, and Reporting Requirements.*

(a) Start-up and shutdown records. For units subject to the start-up and/or shutdown exemptions allowed under §101.11 of this title (relating to Demonstrations [~~Exemptions from Rules and Regulations~~]), hourly records shall be made of start-up and/or shutdown events and maintained for a period of at least two years. Records shall be available for inspection by the executive director, EPA [~~the Unites States Environmental Protection Agency (EPA)~~], and any local air pollution control agency having jurisdiction upon request. These records shall include, but are not limited to: type of fuel burned; quantity of each type fuel burned; gross and net energy production in megawatt-hours (MW-hr); and the date, time, and duration of the event.

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

(d) Semiannual reports. The owner or operator of a unit required to install a CEMS, PEMS, or steam- to-fuel or water-to-fuel ratio monitoring system under §117.113 of this title shall report in writing to the executive director on a semiannual basis any exceedance of the applicable emission limitations in this division and the monitoring system performance. All reports shall be postmarked or received by the 30th day following the end of each calendar semiannual period. Written reports shall include the following information:

(1) the magnitude of excess emissions computed in accordance with 40 Code of Federal Regulations (CFR), Part 60, §60.13(h), any conversion factors used, the date and time of commencement and completion of each time period of excess emissions, and the unit operating time during the reporting period.

(A) For stationary gas turbines using steam-to-fuel or water-to-fuel ratio monitoring to demonstrate compliance in accordance with §117.113 of this title, excess emissions are computed as each one-hour period during which the hourly steam-to-fuel or water-to-fuel ratio is less than the ratio determined to result in compliance during the initial demonstration of compliance test required by §117.111 of this title.

(B) (No change.)

(2) - (5) (No change.)

(e) (No change.)

*§117.121. Alternative Case Specific Specifications.*

(a) Where a person can demonstrate that an affected unit cannot attain the applicable requirements of §117.105 of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT)), or the carbon monoxide or ammonia limits of §117.106(d) [~~§117.106(c)~~] of this title (relating to Emission Specifications for Attainment Demonstrations), the executive director may approve emission specifications different from §117.105 of this title for that unit. The executive director:

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

(b) Any person affected by the executive director's decision to deny an alternative case specific emission specification may file a motion for reconsideration. The requirements of §50.39 of this title (relating to Motion for Reconsideration) or §50.139 of this title (relating to Overturn Executive Director's Decision) apply. However, only a person affected may file a motion for reconsideration. Executive director approval does not necessarily constitute satisfaction of all federal requirements nor eliminate the need for approval by the EPA [~~United States Environmental Protection Agency~~] in cases where specified criteria for determining equivalency have not been clearly identified in applicable sections of this division (relating to Utility Electric Generation in Ozone Nonattainment Areas).

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005643
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## DIVISION 2. UTILITY ELECTRIC GENERATION IN EAST AND CENTRAL TEXAS

**30 TAC §117.138**

STATUTORY AUTHORITY

The amendment is proposed under the Texas Health and Safety Code, TCAA, §382.011, concerning General Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.012, concerning State Air Control Plan, which requires the commission to develop plans for protection of the state's air, such as the SIP; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; §382.017, concerning Rules, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and §382.051(d), concerning Permitting Authority of Board; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Chapter 382.

The proposed amendment implements the Texas Health and Safety Code, TCAA, §§382.011, 382.012, 382.016, 382.017, and 382.051(d).

*§117.138. System Cap.*

(a) (No change.)

(b) Each unit within an electric power generating system, as defined in §117.10(12)(B) [~~§117.10(11)(B)~~] of this title (relating to Definitions), that would otherwise be subject to the $NO_x$ emission limits of §117.135 of this title must be included in the system cap.

(c) - (k) (No change.)

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005642
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## DIVISION 3. INDUSTRIAL, COMMERCIAL, AND INSTITUTIONAL COMBUSTION SOURCES IN OZONE NONATTAINMENT AREAS

**30 TAC §§117.201, 117.203, 117.205 - 117.208, 117.210, 117.211, 117.213, 117.214, 117.216, 117.219, 117.221**

STATUTORY AUTHORITY

The amendments and new sections are proposed under the Texas Health and Safety Code, TCAA, §382.011, concerning General Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.012, concerning State Air Control Plan, which requires the commission to develop plans for protection of the state's air, such as the SIP; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; §382.017, concerning Rules, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and §382.051(d), concerning Permitting Authority of Board; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Chapter 382.

The proposed amendments and new sections implement the Texas Health and Safety Code, TCAA, §§382.011, 382.012, 382.016, 382.017, and 382.051(d).

*§117.201. Applicability.*

The provisions of this division (relating to Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas), shall apply to the following units located at any major stationary source of nitrogen oxides located within the Beaumont/Port Arthur, Dallas/Fort Worth, or Houston/Galveston ozone nonattainment areas:

(1) industrial, commercial, or institutional [~~, or industrial~~] boilers and process heaters [~~with a maximum rated capacity of 40 million Btu per hour or greater~~];

(2) stationary gas turbines; [~~with a megawatt (MW) rating of 1.0 MW or greater; and~~]

(3) stationary internal combustion engines; [~~which are:~~]

[~~(A) located in the Houston/Galveston ozone nonattainment area with a horsepower (hp) rating of 150 hp or greater; or~~]

[~~(B) located in the Beaumont/Port Arthur or Dallas/Fort Worth ozone nonattainment area with a horsepower rating of 300 hp or greater.~~]

(4) fluid catalytic cracking units (including carbon monoxide (CO) boilers, CO furnaces, and catalyst regenerator vents);

(5) boilers and industrial furnaces which were regulated as existing facilities by the EPA at 40 Code of Federal Regulations Part 266, Subpart H (as was in effect on June 9, 1993);

(6) duct burners used in turbine exhaust ducts;

(7) pulping liquor recovery furnaces;

(8) lime kilns;

(9) lightweight aggregate kilns;

(10) heat treating furnaces and reheat furnaces;

(11) magnesium chloride fluidized bed dryers; and

(12) incinerators (including fume abaters).

*§117.203. Exemptions.*

(a) Units exempted from the provisions of this division (relating to Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas), except as may be specified in §117.209(c)(1) of this title (relating to Initial Control Plan Procedures) [~~and §117.213(a) and (i) of this title (relating to Continuous Demonstration of Compliance)~~], include the following:

(1) any new units placed into service after November 15, 1992, except for new units which were placed into service as functionally identical replacement for existing units subject to the provisions of this division as of June 9, 1993. Any emission credits resulting from the operation of such replacement units shall be limited to the cumulative maximum rated capacity of the units replaced;

(2) any commercial, institutional, or industrial boiler or process heater with a maximum rated capacity of less than 40 million Btu per hour (MMBtu/hr);

(3) heat treating furnaces and reheat furnaces. This exemption shall no longer apply to any heat treating furnace or reheat furnace with a maximum rated capacity of 20 MMBtu/hr or greater in the Houston/Galveston ozone nonattainment area after the appropriate compliance date(s) for emission specifications for attainment demonstrations specified in §117.520 of this title (relating to Compliance Schedule for Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas);

[~~(3) any electric utility power generating boiler;~~]

(4) flares, incinerators, fume abaters, pulping liquor recovery furnaces, sulfur recovery units, sulfuric acid regeneration units, and sulfur plant reaction boilers. This exemption shall no longer apply to the following units in the Houston/Galveston ozone nonattainment area after the appropriate compliance date(s) for emission specifications for attainment demonstrations specified in §117.520 of this title:

(A) incinerators (including fume abaters) with a maximum rated capacity of 40 MMBtu/hr or greater; and

(B) pulping liquor recovery furnaces;

(5) dryers, kilns, or ovens used for drying, baking, cooking, calcining, and vitrifying. This exemption shall no longer apply to the following units in the Houston/Galveston ozone nonattainment area after the appropriate compliance date(s) for emission specifications for attainment demonstrations specified in §117.520 of this title:

(A) magnesium chloride fluidized bed dryers; and

(B) lime kilns and lightweight aggregate kilns;

(6) stationary gas turbines and engines, which are:

(A) used in research and testing, or used for purposes of performance verification and testing, or used solely to power other engines or gas turbines during start-ups, or operated exclusively for firefighting and/or flood control, or used in response to and during the existence of any officially declared disaster or state of emergency, or used directly and exclusively by the owner or operator for agricultural operations necessary for the growing of crops or raising of fowl or animals, or used as chemical processing gas turbines; or

(B) demonstrated to operate less than 850 hours per year, based on a rolling 12-month average; [.]

(7) stationary gas turbines with a megawatt (MW) rating of less than 1.0 MW; [and]

(8) stationary internal combustion engines which are:

(A) located in the Houston/Galveston ozone nonattainment area with a horsepower (hp) rating of less than 150 hp; or

(B) located in the Beaumont/Port Arthur or Dallas/Fort Worth ozone nonattainment area with a hp rating of less than 300 hp; and [.]

(9) any boiler or process heater with a maximum rated capacity of 2.0 MMBtu/hr or less.

(b) The exemptions in paragraphs (1), (2), (6)(B), (7), and (8)(A) of subsection (a) shall no longer apply in the Houston/Galveston ozone nonattainment area after the appropriate compliance date(s) for emission specifications for attainment demonstrations specified in §117.520 of this title.

(c) Upon issuance of a standard permit by the commission for the distributed generation of electricity, combustion sources registered under that permit are exempt from this chapter.

*§117.205. Emission Specifications for Reasonably Available Control Technology (RACT).*

(a) (No change.)

(b) For each boiler and process heater with a maximum rated capacity greater than or equal to 100.0 MMBtu/hr of heat input, the applicable emission limit is as follows:

(1) - (5) (No change.)

(6) for any gas-fired boiler or process heater firing gaseous fuel which contains more than 50% hydrogen by volume, over an eight-hour period, in which the fuel gas composition is sampled and analyzed every three hours, a multiplier of up to 1.25 times the appropriate emission limit in this subsection may be used for that eight-hour period. The total hydrogen volume in all gaseous fuel streams will be divided by the total gaseous fuel flow volume to determine the volume percent of hydrogen in the fuel supply. The multiplier may not be used to increase limits set by permit. [;] The following equation shall be used by an owner or operator using a gas-fired boiler or process heater which is subject to this paragraph and one of the rolling 30-day averaging period emission limitations contained in paragraph (1) or (2) of this subsection to calculate an emission limitation for each rolling 30-day period: Figure: 30 TAC §117.205(b)(6)

(7) for units which operate with a $NO_x$ continuous emissions monitoring system [emission monitors] (CEMS) or predictive emissions monitoring system [emission monitors] (PEMS) under §117.213 of this title (relating to Continuous Demonstration of Compliance), the emission limits shall apply as:

(A) - (B) (No change.)

(8) (No change.)

(c) No person shall allow the discharge into the atmosphere from any stationary gas turbine with a MW rating greater than or equal to 10.0 MW, emissions in excess of a block one-hour average concentration of 42 parts per million by volume (ppmv) $NO_x$ and 132 ppmv carbon monoxide (CO) at 15% oxygen ($O_2$), dry basis. For stationary gas turbines equipped with CEMS or PEMS for CO, the owner or operator may elect to comply with the CO limit of this subsection using a 24-hour rolling average.

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

(h) Units exempted from the emissions specifications of this section include the following:

(1) any industrial, commercial, or institutional [, or industrial] boiler or process heater with a maximum rated capacity less than 100 MMBtu/hr;

(2) (No change.)

(3) boilers and industrial furnaces which were regulated as existing facilities by the EPA [United States Environmental Protection Agency] at 40 Code of Federal Regulations Part 266, Subpart H, as was in effect on June 9, 1993;

(4) fluid catalytic cracking units (including CO boilers, CO furnaces, and catalyst regenerator vents);

(5) duct burners [supplemental waste heat recovery units] used in turbine exhaust ducts;

(6) any lean-burn, stationary, reciprocating internal combustion engine located in the Houston/Galveston or Dallas/Fort Worth ozone nonattainment area; [and]

(7) any stationary gas turbine with an MW rating less than 10.0 MW; [.]

(8) any new units placed into service after November 15, 1992, except for new units which were placed into service as functionally identical replacement for existing units subject to the provisions of this division as of June 9, 1993. Any emission credits resulting from the operation of such replacement units shall be limited to the cumulative maximum rated capacity of the units replaced;

(9) any industrial, commercial, or institutional, boiler or process heater with a maximum rated capacity of less than 40 MMBtu/hr;

(10) stationary gas turbines and engines, which are demonstrated to operate less than 850 hours per year, based on a rolling 12-month average; and

(11) stationary internal combustion engines which are:

(A) located in the Houston/Galveston ozone nonattainment area with a horsepower (hp) rating of less than 150 hp; or

(B) located in the Beaumont/Port Arthur or Dallas/Fort Worth ozone nonattainment area with a hp rating of less than 300 hp.

(i) This section shall no longer apply:

(1) to any gas-fired boiler or process heater in the Beaumont/Port Arthur ozone nonattainment area after the appropriate compliance date(s) for emission specifications for attainment demonstrations given in §117.520(a)(3) of this title; and

(2) in the Houston/Galveston ozone nonattainment area after the appropriate compliance date(s) for emission specifications for attainment demonstrations given in §117.520(c)(2) of this title.

*§117.206. Emission Specifications for Attainment Demonstrations.*

(a) Beaumont/Port Arthur. No person shall allow the discharge into the atmosphere from any gas-fired boiler or process heater with a maximum rated capacity equal to or greater than 40 million (MM) Btu/hr in the Beaumont/Port Arthur ozone nonattainment area, emissions of nitrogen oxides ($NO_x$) in excess of the following, except as provided in subsections (f) [~~(d)~~] and (g) [~~(e)~~] of this section:

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

(b) Dallas/Fort Worth. No person shall allow the discharge into the atmosphere in the Dallas/Fort Worth ozone nonattainment area, emissions in excess of the following, except as provided in subsections (f) [~~(d)~~] and (g) [~~(e)~~] of this section:

(1) (No change.)

(2) gas-fired and gas/liquid-fired, lean-burn, stationary reciprocating internal combustion engines rated 300 horsepower (hp) or greater, 2.0 grams $NO_x$ per horsepower hour (g $NO_x$/hp-hr) and 3.0 g carbon monoxide (CO)/hp-hr [~~g CO/hp-hr~~].

(c) Houston/Galveston. In the Houston/Galveston ozone nonattainment area, the emission rate values used to determine allocations for Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) shall be the lower of any applicable permit limit or the following:

(1) gas-fired boilers:

(A) with a maximum rated capacity equal to or greater than 100 MMBtu/hr, 0.010 lb $NO_x$ per MMBtu;

(B) with a maximum rated capacity equal to or greater than 40 MMBtu/hr, but less than 100 MMBtu/hr, 0.015 lb $NO_x$ per MMBtu; and

(C) with a maximum rated capacity less 40 MMBtu/hr, 0.036 lb $NO_x$ per MMBtu (or alternatively, 30 ppmv $NO_x$, at 3.0% $O_2$, dry basis);

(2) fluid catalytic cracking units (including CO boilers, CO furnaces, and catalyst regenerator vents), 10 ppmv $NO_x$ at 0.0% $O_2$, dry basis;

(3) boilers and industrial furnaces which were regulated as existing facilities by the EPA at 40 Code of Federal Regulations Part 266, Subpart H (as was in effect on June 9, 1993), 0.015 lb $NO_x$ per MMBtu;

(4) coke-fired boilers, 0.057 lb $NO_x$ per MMBtu;

(5) wood fuel-fired boilers, 0.020 lb $NO_x$ per MMBtu;

(6) rice hull-fired boilers, 0.089 lb $NO_x$ per MMBtu;

(7) oil-fired boilers, 2.0 lb $NO_x$ per 1,000 gallons of oil burned;

(8) process heaters:

(A) with a maximum rated capacity equal to or greater than 100 MMBtu/hr, 0.010 lb $NO_x$ per MMBtu;

(B) with a maximum rated capacity equal to or greater than 40 MMBtu/hr, but less than 100 MMBtu/hr, 0.015 lb $NO_x$ per MMBtu; and

(C) with a maximum rated capacity less 40 MMBtu/hr, 0.036 lb $NO_x$ per MMBtu (or alternatively, 30 ppmv $NO_x$, at 3.0% $O_2$, dry basis);

(9) stationary, reciprocating internal combustion engines:

(A) gas-fired engines at sites with a total hp rating of 3,000 hp or more in 1997 or later, 0.17 g $NO_x$/hp-hr, except as specified in subparagraph (C) of this paragraph;

(B) gas-fired engines at sites with a total hp rating of less than 3,000 hp in 1997 or later, 0.50 g $NO_x$/hp-hr; and

(C) dual-fuel engines:

*(i)* with initial start of operation on or before December 31, 2000, 0.50 g $NO_x$/hp-hr; and;

*(ii)* with initial start of operation after December 31, 2000, 0.17 g $NO_x$/hp- hr;

(10) stationary gas turbines, 0.015 lb $NO_x$ per MMBtu;

(11) duct burners used in turbine exhaust ducts, 0.015 lb $NO_x$ per MMBtu;

(12) pulping liquor recovery furnaces, 0.050 lb $NO_x$ per MMBtu;

(13) kilns:

(A) lime kilns, 0.66 lb $NO_x$ per ton of calcium oxide (CaO); and

(B) lightweight aggregate kilns, 0.76 lb $NO_x$ per ton of product;

(14) furnaces:

(A) heat treating furnaces, 0.087 lb $NO_x$ per MMBtu; and

(B) reheat furnaces, 0.062 lb $NO_x$ per MMBtu;

(15) magnesium chloride fluidized bed dryers, a 90% reduction from the emission factor used to calculate the 1997 ozone season daily $NO_x$ emissions; and

(16) incinerators (including fume abaters), a 90% reduction from the emission factor used to calculate the 1997 ozone season daily $NO_x$ emissions.

(d) [~~(c)~~] $NO_x$ averaging time.

(1) In the Beaumont/Port Arthur and Dallas/Fort Worth ozone nonattainment areas, the [~~The~~] emission limits of subsections (a) and (b) of this section shall apply:

(A) [~~(1)~~] if the unit is operated with a $NO_x$ continuous emissions monitoring system [~~emission monitors~~] (CEMS) or predictive emissions monitoring system [~~emission monitors~~] (PEMS) under §117.213 of this title (relating to Continuous Demonstration of Compliance), either as:

*(i)* [~~(A)~~] a rolling 30-day average period, in the units of the applicable standard;

*(ii)* [~~(B)~~] a block one-hour average, in the units of the applicable standard, or alternatively;

*(iii)* [~~(C)~~] a block one-hour average, in pounds per hour, for boilers and process heaters, calculated as the product of the boiler's or process heater's maximum rated capacity and its applicable limit in lb $NO_x$ per MMBtu; and

(B) [~~(2)~~] if the unit is not operated with a $NO_x$ CEMS or PEMS under §117.213 of this title, a block one-hour average, in the units of the applicable standard. Alternatively for boilers and process heaters, the emission limits may be applied in lbs per hour, as specified in subparagraph (A)(iii) of this paragraph [~~paragraph (1)(C) of this subsection~~].

(2) In the Houston/Galveston ozone nonattainment area, the averaging time for the emission limits of subsection (c) of this section shall be as specified in Chapter 101, Subchapter H, Division 3 of this title, except that electric generating facilities (EGFs) shall also comply with the daily and 30-day system cap emission limitations of §117.210 of this title (relating to System Cap).

(e) [~~(d)~~] Related emissions. No person shall allow the discharge into the atmosphere from any boiler or process heater subject to $NO_x$ emission specifications in subsection (a), (b), or (c) [~~(b)~~] of this section, emissions in excess of the following, except as provided in §117.221 of this title (relating to Alternative Case Specific Specifications):

(1) carbon monoxide (CO), 400 ppmv at 3.0% $O_2$, dry basis;

(A) on a rolling 24-hour averaging period, for units equipped with CEMS or PEMS for CO; and

(B) on a one-hour average, for units not equipped with CEMS or PEMS for CO; and

(2) ammonia emissions, 10 [~~5~~] ppmv on a block one-hour averaging period.

(f) [~~(e)~~] Compliance flexibility.

(1) In the Beaumont/Port Arthur and Dallas/Fort Worth ozone nonattainment areas, an [~~An~~] owner or operator may use any of the following alternative methods to comply with the $NO_x$ emission specifications of this section:

(A) §117.207 of this title (relating to Alternative Plant-Wide Emission Specifications);

(B) §117.223 of this title (relating to Source Cap); or

(C) §117.570 (relating to Trading).

(2) Section 117.221 of this title (relating to Alternative Case Specific Specifications) is not an applicable method of compliance with the $NO_x$ emission specifications of this section.

(3) An owner or operator may petition the executive director for an alternative to the CO or ammonia limits of this section in accordance with §117.221 of this title.

(4) In the Houston/Galveston ozone nonattainment area, an owner or operator may not use the alternative methods specified in §§117.207, 117.223, and 117.570 of this title to comply with the $NO_x$ emission specifications of this section. The owner or operator shall use the mass emissions cap and trade program in Chapter 101, Subchapter H, Division 3 of this title to comply with the $NO_x$ emission specifications of this section, except that EGFs shall also comply with the daily and 30-day system cap emission limitations of §117.210 of this title.

(g) [~~(f)~~] Exemptions. Units exempted from the emissions specifications of this section include the following in the Beaumont/Port Arthur and Dallas/Fort Worth ozone nonattainment areas:

(1) any industrial, commercial, or institutional [~~, or industrial~~] boiler or process heater with a maximum rated capacity less than 40 MMBtu/hr; and

(2) units exempted from emission specifications in §117.205(h)(2) - (5) of this title.

*§117.207. Alternative Plant-wide Emission Specifications.*

(a) (No change.)

(b) The owner or operator shall establish an enforceable ($NO_x$) emission limit for each affected unit at the source as follows.

(1) For boilers and process heaters which operate with continuous emissions monitoring system [~~emission monitors~~] (CEMS) or predictive emissions monitoring system [~~emission monitors~~] (PEMS) in accordance with §117.213 of this title (relating to Continuous Demonstration of Compliance), the emission limits shall apply in:

(A) - (B) (No change.)

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

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

(f) Units exempted from emission specifications in accordance with §117.205(h) and §117.206(g) [~~§117.206(e)~~] of this title are also exempt under this section and shall not be included in the plant-wide emission limit, except as follows. The owner or operator of exempted units as defined in §117.205(h) and §117.206(g) [~~§117.206(e)~~] of this title may opt to include one or more of an entire equipment class of exempted units into the alternative plant-wide emission specifications.

(1) Low annual capacity factor boilers, process heaters, stationary gas turbines, or stationary internal combustion engines as defined in §117.10 of this title are not to be considered as part of the opt-in class of equipment.

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

(4) The equipment classes which may be included in the alternative plant-wide emission specifications and the $NO_x$ emission rates that are to be used in calculating the alternative plant-wide emission specifications are listed in the [~~following~~] table titled[~~,~~] §117.207(f) OPT- IN UNITS.[~~:~~]
Figure: 30 TAC §117.207(f)(4)

(g) - (i) (No change.)

*§117.208. Operating Requirements.*

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

(d) All units subject to the emission limitations of §§117.205, 117.206 [~~(relating to Emission Specifications for Attainment Demonstrations~~], 117.207, or 117.223 of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT); Emission Specifications for Attainment Demonstrations; Alternative Plant-wide Emission Specifications; and Source Cap) shall be operated so as to minimize $NO_x$ emissions, consistent with the emission control techniques selected, over the unit's operating or load range during normal operations. Such operational requirements include the following.

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

(4) Each unit controlled with steam or water injection shall be operated such that injection rates are maintained to limit $NO_x$ concentrations to less than or equal to the $NO_x$ concentrations achieved at maximum rated capacity (corrected to 15% $O_2$ on a dry basis for stationary gas turbines).

(5) - (7) (No change.)

*§117.210. System Cap.*

(a) The owner or operator of each electric generating facility (EGF) in the Houston/Galveston ozone nonattainment area must comply with a daily and 30-day system cap emission limitation for nitrogen oxides ($NO_x$) in accordance with the requirements of this section.

(b) Each EGF that would otherwise be subject to the $NO_x$ emission rates of §117.206 of this title (relating to Emission Specifications for Attainment Demonstrations) must be included in the system cap.

(c) The system cap shall be calculated as follows.

(1) A rolling 30-day average emission cap shall be calculated using the following equation.
Figure: 30 TAC §117.210(c)(1)

(2) A maximum daily cap shall be calculated using the following equation.
Figure: 30 TAC §117.210(c)(2)

(3) Each EGF in the system cap shall be subject to the emission limits of both paragraphs (1) and (2) of this subsection at all times.

(d) The $NO_x$ emissions monitoring required by §117.213 of this title (relating to Continuous Demonstration of Compliance) for each EGF in the system cap shall be used to demonstrate continuous compliance with the system cap.

(e) For each operating EGF, the owner or operator shall use one of the following methods to provide substitute emissions compliance data during periods when the $NO_x$ monitor is off-line:

(1) if the $NO_x$ monitor is a continuous emissions monitoring system (CEMS):

(A) subject to 40 CFR 75, use the missing data procedures specified in 40 CFR 75, Subpart D (Missing Data Substitution Procedures); or

(B) subject to 40 CFR 75, Appendix E, use the missing data procedures specified in 40 CFR 75, Appendix E, §2.5 (Missing Data Procedures);

(2) use Appendix E monitoring in accordance with §117.113(d) of this title (relating to Continuous Demonstration of Compliance);

(3) if the $NO_x$ monitor is a predictive emissions monitoring system (PEMS):

(A) use the methods specified in 40 CFR 75, Subpart D; or

(B) use calculations in accordance with §117.113(f) of this title; or

(4) if the methods specified in paragraphs (1) - (3) of this subsection are not used, the owner or operator must use the maximum block one-hour emission rate as measured by the 30-day testing.

(f) The owner or operator of any EGF subject to a system cap shall maintain daily records indicating the $NO_x$ emissions and fuel usage from each EGF and summations of total $NO_x$ emissions and fuel usage for all EGFs under the system cap on a daily basis. Records shall also be retained in accordance with §117.219 of this title (relating to Notification, Recordkeeping, and Reporting Requirements).

(g) The owner or operator of any EGF subject to a system cap shall report any exceedance of the system cap emission limit within 48 hours to the appropriate regional office. The owner or operator shall then follow up within 21 days of the exceedance with a written report to the regional office which includes an analysis of the cause for the exceedance with appropriate data to demonstrate the amount of emissions in excess of the applicable limit and the necessary corrective actions taken by the company to assure future compliance. Additionally, the owner or operator shall submit semiannual reports for the monitoring systems in accordance with §117.219 of this title.

(h) The owner or operator of any EGF subject to a system cap shall demonstrate initial compliance with the system cap in accordance with the schedule specified in §117.520 of this title (relating to Compliance Schedule for Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas).

(i) An EGF which is permanently retired or decommissioned and rendered inoperable may be included in the source cap emission limit, provided that the permanent shutdown occurred after January 1, 2000. The source cap emission limit is calculated in accordance with subsection (b) of this section.

(j) Emission reductions from shutdowns or curtailments which have been used for netting or offset purposes under the requirements of Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) may not be included in the baseline for establishing the cap.

(k) For the purposes of determining compliance with the source cap emission limit, the contribution of each affected EGF that is operating during a startup, shutdown, or upset period shall be calculated from the $NO_x$ emission rate measured by the $NO_x$ monitor, if operating properly. If the $NO_x$ monitor is not operating properly, the substitute data procedures identified in subsection (e) of this section must be used. If neither the $NO_x$ monitor nor the substitute data procedure are operating properly, the owner or operator must use the maximum daily rate measured during the initial demonstration of compliance, unless the owner or operator provides data demonstrating to the satisfaction of the executive director and the EPA that actual emissions were less than maximum emissions during such periods.

*§117.211. Initial Demonstration of Compliance.*

(a) The owner or operator of all units which are subject to the emission limitations of this division (relating to Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas) must test the units as follows.

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

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

(e) Compliance with the emission specifications of this division for units operating without CEMS or PEMS shall be demonstrated while operating at the maximum rated capacity, or as near thereto as practicable. Compliance shall be determined by the average of three one-hour emission test runs, using the following test methods:

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

(5) American Society of Testing and Materials (ASTM) Method D1945-91 or ASTM Method D3588- 93 for fuel composition; ASTM Method D1826-88 or ASTM Method D3588-91 for calorific value; or alternate methods as approved by the executive director and EPA [~~the United States Environmental Protection Agency (EPA)~~]; or

(6) (No change.)

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

*§117.213. Continuous Demonstration of Compliance.*

(a) Totalizing fuel flow meters. The owner or operator of units listed in this subsection shall install, calibrate, maintain, and operate a totalizing fuel flow meter to individually and continuously measure

the gas and liquid fuel usage. A computer which collects, sums, and stores electronic data from continuous fuel flow meters is an acceptable totalizer.

(1) The units are the following:

(A) for units which are subject to §117.205 of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT)), and for units in the Beaumont/Port Arthur (BPA) and Dallas/Fort Worth (DFW) ozone nonattainment areas which are subject to §117.206 of this title (relating to Emission Specifications for Attainment Demonstrations):

*(i)* [~~(A)~~] if individually rated more than 40 million British thermal units (Btu) per hour (MMBtu/hr):

*(I)* [~~(i)~~] boilers;

*(II)* [~~(ii)~~] process heaters;

*(III)* [~~(iii)~~] boilers and industrial furnaces which were regulated as existing facilities by EPA at 40 Code of Federal Regulations (CFR) Part 266, Subpart H, as was in effect on June 9, 1993; and

*(IV)* [~~(iv)~~] gas turbine supplemental-fired waste heat recovery units;

*(ii)* [~~(B)~~] stationary, reciprocating internal combustion engines not exempt by §117.203(a)(6) or (8) [~~§117.203(6) or (8)~~] of this title (relating to Exemptions), or §117.205(h)(10) or (11) of this title;

*(iii)* [~~(C)~~] stationary gas turbines with a megawatt (MW) rating greater than or equal to 1.0 MW operated more than 850 hours per year; and

*(iv)* [~~(D)~~] fluid catalytic cracking unit boilers using supplemental fuel; and [~~.~~]

(B) for units in the Houston/Galveston (HGA) ozone nonattainment area which are subject to §117.206 of this title:

*(i)* boilers;

*(ii)* process heaters;

*(iii)* boilers and industrial furnaces which were regulated as existing facilities by EPA at 40 CFR Part 266, Subpart H, as was in effect on June 9, 1993;

*(iv)* duct burners used in turbine exhaust ducts;

*(v)* stationary, reciprocating internal combustion engines;

*(vi)* stationary gas turbines;

*(vii)* fluid catalytic cracking unit boilers and furnaces using supplemental fuel;

*(viii)* pulping liquor recovery furnaces;

*(ix)* lime kilns;

*(x)* lightweight aggregate kilns;

*(xi)* heat treating furnaces;

*(xii)* reheat furnaces;

*(xiii)* magnesium chloride fluidized bed dryers; and

*(xiv)* incinerators.

(2) As an alternative to the fuel flow monitoring requirements of this subsection, units operating with a nitrogen oxides ($NO_x$) and diluent continuous emissions [~~emission~~] monitoring system (CEMS) under subsection (e) of this section may monitor stack exhaust flow using the flow monitoring specifications of 40 CFR 60, Appendix B, Performance Specification 6 or 40 CFR 75, Appendix A.

(b) Oxygen ($O_2$) monitors.

(1) (No change.)

(2) The following are not subject to this subsection:

(A) units listed in §117.205(h)(3) - (5) and (8) - (11) of this title [~~(relating to Emission Specifications~~];

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

(3) (No change.)

(c) $NO_x$ monitors.

(1) The owner or operator of units listed in this paragraph shall install, calibrate, maintain, and operate a CEMS or predictive emissions monitoring system (PEMS) to monitor exhaust $NO_x$. The units are:

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

(E) units which use a chemical reagent for reduction of $NO_x$; [~~and~~]

(F) units for which the owner or operator elects to comply with the $NO_x$ emission specifications of §117.205 or §117.206(a) or (b) of this title [~~this division~~] using a pound per MMBtu limit on a 30-day rolling average;[~~.~~]

(G) lime kilns and lightweight aggregate kilns in HGA; and

(H) units with a rated heat input greater than or equal to 100 MMBtu/hr which are subject to §117.206(c) of this title.

(2) The following are not required to install CEMS or PEMS under this subsection:

(A) for purposes of §117.205 or §117.206(a) or (b) of this title, units listed in §117.205(h)(3) - (5) and (8) - (11) of this title [~~(relating to Emission Specifications for Reasonably Available Control Technology)~~]; and

(B) (No change.)

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

(h) Monitoring for stationary gas turbines less than 30 MW. The owner or operator of any stationary gas turbine rated less than 30 MW using steam or water injection to comply with the emission specifications of §117.205 or §117.207 of this title (relating to Alternative Plant- wide Emission Specifications) shall either:

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

(i) Run time meters. The owner or operator of any stationary gas turbine or stationary internal combustion engine claimed exempt using the 850 hours per year exemption of §117.203(a)(6)(B) [~~§117.203(6)(B)~~] of this title shall record the operating time with an elapsed run time meter.

(j) (No change.)

(k) Data used for compliance.

(1) After the initial demonstration of compliance required by §117.211 of this title, the methods required in this section shall be used to determine compliance with the emission specifications of §117.205 or §117.206(a) or (b) of this title [~~this division~~]. For enforcement purposes, the executive director may also use other commission

compliance methods to determine whether the source is in compliance with applicable emission limitations.

(2) For units subject to the emission specifications of §117.206(c) of this title, the methods required in this section and §117.214 of this title (relating to Emission Testing and Monitoring for the Houston/Galveston Attainment Demonstration) shall be used in conjunction with the requirements of Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) to determine compliance. For enforcement purposes, the executive director may also use other commission compliance methods to determine whether the source is in compliance with applicable emission limitations.

(l) Enforcement of $NO_x$ RACT limits. If compliance with §117.205 of this title is selected, no unit subject to §117.205 of this title shall be operated at an emission rate higher than that allowed by the emission specifications of §117.205 of this title. If compliance with §117.207 of this title is selected, no unit subject to §117.207 of this title shall be operated at an emission rate higher than that approved by the executive director pursuant to §117.215(b) of this title (relating to Final Control Plan Procedures for Reasonably Available Control Technology).

(m) Loss of $NO_x$ RACT exemption. The owner or operator of any unit claimed exempt from the emission specifications of this division using the low annual capacity factor exemption of §117.205(h)(2) of this title (relating to Definitions), shall notify the executive director within seven days if the Btu/yr or hour-per-year limit specified in §117.10 of this title, as appropriate, is exceeded.

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

*§117.214. Emission Testing and Monitoring for the Houston/Galveston Attainment Demonstration.*

(a) Monitoring requirements. The owner or operator of units which are subject to the emission limits of §117.206(c) of this title (relating to Emission Specifications for Attainment Demonstrations) must comply with the following monitoring requirements.

(1) The nitrogen oxides ($NO_x$) monitoring requirements of §117.213(c), and (e) - (f) of this title (relating to Continuous Demonstration of Compliance) apply.

(2) The carbon monoxide (CO) monitoring requirements of §117.213(d) of this title apply.

(3) The totalizing fuel flow meter requirements of §117.213(a) of this title apply.

(4) Installation of monitors shall be performed in accordance with the schedule specified in §117.520(c)(2) of this title (relating to Compliance Schedule for Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas).

(b) Testing requirements. The owner or operator of units which are subject to the emission limits of §117.206(c) of this title must test the units as specified in §117.211 of this title (relating to Initial Demonstration of Compliance).

(c) Emission allowances.

(1) The $NO_x$ testing and monitoring data of subsections (a) and (b) of this section, together with the level of activity, as defined in §101.350 of this title (relating to Definitions), shall be used to establish the emission factor for calculating actual emissions for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(2) For units not operating with continuous emissions monitoring system (CEMS) or predictive emissions monitoring system (PEMS), the following apply.

(A) Retesting as specified in subsection (b) of this section is required within 60 days after any modification which could reasonably be expected to increase the $NO_x$ emission rate.

(B) Retesting as specified in subsection (b) of this section may be conducted at the discretion of the owner or operator after any modification which could reasonably be expected to decrease the $NO_x$ emission rate, including, but not limited to, installation of post-combustion controls, low-$NO_x$ burners, low excess air operation, staged combustion (for example, overfire air), flue gas recirculation (FGR), and fuel-lean and conventional (fuel-rich) reburn.

(C) The $NO_x$ emission rate determined by the retesting shall establish a new emission factor to be used to calculate actual emissions instead of the previously determined emission factor used to calculate actual emissions for compliance with Chapter 101, Subchapter H, Division 3 of this title.

(3) The emission factor in paragraph (1) or (2) of this subsection is multiplied by the unit's level of activity to determine the unit's actual emissions for compliance with Chapter 101, Subchapter H, Division 3 of this title.

*§117.216. Final Control Plan Procedures for Attainment Demonstration Emission Specifications.*

(a) The owner or operator of units listed in §117.206 of this title (relating to Emission Specifications for Attainment Demonstrations) at a major source of nitrogen oxides ($NO_x$) shall submit a final control report to show compliance with the requirements of §117.206 of this title. The report must include:

(1) the section under which $NO_x$ compliance is being established, either:

(A) (No change.)

(B) Section 117.210 of this title (relating to System Cap);

(C) [~~(B)~~] Section 117.223 of this title (relating to Source Cap); and as applicable, [~~or~~]

(D) [~~(C)~~] Section 117.570 of this title (relating to Trading); or

(E) Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program);

(2) - (5) (No change.)

(b) (No change.)

(c) The report must be submitted to the executive director by the applicable date specified for final control plans in §117.520(a) or (b) of this title (relating to Compliance Schedule for [~~For~~] Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas). The plan must be updated with any emission compliance measurements submitted for units using continuous emissions monitoring system or predictive emissions monitoring system and complying with the source cap rolling 30-day average emission limit, according to the applicable schedule given in §117.520 of this title.

*§117.219. Notification, Recordkeeping, and Reporting Requirements.*

(a) Start-up and shutdown records. For units subject to the start-up and/or shutdown exemptions allowed under §101.11 of this title (relating to Demonstrations [~~Exemptions from Rules and Regulations~~]), hourly records shall be made of start-up and/or shutdown events

and maintained for a period of at least two years. Records shall be available for inspection by the executive director, EPA, and any local air pollution control agency having jurisdiction upon request. These records shall include, but are not limited to: type of fuel burned; quantity of each type of fuel burned; and the date, time, and duration of the procedure.

(b) Notification. The owner or operator of an affected source shall submit notification to the executive director, as follows:

(1) (No change.)

(2) verbal notification of the date of any continuous emissions monitoring system (CEMS) or predictive emissions monitoring system (PEMS) relative accuracy test audit (RATA) [~~performance evaluation~~] conducted under §117.213 of this title (relating to Continuous Demonstration of Compliance) at least 15 days prior to such date followed by written notification within 15 days after testing is completed.

(c) Reporting of test results. The owner or operator of an affected unit shall furnish the appropriate regional office [~~executive director~~] and any local air pollution control agency having jurisdiction a copy of any initial demonstration of compliance testing conducted under §117.211 of this title and any CEMS or PEMS RATA [~~relative accuracy test audit (RATA)~~] conducted under §117.213 of this title:

(1) (No change.)

(2) not later than the compliance schedule specified in §117.520 of this title (relating to Compliance Schedule for [~~For~~] Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas).

(d) Semiannual reports. The owner or operator of a unit required to install a CEMS, PEMS, or water- to-fuel or steam-to-fuel ratio monitoring system under §117.213 of this title shall report in writing to the executive director on a semiannual basis any exceedance of the applicable emission limitations of this division (relating to Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas) and the monitoring system performance. All reports shall be postmarked or received by the 30th day following the end of each calendar semiannual period. Written reports shall include the following information:

(1) the magnitude of excess emissions computed in accordance with 40 Code of Federal Regulations, Part 60, §60.13(h), any conversion factors used, the date and time of commencement and completion of each time period of excess emissions, and the unit operating time during the reporting period.

(A) For stationary gas turbines using steam-to-fuel or water-to-fuel ratio monitoring to demonstrate compliance in accordance with §117.213(h)(2) of this title, excess emissions are computed as each one-hour period during which the average steam or water injection rate is below the level defined by the control algorithm as necessary to achieve compliance with the applicable emission limitations in §117.205 of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT)).

(B) (No change.)

(2) - (5) (No change.)

(e) (No change.)

(f) Recordkeeping. The owner or operator of a unit subject to the requirements of this division shall maintain written or electronic records of the data specified in this subsection. Such records shall be kept for a period of at least five years and shall be made available upon request by authorized representatives of the executive director, EPA, or local air pollution control agencies having jurisdiction. The records shall include:

(1) for each unit subject to §117.213(a) of this title, records of annual fuel usage;

(2) [~~(1)~~] for [~~For~~] each unit using a CEMS or PEMS in accordance with §117.213 of this title, monitoring records of:

(A) hourly emissions and fuel usage (or stack exhaust flow) for units complying with an emission limit enforced on a block one-hour average; and

(B) daily emissions and fuel usage (or stack exhaust flow) for units complying with an emission limit enforced on a rolling 30-day average. Emissions must be recorded in units of:

*(i)* pound per million British thermal units (Btu) heat input; and

*(ii)* pounds or tons per day; [~~.~~]

(3) [~~(2)~~] for each stationary internal combustion engine subject to the emission specifications of this division, records of:

(A) emissions measurements required by:

*(i)* §117.208(d)(7) [~~§117.208(7)~~] of this title; and

*(ii)* §117.213(g) of this title; and

(B) catalytic converter, air-fuel ratio controller, or other emissions-related control system maintenance, including the date and nature of corrective actions taken; [~~.~~]

(4) [~~(3)~~] for each stationary gas turbine monitored by steam-to-fuel or water-to-fuel ratio in accordance with §117.213(h) of this title, records of hourly:

(A) pounds of steam or water injected;

(B) pounds of fuel consumed; and

(C) the steam-to-fuel or water-to-fuel ratio; [~~.~~]

(5) [~~(4)~~] for hydrogen ($H_2$) fuel monitoring in accordance with §117.213(j) of this title, records of the volume percent $H_2$ every three hours; [~~.~~]

(6) [~~(5)~~] for units claimed exempt from the emission specifications of this division using the low annual capacity factor exemption of §117.205(h)(2), either records of monthly:

(A) fuel usage, for exemptions based on heat input; or

(B) hours of operation, for exemptions based on hours per year of operation; [~~.~~]

(7) [~~(6)~~] Records of carbon monoxide measurements specified in §117.213(d)(2) of this title; [~~.~~]

(8) [~~(7)~~] records of the results of initial certification testing, evaluations, calibrations, checks, adjustments, and maintenance of CEMS, PEMS, or steam-to-fuel or water-to-fuel ratio monitoring systems; and [~~.~~]

(9) [~~(8)~~] records of the results of performance testing, including initial demonstration of compliance testing conducted in accordance with §117.211 of this title.

*§117.221. Alternative Case Specific Specifications.*

(a) Where a person can demonstrate that an affected unit cannot attain the applicable requirements of §117.205 of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT)) or the carbon monoxide or ammonia limits of §117.206(e) [~~§117.206(d)~~] of this title (relating [~~Relating~~] to Emission

Specifications for Attainment Demonstrations), the executive director may approve emission specifications different from §117.205 of this title for that unit. The executive director:

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

(b) Any person affected by the executive director's decision to deny an alternative case specific emission specification may file a motion for reconsideration. The requirements of §50.39 of this title (relating to Motion for Reconsideration) or §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) apply. However, only a person affected may file a motion for reconsideration. Executive director approval does not necessarily constitute satisfaction of all federal requirements nor eliminate the need for approval by EPA [~~the United States Environmental Protection Agency~~] in cases where specified criteria for determining equivalency have not been clearly identified in applicable sections of this division (relating to Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas).

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005641
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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# SUBCHAPTER D. SMALL COMBUSTION SOURCES
# DIVISION 2. BOILERS, PROCESS HEATERS, AND STATIONARY ENGINES AT MINOR SOURCES

**30 TAC §§117.471, 117.473, 117.475, 117.478, 117.479**

STATUTORY AUTHORITY

The new sections are proposed under the Texas Health and Safety Code, TCAA, §382.011, concerning General Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.012, concerning State Air Control Plan, which requires the commission to develop plans for protection of the state's air, such as the SIP; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; §382.017, concerning Rules, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and §382.051(d), concerning Permitting Authority of Board; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Chapter 382.

The proposed new sections implement the Texas Health and Safety Code, TCAA, §§382.011, 382.012, 382.016, 382.017, and 382.051(d).

*§117.471. Applicability.*

This division (relating to Boilers, Process Heaters, and Stationary Engines at Minor Sources) applies in the Houston/Galveston ozone nonattainment area to the following equipment at any stationary source of nitrogen oxides ($NO_x$) which is not a major source of $NO_x$:

(1) boilers and process heaters; and

(2) stationary, reciprocating internal combustion engines.

*§117.473. Exemptions.*

(a) This division (relating to Boilers, Process Heaters, and Stationary Engines at Minor Sources) does not apply to the following:

(1) boilers and process heaters with a maximum rated capacity of 2.0 million British thermal units per hour (MMBtu/hr) or less; and

(2) the following engines:

(A) engines with a horsepower (hp) rating of 50 hp or less;

(B) engines used in research and testing;

(C) engines used for purposes of performance verification and testing;

(D) engines used solely to power other engines or gas turbines during start-ups;

(E) engines operated exclusively for firefighting and/or flood control;

(F) engines used in response to and during the existence of any officially declared disaster or state of emergency; and

(G) engines used directly and exclusively by the owner or operator for agricultural operations necessary for the growing of crops or raising of fowl or animals.

(b) At any stationary source of nitrogen oxides ($NO_x$) which is not subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program), the following are exempt from the requirements of this division, except for the totalizing fuel flow requirements of §117.479(a), (d), and (g)(1) of this title (relating to Monitoring, Recordkeeping, and Reporting Requirements):

(1) any boiler or process heater with a maximum rated capacity greater than 2.0 MMBtu/hr and less than 5.0 MMBtu/hr that has an annual heat input less than or equal to 1.8 ($10^9$) Btu per calendar year; and

(2) any boiler or process heater with a maximum rated capacity equal to or greater than 5.0 MMBtu/hr that has an annual heat input less than or equal to 9.0 ($10^9$) Btu per calendar year.

(c) Upon issuance of a standard permit by the commission for the distributed generation of electricity, combustion sources registered under that permit are exempt from this chapter.

*§117.475. Emission Specifications.*

(a) For sources which are subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program), the nitrogen oxides ($NO_x$) emission rate values used to determine allocations for Chapter 101, Subchapter H, Division 3 of this title shall be the lower of any applicable permit limit or the limits in subsection (c) of this section. The averaging time shall be as specified in Chapter 101, Subchapter H, Division 3 of this title.

(b) For sources which are not subject to Chapter 101, Subchapter H, Division 3 of this title, $NO_x$ emissions are limited to the lower of any applicable permit limit or the limits in subsection (c) of this section. The averaging time shall be as follows:

(1) if the boiler, process heater, or engine is operated with a $NO_x$ continuous emissions monitoring system (CEMS) or predictive emissions monitoring system (PEMS) under §117.479(c) of this title (relating to Monitoring, Recordkeeping, and Reporting Requirements), either as:

(A) a rolling 30-day average period, in the units of the applicable standard;

(B) a block one-hour average, in the units of the applicable standard, or alternatively;

(C) a block one-hour average, in pounds per hour, for boilers and process heaters, calculated as the product of the boiler's or process heater's maximum rated capacity and its applicable limit in pound $NO_x$ per million British thermal units (lb/MMBtu); or

(2) if the unit is not operated with a $NO_x$ CEMS or PEMS under §117.479(c) of this title, a block one-hour average, in the units of the applicable standard.

(c) No person shall allow the discharge of $NO_x$ emissions into the atmosphere in excess of the following rates:

(1) from boilers and process heaters, 0.036 lb/MMBtu heat input (or alternatively, 30 parts per million by volume (ppmv), at 3.0% oxygen ($O_2$), dry basis); and

(2) from stationary, reciprocating internal combustion engines, 0.50 gram per horsepower-hour (g/hp- hr).

*§117.478. Operating Requirements.*

(a) The owner or operator shall operate any boiler, process heater, or engine subject to the emission limitations of §117.475 of this title (relating to Emission Specifications) in compliance with those limitations.

(b) All boilers, process heaters, and engines subject to the emission limitations of §117.475 of this title shall be operated so as to minimize nitrogen oxides ($NO_x$) emissions, consistent with the emission control techniques selected, over the unit's operating or load range during normal operations. Such operational requirements include the following.

(1) Each boiler, except for wood-fired boilers, shall be operated with oxygen ($O_2$), carbon monoxide (CO), or fuel trim.

(2) Each boiler and process heater controlled with forced flue gas recirculation (FGR) to reduce $NO_x$ emissions shall be operated such that the proportional design rate of FGR is maintained, consistent with combustion stability, over the operating range.

(3) Each boiler, process heater, or engine controlled with post combustion control techniques shall be operated such that the reducing agent injection rate is maintained to limit $NO_x$ concentrations to less than or equal to the $NO_x$ concentrations achieved at maximum rated capacity.

(4) Each stationary internal combustion engine controlled with nonselective catalytic reduction shall be equipped with an automatic air-fuel ratio (AFR) controller which operates on exhaust $O_2$ or CO control and maintains AFR in the range required to meet the engine's applicable emission limits.

(5) Each stationary internal combustion engine shall be checked for proper operation of the engine by recorded measurements of $NO_x$ and CO emissions at least quarterly and as soon as practicable after each occurrence of engine maintenance which may reasonably be expected to increase emissions, $O_2$ sensor replacement, catalyst cleaning, or catalyst replacement. Stain tube indicators specifically designed to measure $NO_x$ concentrations shall be acceptable for this documentation, provided a hot air probe or equivalent device is used to prevent error due to high stack temperature, and three sets of concentration measurements are made and averaged. Portable $NO_x$ analyzers shall also be acceptable for this documentation.

*§117.479. Monitoring, Recordkeeping, and Reporting Requirements.*

(a) Totalizing fuel flow meters.

(1) The owner or operator of each boiler, process heater, or engine subject to the emission limitations of §117.475 of this title (relating to Emission Specifications) shall install, calibrate, maintain, and operate totalizing fuel flow meters to individually and continuously measure the gas and liquid fuel usage. A computer which collects, sums, and stores electronic data from continuous fuel flow meters is an acceptable totalizer.

(2) As an alternative to the fuel flow monitoring requirements of this subsection, units operating with a nitrogen oxides ($NO_x$) and diluent continuous emissions monitoring system (CEMS) under subsection (c) of this section may monitor stack exhaust flow using the flow monitoring specifications of 40 Code of Federal Regulations (CFR) 60, Appendix B, Performance Specification 6 or 40 CFR 75, Appendix A.

(b) Oxygen ($O_2$) monitors. If the owner or operator installs an $O_2$ monitor, the criteria in §117.213(e) of this title (relating to Continuous Demonstration of Compliance) should be considered the appropriate guidance for the location and calibration of the monitor.

(c) $NO_x$ monitors. If the owner or operator installs a CEMS or predictive emissions monitoring system (PEMS), it shall meet the requirements of §117.213(e) or (f) of this title.

(d) Monitor installation schedule. Installation of monitors shall be performed in accordance with the schedule specified in §117.534 of this title (relating to Compliance Schedule for Boilers, Process Heaters, and Stationary Engines at Minor Sources).

(e) Testing requirements. The owner or operator of any boiler, process heater, or engine subject to the emission limitations of §117.475 of this title shall comply with the following testing requirements.

(1) Each boiler, process heater, or engine shall be tested for $NO_x$, carbon monoxide (CO), and $O_2$ emissions.

(2) Boilers, process heaters, and engines which inject urea or ammonia into the exhaust stream for $NO_x$ control shall be tested for ammonia emissions.

(3) All testing shall be conducted while operating at the maximum rated capacity, or as near thereto as practicable. Compliance shall be determined by the average of three one-hour emission test runs, using the following test methods:

(A) Test Method 7E or 20 (40 CFR 60, Appendix A) for $NO_x$;

(B) Test Method 10, 10A, or 10B (40 CFR 60, Appendix A) for CO;

(C) Test Method 3A or 20 (40 CFR 60, Appendix A) for $O_2$;

(D) Test Method 2 (40 CFR 60, Appendix A) for exhaust gas flow and following the measurement site criteria of Test Method 1, Section 2.1 (40 CFR 60, Appendix A), or Test Method 19

(40 CFR 60, Appendix A) for exhaust gas flow in conjunction with the measurement site criteria of Performance Specification 2, Section 3.2 (40 CFR 60, Appendix B);

(E) American Society of Testing and Materials (ASTM) Method D1945-91 or ASTM Method D3588- 93 for fuel composition; ASTM Method D1826-88 or ASTM Method D3588-91 for calorific value; or

(F) EPA-approved alternate test methods or minor modifications to these test methods as approved by the executive director, as long as the minor modifications meet the following conditions:

*(i)* the change does not affect the stringency of the applicable emission limitation; and

*(ii)* the change affects only a single source or facility application.

(4) Test results shall be reported in the units of the applicable emission limits and averaging periods. If compliance testing is based on 40 CFR, Part 60, Appendix A reference methods, the report must contain the information specified in §117.211(g) of this title (relating to Initial Demonstration of Compliance).

(5) For boilers, process heaters, or engines equipped with CEMS or PEMS, the CEMS or PEMS shall be installed and operational before testing under this subsection. Verification of operational status shall, as a minimum, include completion of the initial monitor certification and the manufacturer's written requirements or recommendations for installation, operation, and calibration of the device.

(6) Initial compliance with the emission specifications of §117.475 of this title for boilers, process heaters, or engines operating with CEMS or PEMS shall be demonstrated after monitor certification testing using the $NO_x$ CEMS or PEMS.

(7) For units not operating with CEMS or PEMS, the following apply.

(A) Retesting as specified in paragraphs (1) - (4) of this subsection is required within 60 days after any modification which could reasonably be expected to increase the $NO_x$ emission rate.

(B) Retesting as specified in paragraphs (1) - (4) of this subsection may be conducted at the discretion of the owner or operator after any modification which could reasonably be expected to decrease the $NO_x$ emission rate, including, but not limited to, installation of post-combustion controls, low-$NO_x$ burners, low excess air operation, staged combustion (for example, overfire air), flue gas recirculation (FGR), and fuel-lean and conventional (fuel-rich) reburn.

(C) The $NO_x$ emission rate determined by the retesting shall establish a new emission factor to be used to calculate actual emissions instead of the previously determined emission factor used to calculate actual emissions for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(8) Testing shall be performed in accordance with the schedule specified in §117.534 of this title.

(f) Emission allowances.

(1) For sources which are subject to Chapter 101, Subchapter H, Division 3 of this title, the $NO_x$ testing and monitoring data of subsections (a) - (e) of this section, together with the level of activity, as defined in §101.350 of this title (relating to Definitions), shall be used to establish the emission factor calculating actual emissions for compliance with Chapter 101, Subchapter H, Division 3 of this title.

(2) The emission factor in paragraph (e)(7) of this section or paragraph (1) of this subsection is multiplied by the unit's level of activity to determine the unit's actual emissions for compliance with Chapter 101, Subchapter H, Division 3 of this title.

(g) Recordkeeping. The owner or operator of a unit subject to the emission limitations of §117.475 of this title shall maintain written or electronic records of the data specified in this subsection. Such records shall be kept for a period of at least five years and shall be made available upon request by authorized representatives of the executive director, EPA, or local air pollution control agencies having jurisdiction. The records shall include:

(1) records of annual fuel usage;

(2) for each unit using a CEMS or PEMS in accordance with subsection (c) of this section, monitoring records of:

(A) hourly emissions and fuel usage (or stack exhaust flow) for units complying with an emission limit enforced on a block one-hour average; and

(B) daily emissions and fuel usage (or stack exhaust flow) for units complying with an emission limit enforced on a rolling 30-day average. Emissions must be recorded in units of:

*(i)* pound per million British thermal units (Btu) heat input; and

*(ii)* pounds or tons per day;

(3) for each stationary internal combustion engine subject to the emission limitations of §117.475 of this title, records of:

(A) emissions measurements required by §117.478(b)(5) of this title (relating to Operating Requirements); and

(B) catalytic converter, air-fuel ratio controller, or other emissions-related control system maintenance, including the date and nature of corrective actions taken;

(4) records of carbon monoxide measurements specified in §117.478(b)(5) of this title;

(5) records of the results of initial certification testing, evaluations, calibrations, checks, adjustments, and maintenance of CEMS, PEMS, or steam-to-fuel or water-to-fuel ratio monitoring systems; and

(6) records of the results of performance testing, including the testing conducted in accordance with subsection (e) of this section.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005640
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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## SUBCHAPTER E. ADMINISTRATIVE PROVISIONS

**30 TAC §§117.510, 117.520, 117.534**

STATUTORY AUTHORITY

The amendments and new section are proposed under the Texas Health and Safety Code, TCAA, §382.011, concerning General Powers and Duties, which provides the commission with the authority to establish the level of quality to be maintained in the state's air and the authority to control the quality of the state's air; §382.012, concerning State Air Control Plan, which requires the commission to develop plans for protection of the state's air, such as the SIP; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; §382.017, concerning Rules, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and §382.051(d), concerning Permitting Authority of Board; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under Chapter 382.

The proposed amendments and new section implement the Texas Health and Safety Code, TCAA, §§382.011, 382.012, 382.016, 382.017, and 382.051(d).

*§117.510. Compliance Schedule for [~~For~~] Utility Electric Generation in Ozone Nonattainment Areas.*

(a) The owner or operator of each electric utility in the Beaumont/Port Arthur ozone nonattainment area shall comply with the requirements of Subchapter B, Division 1 of this chapter (relating to Utility Electric Generation in Ozone Nonattainment Areas) as soon as practicable, but no later than the dates specified in this subsection.

(1) (No change.)

(2) Emission specifications for attainment demonstration. The owner or operator shall comply with the requirements of §117.106(a) of this title (relating to Emission Specifications for Attainment Demonstrations) as soon as practicable, but no later than:

(A) May 1, 2003, demonstrate that at least two-thirds of the $NO_x$ emission reductions required by §117.106(a) of this title have been accomplished, as measured either by

*(i)* the total number of units required to reduce emissions in order to comply with §117.106(a) of this title using direct compliance with the emission specifications, counting only units still required to reduce after May 11, 2000 [~~the effective date of §117.106(a) of this title~~]; or

*(ii)* the total amount of emissions reductions required to comply with §117.106(a) of this title using the alternative methods to comply, either:

*(I)* Section 117.108 of this title (relating to System Cap); [~~,~~] or

*(II)* (No change.)

(B) - (D) (No change.)

(E) May 1, 2005, submit a revised final control plan which contains:

*(i) - (ii)* (No change.)

*(iii)* any other revisions to the source's final control plan as a result of complying with the emission specifications in §117.106(a) of this title; and

(F) July 31, 2005, submit to the executive director the applicable tests for the initial demonstration of compliance as specified in §117.111 of this title, if using the 30-day average system cap $NO_x$ emission limit to comply with the emission specifications in §117.106(a) of this title.

(b) The owner or operator of each electric utility in the Dallas/Fort Worth ozone nonattainment area shall comply with the requirements of Subchapter B, Division 1 of this chapter as soon as practicable, but no later than the dates specified in this subsection.

(1) Reasonably available control technology (RACT). The owner or operator shall comply with the requirements of Subchapter B, Division 1 of this chapter as soon as practicable, but no later than March 31, 2001 (final compliance date), except as provided in subparagraph (D) of this paragraph, relating to oil firing, and paragraph (2) of this subsection, relating to emission specifications for attainment demonstration.

(A) - (B) (No change.)

(C) Submit to the executive director:

*(i)* (No change.)

*(ii)* for units operating with CEMS or PEMS in accordance with §117.113 of this title, the results of:

*(I) - (II)* (No change.)

*(III)* no later than:

(-a-) March 31, 2001 for units complying with the $NO_x$ emission limit in pounds per hour on a block one-hour average; [~~,~~]

(-b-) May 31, 2001 for units complying with the $NO_x$ emission limit on a rolling 30-day average; [~~and~~]

(D) - (E) (No change.)

(2) Emission specifications for attainment demonstration.

(A) The owner or operator shall comply with the requirements of §117.106(b) of this title [~~(relating to Emission Specifications for Attainment Demonstrations)~~] as soon as practicable, but no later than:

*(i)* [~~(A)~~] May 1, 2003, demonstrate that at least two-thirds of the $NO_x$ emission reductions required by §117.106(b) of this title have been accomplished, as measured either by

*(I)* [~~(i)~~] the total number of units required to reduce emissions in order to comply with §117.106(b) of this title using direct compliance with the emission specifications, counting only units still required to reduce after May 11, 2000 [~~the effective date of §117.106(b) of this title~~]; or

*(II)* [~~(ii)~~] the total amount of emissions reductions required to comply with §117.106(b) of this title using the alternative methods to comply, either:

(-a-) [~~(I)~~] Section 117.108 of this title (relating to System Cap); [~~,~~] or

(-b-) [~~(II)~~] Section 117.570 (relating to Trading);

*(ii)* [~~(B)~~] May 1, 2003, submit to the executive director:

*(I)* [~~(i)~~] identification of enforceable emission limits which satisfy clause (i) [~~subparagraph (A)~~] of this subparagraph [~~paragraph~~];

*(II)* [~~(ii)~~] the information specified in §117.116 of this title [~~(relating to Final Control Plans Procedures for Attainment Demonstration Emission Specifications)~~] to comply with clause (i) [~~subparagraph (A)~~] of this subparagraph [~~paragraph~~]; and

*(III)* [~~(iii)~~] any other revisions to the source's final control plan as a result of complying with clause (i) [~~subparagraph (A)~~] of this subparagraph [~~paragraph~~];

*(iii)* [~~(C)~~] July 31, 2003, submit to the executive director the applicable tests for the initial demonstration of compliance as specified in §117.111 of this title, if using the 30-day average system cap to comply with clause (i) [~~subparagraph (A)~~] of this subparagraph [~~paragraph~~];

*(iv)* [~~(D)~~] May 1, 2005, comply with §117.106(b) of this title;

*(v)* [~~(E)~~] May 1, 2005, submit a revised final control plan which contains:

*(I)* [~~(i)~~] a demonstration of compliance with §117.106(b) of this title;

*(II)* [~~(ii)~~] the information specified in §117.116 of this title; and

*(III)* [~~(iii)~~] any other revisions to the source's final control plan as a result of complying with the emission specifications in §117.106(b) of this title; and

*(vi)* [~~(F)~~] July 31, 2005, submit to the executive director the applicable tests for the initial demonstration of compliance as specified in §117.111 of this title, if using the 30-day average system cap $NO_x$ emission limit to comply with the emission specifications in §117.106(b) of this title.

(B) The requirements of 117.510(b)(2)(A)(i) of this title may be modified as follows. Boilers which are to be retired and decommissioned before May 1, 2005 are not required to install controls by May 1, 2003 if the following conditions are met:

*(i)* the boiler is designated by the Public Utility Commission of Texas to be necessary to operate for reliability of the electric system;

*(ii)* the owner provides the executive director an enforceable written commitment by May 1, 2003 to retire and permanently decommission the boiler by May 1, 2005;

*(iii)* the utility boiler is retired and permanently decommissioned by May 1, 2005; and

*(iv)* by May 1, 2003, all remaining boilers (those not designated for retirement and decommissioning as specified in clauses (i) - (iii) of this subparagraph) within the electric utility system are controlled to achieve at least two-thirds of the $NO_x$ emission reductions from units not being retired and decommissioned.

(c) The owner or operator of each electric utility in the Houston/Galveston ozone nonattainment area shall comply with the requirements of Subchapter B, Division 1 of this chapter as soon as practicable, but no later than the dates specified in this subsection. [~~November 15, 1999 (final compliance date). The owner or operator shall:~~]

(1) Reasonably Available Control Technology. The owner or operator shall, for all units, comply with the requirements of Subchapter B, Division 1 of this chapter as soon as practicable, but no later than November 15, 1999 (final compliance date), except as specified in subparagraph (D) of this paragraph, relating to oil firing, and paragraph (2) of this subsection, relating to emission specifications for attainment demonstration.

(A) [~~(1)~~] conduct applicable CEMS or PEMS evaluations and quality assurance procedures as specified in §117.113 of this title according to the following schedules:

*(i)* [~~(A)~~] for equipment and software required pursuant to 40 CFR 75, no later than January 1, 1995 for units firing coal, and no later than July 1, 1995 for units firing natural gas or oil; and

*(ii)* [~~(B)~~] for equipment and software not required under 40 CFR 75, no later than November 15, 1999;

(B) [~~(2)~~] install all $NO_x$ abatement equipment and implement all $NO_x$ control techniques no later than November 15, 1999;

(C) [~~(3)~~] submit to the executive director:

*(i)* [~~(A)~~] for units operating without CEMS or PEMS, the results of applicable tests for initial demonstration of compliance as specified in §117.111 of this title; by April 1, 1994, or as early as practicable, but in no case later than November 15, 1999;

*(ii)* [~~(B)~~] for units operating with CEMS or PEMS in accordance with §117.113 of this title, the results of:

*(I)* [~~(i)~~] the applicable CEMS or PEMS performance evaluation and quality assurance procedures as specified in §117.113 of this title; and

*(II)* [~~(ii)~~] the applicable tests for the initial demonstration of compliance as specified in §117.111 of this title;

*(III)* [~~(iii)~~] no later than:

(-a-) [~~(I)~~] November 15, 1999, for units complying with the $NO_x$ emission limit on an hourly average; and

(-b-) [~~(II)~~] January 15, 2000, for units complying with the $NO_x$ emission limit on a rolling 30-day average;

(D) [~~(4)~~] conduct applicable tests for initial demonstration of compliance with the $NO_x$ emission limit for fuel oil firing, in accordance with §117.111(d)(2) of this title, and submit test results within 60 days after completion of such testing; and

(E) [~~(5)~~] submit a final control plan for compliance in accordance with §117.115 of this title, no later than November 15, 1999.

(2) Emission specifications for attainment demonstration. The owner or operator shall comply with the requirements of §117.106(c) of this title as soon as practicable, but no later than:

(A) December 31, 2001, install all totalizing fuel flow meters, $NO_x$ monitors, and carbon monoxide (CO) monitors required by §117.113 of this title;

(B) December 31, 2002, demonstrate that at least one-third of the $NO_x$ emission reductions required by §117.106(c) of this title have been accomplished, as measured by the total amount of emissions reductions required to comply with §117.106(c) of this title using §117.108 of this title;

(C) December 31, 2003, demonstrate that at least two-thirds of the $NO_x$ emission reductions required by §117.106(c) of this title have been accomplished, as measured by the total amount of emissions reductions required to comply with §117.106(c) of this title using §117.108 of this title;

(D) December 31, 2002, submit to the executive director:

*(i)* identification of enforceable emission limits which satisfy subparagraph (B) of this paragraph;

*(ii)* the information specified in §117.116 of this title to comply with subparagraph (B) of this paragraph; and

*(iii)* any other revisions to the source's final control plan as a result of complying with subparagraph (B) of this paragraph;

(E) February 28, 2003, submit to the executive director the applicable tests for the initial demonstration of compliance as specified in §117.111 of this title;

(F) December 31, 2004, demonstrate that all $NO_x$ emission reductions required by §117.106(c) of this title have been accomplished, as measured by the total amount of emissions reductions required to comply with §117.106(c) of this title using §117.108 of this title;

(G) February 28, 2005, submit a revised final control plan which contains:

*(i)* a demonstration of compliance with §117.106(c) of this title;

*(ii)* the information specified in §117.116 of this title; and

*(iii)* any other revisions to the source's final control plan as a result of complying with the emission specifications in §117.106(c) of this title; and

(H) the appropriate dates specified in Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) for the requirements of that program.

*§117.520. Compliance Schedule for [~~For~~] Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas.*

(a) The owner or operator of each industrial, commercial, and institutional [~~, and industrial~~] source in the Beaumont/Port Arthur ozone nonattainment area shall comply with the requirements of Subchapter B, Division 3 of this chapter (relating to Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas) as soon as practicable, but no later than the dates specified in this subsection.

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

(3) Emission specifications for attainment demonstration. The owner or operator shall comply with the requirements of §117.206(a) of this title (relating to Emission Specifications for Attainment Demonstrations) as soon as practicable, but no later than

(A) May 1, 2003, demonstrate that at least two-thirds of the $NO_x$ emission reductions required by §117.206(a) of this title have been accomplished, as measured either by

*(i)* the total number of units required to reduce emissions in order to comply with §117.206(a) of this title using direct compliance with the emission specifications, counting only units still required to reduce after May 11, 2000 [~~the effective date of §117.206(a) of this title~~]; or

*(ii)* (No change.)

(B) May 1, 2003, submit to the executive director:

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

*(v)* any other revisions to the source's final control plan as a result of complying with the emission specifications in §117.206(a) of this title;

(C) - (D) (No change.)

(E) May 1, 2005, submit a revised final control plan which contains:

*(i) - (ii)* (No change.)

*(iii)* any other revisions to the source's final control plan as a result of complying with the emission specifications in §117.206(a) of this title; and

(F) July 31, 2005, submit to the executive director the applicable tests for the initial demonstration of compliance as specified in §117.211 of this title, if using the 30-day average source cap $NO_x$ emission limit to comply with the emission specifications in §117.206(a) of this title.

(b) The owner or operator of each industrial, commercial, and institutional [~~, and industrial~~] source in the Dallas/Fort Worth ozone nonattainment area shall comply with the requirements of Subchapter B, Division 3 of this chapter as soon as practicable, but no later than March 31, 2002 (final compliance date). The owner or operator shall:

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

(c) The owner or operator of each industrial, commercial, and institutional [~~, and industrial~~] source in the Houston/Galveston ozone nonattainment area shall comply with the requirements of Subchapter B, Division 3 of this chapter as soon as practicable, but no later than the dates specified in this subsection. [~~November 15, 1999 (final compliance date). The owner or operator shall:~~]

(1) Reasonably available control technology (RACT). The owner or operator shall, for all units, comply with the requirements of Subchapter B, Division 3 of this chapter, except as specified in paragraph (2) (relating to emission specifications for attainment demonstration), by November 15, 1999 (final compliance date) and:

(A) [~~(1)~~] submit a plan for compliance in accordance with §117.209 of this title (relating to Initial Control Plan Procedures) according to the following schedule:

*(i)* [~~(A)~~] for major sources of $NO_x$ which have units subject to emission specifications under this chapter, submit an initial control plan for all such units no later than April 1, 1994;

*(ii)* [~~(B)~~] for major sources of $NO_x$ which have no units subject to emission specifications under this chapter, submit an initial control plan for all such units no later than September 1, 1994; and

*(iii)* [~~(C)~~] for major sources of $NO_x$ subject to either subparagraphs (A) or (B) of this paragraph, submit the information required by §117.209(c)(6), (7), and (9) of this title no later than September 1, 1994;

(B) [~~(2)~~] install all $NO_x$ abatement equipment and implement all $NO_x$ control techniques no later than November 15, 1999;

(C) [~~(3)~~] submit to the executive director:

*(i)* [~~(A)~~] for units operating without CEMS or PEMS, the results of applicable tests for initial demonstration of compliance as specified in §117.211 of this title; by April 1, 1994, or as early as practicable, but in no case later than November 15, 1999;

*(ii)* [~~(B)~~] for units operating with CEMS or PEMS in accordance with §117.213 of this title, submit the results of:

*(I)* [~~(i)~~] the applicable CEMS or PEMS performance evaluation and quality assurance procedures as specified in §117.213(e)(1)(A) and (B) and (f)(3) - (5)(A) of this title; and

*(II)* [~~(ii)~~] the applicable tests for the initial demonstration of compliance as specified in §117.211 of this title;

*(III)* [~~(iii)~~] no later than:

(-a-) [~~(I)~~] November 15, 1999, for units complying with the $NO_x$ emission limit on an hourly average; and

(-b-) [~~(II)~~] January 15, 2000, for units complying with the $NO_x$ emission limit on a rolling 30-day average;

*(iii)* [~~(C)~~] a final control plan for compliance in accordance with §117.215 of this title, no later than November 15, 1999; and

*(iv)* [~~(D)~~] the first semiannual report required by §117.219(d) or (e) of this title, covering the period November 15, 1999, through December 31, 1999, no later than January 31, 2000.

(2) Emission specifications for attainment demonstration. The owner or operator shall comply with the requirements of §117.206(c) of this title as soon as practicable, but no later than:

(A) December 31, 2001, install all totalizing fuel flow meters, $NO_x$ monitors, and carbon monoxide (CO) monitors required by §117.213 of this title;

(B) December 31, 2002, demonstrate that at least one-third of the $NO_x$ emission reductions required by §117.206(c) of this title have been accomplished, as measured by:

*(i)* for electric generating facilities (EGFs), the total amount of emissions reductions required to comply with §117.206(c) of this title using §117.210 of this title (relating to System Cap); and

*(ii)* for non-EGFs, the total amount of emissions reductions required to comply with §117.206(c) of this title using Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program);

(C) December 31, 2003, demonstrate that at least two-thirds of the $NO_x$ emission reductions required by §117.206(c) of this title have been accomplished, as measured by:

*(i)* for EGFs, the total amount of emissions reductions required to comply with §117.206(c) of this title using §117.210 of this title; and

*(ii)* for non-EGFs, the total amount of emissions reductions required to comply with §117.206(c) of this title using Chapter 101, Subchapter H, Division 3 of this title;

(D) December 31, 2002, submit to the executive director:

*(i)* identification of enforceable emission limits which satisfy subparagraph (B) of this paragraph;

*(ii)* for units operating without CEMS or PEMS, the results of applicable tests for initial demonstration of compliance as specified in §117.211 of this title;

*(iii)* for units newly operating with CEMS or PEMS to comply with the monitoring requirements of §117.213(c) of this title, the applicable CEMS or PEMS performance evaluation and quality assurance procedures as specified in §117.213(e)(1)(A) and (B) and (f)(3) - (5)(A) of this title;

*(iv)* the information specified in §117.216 of this title to comply with subparagraph (B) of this paragraph; and

*(v)* any other revisions to the source's final control plan as a result of complying with subparagraph (B) of this paragraph;

(E) February 28, 2003, submit to the executive director the applicable tests for the initial demonstration of compliance as specified in §117.211 of this title;

(F) December 31, 2004, demonstrate that all $NO_x$ emission reductions required by §117.206(c) of this title have been accomplished, as measured by:

*(i)* for EGFs, the total amount of emissions reductions required to comply with §117.206(c) of this title using §117.210 of this title; and

*(ii)* for non-EGFs, the total amount of emissions reductions required to comply with §117.206(c) of this title using Chapter 101, Subchapter H, Division 3 of this title;

(G) February 28, 2005, submit a revised final control plan which contains:

*(i)* a demonstration of compliance with §117.206(c) of this title;

*(ii)* the information specified in §117.216 of this title; and

*(iii)* any other revisions to the source's final control plan as a result of complying with the emission specifications in §117.206(c) of this title; and

(H) the appropriate dates specified in Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) for the requirements of that program.

*§117.534. Compliance Schedule for Boilers, Process Heaters, and Stationary Engines at Minor Sources.*

The owner or operator of each stationary source of nitrogen oxides ($NO_x$) in the Houston/Galveston ozone nonattainment area which is not a major source of $NO_x$ shall comply with the requirements of Subchapter D, Division 2 of this chapter (relating to Boilers, Process Heaters, and Stationary Engines at Minor Sources) as follows.

(1) For sources which are subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program), the owner or operator shall:

(A) install all totalizing fuel flow meters and begin keeping records of fuel usage no later than December 31, 2001; and

(B) comply with all other requirements of Subchapter D, Division 2 of this chapter in accordance with the schedule specified in Chapter 101, Subchapter H, Division 3 of this title.

(2) For sources which are not subject to Chapter 101, Subchapter H, Division 3 of this title, the owner or operator shall:

(A) install all totalizing fuel flow meters and begin keeping records of fuel usage no later than December 31, 2001; and

(B) comply with all other requirements of Subchapter D, Division 2 of this chapter as soon as practicable, but no later than December 31, 2002.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005639
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-0348

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**30 TAC §117.570**

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §117.570, Trading. This amendment is also proposed as a revision to the Texas state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

Section 117.570 currently refers to 30 TAC §101.29, Emissions Credit Banking and Trading, as a method of meeting emission requirements in Chapter 117. In concurrent rulemaking, §101.29 would be repealed and its requirements transferred and amended to new Chapter 101, Subchapter H, Divisions 1 and 4. This rulemaking would amend §117.570 to cite the correct cross-references and relocate equations and methodologies for calculating emission requirements to comply with Chapter 117 nitrogen oxides ($NO_x$) emission specifications to Chapter 101, Subchapter H, Divisions 1 and 4. In addition, the amended section would require the user of credits to obtain additional emission credits or achieve lower actual emissions if new lower $NO_x$ emission specifications are established by future amendments to Chapter 117.

The commission solicits comment on additional flexibilities relating to rule content and implementation which have not been addressed in this or other concurrent rulemakings. These flexibilities may be available for both mobile and stationary sources. Additional flexibilities may also be achieved through innovative and/or emerging technology which may become available in the future. Additional sources of funds for incentive programs may become available to substitute for some of the measures considered here.

SECTION BY SECTION DISCUSSION

The revised §117.570 changes the title of the section to "Use of Emissions Credits for Compliance" from "Trading" to more clearly reflect the language in §117.570, which discusses how to use emission reduction credits for alternative compliance, not how to trade emission reduction credits.

The proposed amendment to §117.570(a) removes the reference to §101.29 and replace it with a reference to Chapter 101, Subchapter H, Division 1, Emission Reduction Credit Banking and Trading, or Chapter 101, Subchapter H, Division 4, Discrete Emission Reduction Banking and Trading. In addition, this proposal clarifies that emission reduction credits (ERCs), mobile emission reduction credits (MERCs), discrete emission reduction credits (DERCs), or mobile discrete emission reduction credits (MDERCs) may be used to meet certain control requirements of Chapter 117. This option would be limited to those units not subject to the mass cap and trade requirements of Chapter 101, Subchapter H, Division 3. The term "RC" refers to an ERC, MERC, DERC, or MDERC.

The existing §117.570(b), and the equations located there, would be deleted because the methodology for computing emission credits for compliance with Chapter 117 would be revised to be consistent with existing methodology in §101.29. In concurrent rulemaking, §101.29 would be repealed and its requirements transferred to Chapter 101, Subchapter H, new Divisions 1 and 4.

The existing §117.570(c), and the equations located there, would be deleted. The equations currently in §117.570(c)(1) would be transferred to Chapter 101, Subchapter H, new Divisions 1 and 4 in concurrent rulemaking. The equations in §117.570(c)(2) would be deleted because the methodology for computing emission credits for compliance with Chapter 117 would be revised to be consistent with existing methodology in §101.29. In concurrent rulemaking, §101.29 would be repealed and its requirements transferred to Chapter 101, Subchapter H, new Divisions 1 and 4.

The amendments to §117.570(d) would redesignate the subsection to §117.570(b) and would remove the requirement to reevaluate used RCs and add language detailing how owners or operators using Chapter 101, Subchapter H, Division 1 or Division 4 to meet the emission control requirements of Chapter 117 must obtain additional RCs or reduce actual emissions if any lower volatile organic compound emission specification is established by Chapter 117 for the unit or units using RCs.

FISCAL NOTE: COST TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined for the first five-year period the proposed amendment is in effect, there will be no fiscal implications for any unit of state and local government as a result of administration or enforcement of the proposed amendment.

The proposed amendment will achieve administrative consistency with amendments proposed in concurrent rulemaking by correcting a cross-reference made to sections relating to emission credit banking and trading. The concurrent rulemaking would repeal and transfer requirements, and move equations related to the calculation of emission credits for compliance with emission reduction requirements.

The proposed amendment does not add regulatory requirements, but is proposed to allow compliance flexibility in meeting current or future $NO_x$ emission limitations. The proposed amendment clarifies that ERCs, MERCs, DERCs, or MDERCs may be used to meet any of the requirements for meeting emission requirements. Additionally, the proposed amendment adds language describing how owners or operators using emission credit banking and trading to meet emission control requirements must obtain additional emission credits or reduce actual emissions if any lower $NO_x$ emission specification is established by future amendments.

PUBLIC BENEFIT AND COSTS

Mr. Davis has also determined for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of implementing the amendment will be the increased compliance with $NO_x$ emissions limitations through increased rule flexibility.

There are no anticipated fiscal impacts to persons and businesses as a result of implementation of the proposed amendment because the proposed actions are administrative in nature. The proposed amendment will correct a cross-reference with Chapter 101, clarify the use of ERCs, MERCs, DERCs, and MERCs, and will add language specifying that owners must obtain additional emission credits or lower actual emissions if stricter $NO_x$ requirements are implemented through future amendments.

SMALL AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications for small or micro-businesses as a result of administration or enforcement of the proposed amendment. The proposed actions are administrative in nature. The proposed amendment will correct a cross-reference with Chapter 101, clarify the use of ERCs, MERCs,

DERCs, and MERCs, and will add language specifying that owners must obtain additional emission credits or lower actual emissions if stricter $NO_x$ requirements are implemented through future amendments to Chapter 117.

DRAFT REGULATORY ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. The commission has determined that these proposed amendment to Chapter 117 does not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225. "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 commission is proposing the amendment to achieve administrative consistency with amendments to Chapter 101 proposed in concurrent rulemaking. The proposed amendment to Chapter 117 does not add regulatory requirements, but is proposed to allow compliance flexibility in meeting current or future $NO_x$ emission limitations in Chapter 117. In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b), because the proposed rule does not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under the Federal Clean Air Act (FCAA), §7409, and therefore meet a federal requirement. States are primarily responsible for ensuring attainment and maintenance of NAAQS once EPA has established those standards. Under the FCAA, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through a control program directed to sources of the pollutants involved. This proposal is not an express requirement of state law, but was developed specifically in order to meet the air quality standards established under federal law as NAAQS, as authorized under the TCAA, §382.012 (concerning State Air Control Plan). This proposal is intended to help bring the HGA ozone nonattainment area into compliance. The proposed amendments do not exceed a standard set by federal law, exceed an express requirement of state law unless specifically required by federal law, nor exceed a requirement of a delegation agreement. The proposed amendments were not developed solely under the general powers of the agency, but were specifically developed to meet the air quality standards established under federal law as NAAQS. The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission has completed a takings impact assessment for the proposed rule. The following is a summary of that assessment. The commission is proposing the amendment to achieve administrative consistency with amendments to Chapter 101 proposed in concurrent rulemaking. The proposed amendment to Chapter 117 does not add regulatory requirements, but is proposed to allow compliance flexibility in meeting current or future $NO_x$ emission limitations in Chapter 117. The proposed amendment does not affect private real property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, the proposed section does not meet the definition of a takings under Texas Government Code, §2007.002(5).

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2) relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the proposed rules are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. The proposed amendment to Chapter 117 does not add regulatory requirements, but is proposed to allow compliance flexibility in meeting current or future $NO_x$ emission limitations in Chapter 117. Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMIT PROGRAM

Sources which currently have §117.570 listed in their federal operating permit would not be required to amend the permit in response to this amendment. However, those sources that do not have a reference to §117.570 in their operating permit and wish to use RCs must revise their operating permit consistent with the process in 30 TAC Chapter 122, to include the revised §117.570 requirements for each emission unit affected by §117.570 at their site.

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue,

Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; and September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin. The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each 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 to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 1998-089-101-AI. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Matthew R. Baker at (512) 239-1091 or Beecher Cameron at (512) 239-1495.

STATUTORY AUTHORITY

The amendment is proposed under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA, and 42 United States Code, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed amendment implements TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; and §382.012, relating to State Air Control Plan.

*§117.570. Use of Emissions Credits for Compliance [~~Trading~~].*

(a) An owner or operator of a unit not subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emission Cap and Trade Program) may meet emission control requirements of [~~may reduce the amount of emission reductions required by~~] §117.105 or §117.205 of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT)), §117.106 or §117.206 of this title (relating to Emission Specifications for Attainment Demonstrations), §117.107 of this title (relating to Alternative System-Wide Emission Specifications), §117.207 of this title (relating to Alternative Plant-Wide Emission Specifications), §117.108 of this title (relating to System Cap), §117.223 of this title (relating to Source Cap), or §117.475 of this title (relating to Emission Specifications) in whole or in part, by obtaining an emission reduction credit (ERC), mobile emission reduction credit (MERC), discrete emission reduction credit (DERC), or mobile discrete emission reduction credit (MDERC) [~~established~~] in accordance with [~~this section and §101.29 of this title (relating to Emission Credit Banking and Trading)~~] Chapter 101, Subchapter H, Division 1 of this title (relating to Emission Credit Banking and Trading) or Chapter 101, Subchapter H, Division 4 of this title (relating to Discrete Emission Reduction Banking and Trading), unless there are federal or state regulations or permits under the same commission account number which contain a condition or conditions precluding such use. [~~Any ERCs or DERCs for nitrogen oxides ($NO_x$) generated under the provisions of §101.29 of this title used for the purposes of this chapter become subject to the limitations and provisions of this section.~~] For the purposes of this section, the term "reduction credit (RC) [~~ARC~~]" refers to an ERC, MERC, DERC, or MDERC , whichever is applicable.

[~~(b) Reduction credits (RCs) shall be generated as follows.~~]

[~~(1) For sources not subject to the emission specifications of §§117.105, 117.205, or 117.206 of this title, creditable RCs used to meet compliance with those sections shall be established in accordance with the following requirements:~~]

[~~(A) The source shall use emissions test data to establish the actual emissions baseline in accordance with the testing requirements of §117.209(b) of this title (relating to Initial Control Plan Procedures), or §117.111 or §117.211 of this title (relating to Initial Demonstration of Compliance), as applicable. The actual emissions baseline is defined as the actual annual emissions, in tons per year, from a source determined by use of data representative of actual operations:~~]

*~~[(i)~~* ~~in 1990 or later, for compliance with emission specifications required for reasonably available control technology under §117.105 or §117.205(a) - (d) of this title;~~]

*~~[(ii)~~* ~~after September 10, 1993 for compliance with emission specifications required for the Beaumont/Port Arthur ozone attainment demonstration under §§117.106, 117.205(e), or 117.206 of this title;~~]

*~~[(iii)~~* ~~after 1997 for compliance with emission specifications required for the Dallas/Fort Worth ozone attainment demonstration under §117.106 or §117.206 of this title;~~]

*~~[(iv)~~* ~~assuming full compliance with all applicable state and federal rules and regulations;~~]

[~~(B) If the source creating the RC has been shut down or irreversibly changed, the source shall use the best available data and good engineering practice to establish the actual emissions baseline.~~]

[~~(2) For sources subject to the emission specifications of §§117.105, 117.106, 117.205, or 117.206 of this title, creditable RCs shall be calculated using the following equations:~~]
[~~Figure: 30 TAC §117.570(b)(2)~~]

[~~(3) RCs from shutdown units may be generated only by units participating in a source cap in accordance with §117.223 of this title.~~]

[~~(4) For units participating in a source cap in accordance with §117.223 of this title, creditable RCs may be generated only under the following conditions:~~]

[~~(A) The source cap allowable must be reduced by the amount of any creditable ERCs claimed for the unit or units, and~~]

[~~(B) the actual historical average of the daily heat input for the unit or units may not include one standard deviation of the actual~~

~~average daily heat input for the period for which creditable reductions are claimed.]~~

~~[(c) Reduction credits shall be used as follows.]~~

~~[(1) An owner or operator complying with §117.223 of this title may reduce the amount of emission reductions otherwise required by complying with the following equations instead of the equations in §117.223(b)(1) and (2) of this title.]~~
~~[Figure: 30 TAC §117.570(c)(1)]~~

~~[(2) An owner or operator complying with §§117.105, 117.106, 117.107, 117.205, 117.206, §117.207 of this title may reduce the amount of emission reduction otherwise required by those sections for a unit or units at a major source by complying with individual unit emission limits calculated from the following equation:]~~
~~[Figure: 30 TAC §117.570(c)(2)]~~

~~[(3) RCs from shutdown units may be used only by units participating in a source cap in accordance with §117.223 of this title]~~

(b) ~~[(d)]~~ Any lower $NO_x$ emission specification established under this chapter ~~[by rule or permit]~~ for the unit or units using Rcs ~~[generating an ERC]~~ shall require the user of the RCs ~~[ERC]~~ to obtain additional RCs in accordance with Chapter 101 Subchapter H, Division 1 of this title or Chapter 101, Subchapter H, Division 4 of this title and/or ~~[an approved new reduction credit or]~~ otherwise reduce emissions prior to the effective date of such rule ~~[or permit]~~ change. For units using RCs ~~[an ERC]~~ in accordance with this section which are subject to new, more stringent rule ~~[or permit]~~ limitations, the owner or operator using the RCs ~~[ERC]~~ shall submit a revised final control plan to the executive director in accordance with §117.117 or §117.217 of this title (relating to Revision of Final Control Plan) to revise the basis for compliance with the emission specifications of this chapter. The owner or operator using the RCs ~~[ERC]~~ shall submit the revised final control plan as soon as practicable, but no later than 90 days prior to the effective date of the new, more stringent rule ~~[or permit limitations]~~. The owner or operator of the unit(s) currently using RCs shall calculate the necessary emission reductions per unit as follows. ~~[In addition, the owner or operator of a unit generating the ERC shall submit a revised registration application to the executive director, in accordance with subsection (e)(1) of this section, within 90 days prior to the effective date of any new, more stringent rule or permit limitations affecting that unit. If a more stringent $NO_x$ emission specification is established by rule or permit for the unit or units generating the ERC, the value of the ERC shall be recalculated as follows:]~~
Figure: 30 TAC §117.570(b)
~~[Figure: 30 TAC §117.570(d)]~~

~~[(e) The RC program established by this section shall be administered as follows:]~~

~~[(1) For emission units subject to the emission specifications of this chapter, which generate ERCs, MERCs, DERCs, or MDERCs and for which the owner or operator elects to comply with the individual emission specifications of §§117.105, 117.106, 117.107, 117.205, 117.206, or 117.207 of this title, the enforceable emission limit RBj shall be calculated using the maximum rated capacity.]~~

~~[(2) For emission units subject to the emission specifications of this chapter, which generate ERCs, MERCs, DERCs, or MDERCs, and for which the owner or operator elects to achieve compliance using §117.223 of this title, the enforceable emission limit RBj shall be substituted for Rj in the source cap allowable mass emission rate equations of §117.223(b)(1) and (2) of this title, and those allowable rates shall be the enforceable limits for those sources.]~~

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005658
Margaret Hoffman
Director, Envronmental Law Division
Texas Natural Resorce Conservatin Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-1966

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## CHAPTER 311. WATERSHED PROTECTION

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes new §311.6, Storm Water Runoff and Certain Non-Storm Water Discharges; §311.16, Storm Water Runoff and Certain Non-Storm Water Discharges; and §311.56, Storm Water Runoff and Certain Non-Storm Water Discharges.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

Chapter 311 provides that the disposal of wastewater within defined watersheds, or water quality areas, is either prohibited or is allowed only under certain conditions. Subchapters A and B prohibit all discharges within the Lakes Travis and Austin Water Quality Areas and Lakes Inks and Buchanan Water Quality Areas, respectively, except for discharges from sewage treatment facilities that meet a defined level of effluent quality. Subchapter F prohibits discharges into or adjacent to water in the state within the Lakes Lyndon B. Johnson and Marble Falls Water Quality Areas except for discharges from treatment facilities that meet a defined level of effluent quality.

The commission received authority from the United States Environmental Protection Agency (EPA) to issue storm water and certain non-storm water discharge permits on September 14, 1998. In a September 14, 1998 memorandum of agreement (MOA) between the EPA and the commission, the EPA agreed to continue to administer storm water and certain non-storm water discharge permits that were issued prior to September 14, 1998 until they expire. Following the expiration of these permits, the commission would reissue and administer these permits as Texas pollutant discharge elimination system (TPDES) permits.

Although the TNRCC has not operated a separate state storm water permitting program, the current requirements in Subchapters A, B, and F could be interpreted to restrict the development and issuance of TPDES storm water permits within these watersheds. The commission is proposing to revise these subchapters to allow the discharge of storm water runoff and certain other non-storm water runoff if authorized by a TPDES permit. TPDES discharge permits are currently being developed to authorize storm water and certain non-storm water discharges throughout the state. The proposed new sections would allow the issuance of these permits within the specified watersheds.

SECTION BY SECTION DISCUSSION

Proposed new §§311.6, 311.16, and 311.56 (Storm Water Runoff and Certain Non-Storm Water Discharges) would allow

the commission to issue TPDES permits to regulate the discharge of storm water runoff from industrial facilities, municipal separate storm sewer systems, and construction activities into the Lakes Travis, Austin, Inks, Buchanan, Lyndon B. Johnson, and Marble Falls Water Quality Areas. The proposal would also allow the commission to issue TPDES permits to regulate the discharge of the following 11 non-storm water discharges into these water quality areas: fire-fighting activities; fire hydrant flushings; potable water sources, including drinking fountain water and water line flushings; uncontaminated air conditioning or compressor condensate; lawn watering and similar irrigation drainage; pavement washdown without the use of detergents or other chemicals and where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed); routine external building wash down that does not use detergents or other compounds; uncontaminated ground water or spring water; foundation or footing drains where flows are not contaminated with process materials such as solvents; spray down of lumber and wood product storage yards where no chemical additives are used in the spray down waters and no chemicals are applied to the wood during storage; and storm water and ground water seepage from mine dewatering activities at construction sand and gravel, industrial sand, or crushed stone mining facilities.

These discharges are currently authorized in the federal national pollutant discharge elimination system (NPDES) storm water permit program. The TNRCC could choose to be more stringent in the TPDES program than the EPA is in the NPDES program, by imposing a blanket prohibition on all such discharges. However, the TNRCC's opinion is that it is probably environmentally appropriate and economically sound to allow the discharges to continue. These point source storm water and other discharges have been authorized under the NPDES program for several years, and they existed before they were regulated. Continuing the discharges under a regulatory program of individual and general permits is appropriate to ensure that the discharges do not cause an environmental problem. The commission will carefully consider the necessary terms and conditions of each proposed permit before it is issued.

Conversely, to now entirely prohibit these discharges would cause serious economic disruption. Businesses that rely on being able to discharge their storm water and other discharges would have to either find another means of disposing of the water, or shut down their business. Because of the volume of storm water, methods other than discharge would likely be prohibitively expensive. The EPA has issued permits for these discharges based on EPA's finding that the permit conditions maintain water quality. The TPDES program will continue to regulate these discharges to ensure that they do not have an adverse environmental impact. Therefore, amending this rule to enable the commission to continue the NPDES policy authorizing these discharges is appropriate.

COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed new sections are in effect, there will be fiscal implications which are not anticipated to be significant for any single unit of state and local government as a result of administration or enforcement of the proposed new sections.

The proposed new sections would provide the authority for the commission to issue TPDES storm water and certain non-storm water discharge permits, covering industrial facilities, municipal separate storm sewer systems, and construction sites located within the Lakes Travis, Austin, Inks, Buchanan, Lyndon B. Johnson, and Marble Falls Water Quality Areas (located in Travis, Burnet, and Llano Counties). The EPA currently grants permits covering storm water and certain non-storm water discharges into the areas covered by the proposed new sections. State law currently allows the issuance of permits for storm water and certain non-storm water discharges statewide; however, current commission rules prohibit storm water and certain non-storm water discharges in the areas covered by the proposed new sections.

The commission received authority from the EPA to issue storm water and certain non-storm water discharge permits on September 14, 1998. In a September 14, 1998 memorandum of agreement (MOA) between the EPA and the commission, the EPA agreed to continue to administer storm water and certain non-storm discharge permits that were issued prior to September 14, 1998 until they expire. Following expiration of these permits, the commission would reissue and administer these storm water and certain non-storm water permits as TPDES permits. The MOA also stipulated that any new storm water and certain non-storm water permits would be issued by the commission as TPDES storm water and certain non-storm water discharge permits. If the rules are not amended, facilities located within the Lakes Travis, Austin, Inks, Buchanan, Lyndon B. Johnson, and Marble Falls Water Quality Areas currently permitted by the EPA will have to capture and dispose of, in a manner that would not discharge to water in the state, all storm water and certain non-storm water that falls on their facilities. TPDES storm water and certain non-storm water discharge permits are currently being developed to authorize storm water and certain non-storm water discharges throughout the state. The proposed new sections would allow the issuance of these permits within the specified watersheds.

Examples of facilities that would be allowed to discharge as a result of these proposed new sections include: dairy product processing sites; textile mills; feedlots; cement, fertilizer, soap, glass, and rubber manufacturing facilities; metal and coal mining facilities; oil and gas extraction facilities; hazardous waste treatment, storage and disposal facilities; landfills; metal scrap yards; battery reclaimers; salvage yards; automobile junkyards; steam electric power generating facilities; transportation facilities; wastewater facilities; municipal separate storm sewer systems; and construction sites (including clearing, grading, excavation) that disturb one acre or larger tracts of land.

Units of state and local government that operate a facility, subject to these rules, that want to discharge storm water and certain non-storm water into the water quality areas covered under this rulemaking will be required to pay application and annual fees. These will be new fees for the affected facilities. According to the EPA and based on the 1990 census, there are approximately 189 industrial sites and 822 construction sites that have obtained permits under the federal storm water discharge program that are located within Blanco, Llano and Travis Counties. There is also one municipal separate storm sewer system (Austin) within the aforementioned counties. Not all of these federally permitted industrial and construction sites are located within the covered water quality areas. Therefore, the total number of sites located within the specific water quality areas covered by this rulemaking should be less than the total number of facilities cited. Any new storm water and certain non-storm water discharge permits issued by the commission will be at least as stringent as those permits administered by the EPA. Currently, the cost to comply for units of state and local government only includes the payment

of application and annual fees. The commission anticipates that all facilities, except for municipal separate storm sewer systems, seeking permits as a result of this rulemaking will be required to pay an approximate $100 application fee. The operator of a municipal separate storm sewer system will be required to pay an approximate $2,000 application fee. Additionally, all facilities seeking permits authorized by this rulemaking, except for construction sites, will be required to pay an approximate $100-$600 annual fee. Construction sites will not be required to pay an annual fee for the duration of the permit.

PUBLIC BENEFIT AND COSTS

Mr. Davis also has determined that for each year of the first five years the proposed new sections are in effect, the public benefit anticipated from enforcement of and compliance with the proposed new sections will be standardization and clarification of storm water permit requirements within the water quality areas covered by this rulemaking and the continued granting of storm water and certain non-storm water discharge permits currently authorized by the EPA.

The proposed new sections would provide the authority for the commission to issue TPDES storm water and certain non-storm water discharge permits, covering industrial facilities, municipal separate storm sewer systems, and construction sites located within the Lakes Travis, Austin, Inks, Buchanan, Lyndon B. Johnson, and Marble Falls Water Quality Areas (located in Travis, Burnet, and Llano Counties). The EPA currently grants permits covering storm water and certain non-storm water discharges into the areas covered by the proposed new sections. State law currently allows the issuance of permits for storm water and certain non-storm water discharge statewide; however, current commission rules prohibit storm water and certain non-storm water discharges in the areas covered by the proposed new sections.

There will be fiscal implications which are not anticipated to be significant to persons and businesses as a result of administration and enforcement of the proposed new sections. Owners and operators of facilities, subject to these rules, that want to discharge storm water and certain non-storm water into the covered water quality areas of this rulemaking will be required to pay application and annual fees. These will be new fees for the affected facilities. According to the EPA there are approximately 189 industrial sites and 822 construction sites that have obtained permits under the federal storm water discharge program that are located within Blanco, Llano and Travis Counties. Not all of these federally permitted industrial and construction sites are located within the covered water quality areas. Therefore, the total number of sites located within the specific water quality areas covered by this rulemaking should be less than the total number of facilities cited. Any new storm water and certain non-storm water discharge permits issued by the commission will be at least as stringent as those permits administered by the EPA. Currently, the cost to comply for persons and businesses only includes the payment of application and annual fees. The commission anticipates that all facilities seeking permits as a result of this rulemaking will be required to pay an approximate $100 application fee. Additionally, all facilities seeking permits under this rulemaking, except for construction sites, will be required to pay an approximate $100-$600 annual fee. Construction sites will not be required to pay an annual fee for the duration of the permit.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be fiscal implications which are not anticipated to be adverse to any affected small business and micro-business as a result of implementing the proposed new sections.

Small and micro-businesses that own and operate facilities, subject to these rules, that want to discharge storm water and certain non-storm water into the water quality areas covered under this rulemaking, will be required to pay application and annual fees. These will be new fees for the affected facilities. According to the EPA there are approximately 189 industrial sites and 822 construction sites that have obtained permits under the federal storm water discharge program that are located within Blanco, Llano and Travis Counties. Not all of these federally permitted industrial and construction sites are located within the covered water quality areas. Therefore, the total number of sites located within the specific water quality areas covered by this rulemaking, some of which are small and micro-businesses, should be less than the total number of facilities cited. Any new storm water and certain non-storm water discharge permits issued by the commission will be at least as stringent as those permits administered by the EPA. Currently, the cost to comply for small and micro-businesses only includes the payment of application and annual fees. The commission anticipates that all facilities seeking permits under this rulemaking will be required to pay an approximate $100 application fee. Additionally, all facilities seeking permits under this rulemaking, except for construction sites, will be required to pay an approximate $100-$600 annual fee. Construction sites will not be required to pay an annual fee for the duration of the permit.

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 the Government Code.

The specific intent of the proposed new sections is to protect the environment by authorizing, and thus controlling, storm water and certain non-storm water discharges into the Lakes Travis, Austin, Inks, Buchanan, Lyndon B. Johnson, and Marble Falls Water Quality Areas. The proposed new sections, however, will not adversely affect 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; therefore, the new sections do not constitute a major environmental rule.

The proposed rules will not adversely affect the economy, or a sector of the economy. In actuality, the rules will result in an overall economic savings because, without these proposed new sections, all covered discharges would have to be collected and disposed of in some other manner. Any alternative discharge method would be very expensive, and would thus result in an adverse economic impact.

The proposed new sections will not adversely affect productivity, because the proposed changes will authorize the discharge of storm water directly into the lakes in the affected water quality areas. If the rules are not amended, however, there will be an adverse affect on productivity, competition, and jobs, because the affected industries would be required to contain and dispose of storm water in some other manner than discharging to water in the state.

The proposed new sections will not aversely affect jobs, because the affected industries will be able to discharge storm water in a

way that is both economically practical and environmentally safe. If the rules are not amended there could be a negative impact on jobs, because the impacted industries would be required to spend resources on collecting and disposing of storm water. If the affected industries are required to collect and treat storm water, there will necessarily be less money to spend on other areas of the business; thus, jobs could be affected.

Additionally, the proposed new sections will not adversely affect competition; in fact, if the rule is not amended, there will be a significant adverse impact on competition. Industries that do not discharge into the affected water quality areas will have a definite competitive advantage over those that do discharge into the water quality areas. Because industries that do not discharge into one of the affected water quality areas will not be required to collect storm water, but the same industries that do discharge into affected water quality areas will be required to collect the storm water; those industries that do not discharge into the affected water quality areas will have a definite competitive advantage.

Furthermore, the proposed rules will not adversely affect the environment for two reasons. First, discharges authorized under the rules will not add significant concentrations of pollutants to the lakes because the quality of storm water and the certain other non-storm water discharges will be maintained through the TPDES permit. Second, storm water is currently being discharged into the affected lakes, under the terms existing authorization from the EPA. Under federal law, Texas permits must be at least as stringent as the expiring NPDES permit; thus, these proposed new sections will not degrade the affected water bodies.

The public health and safety of the state will not be adversely affected by the proposed new sections because the proposed new sections only give the agency the authority to authorize storm water discharges. The proposed new sections do not authorize any specific discharge; thus, the new sections will not have an impact on public health and safety.

TAKINGS IMPACT ASSESSMENT

The commission's preliminary assessment is that Texas Government Code, Chapter 2007 does not apply to these proposed rules because the proposed new sections are not a taking as defined in Chapter 2007, nor are they a constitutional taking of private real property. The specific purpose of the proposed new sections is to authorize the discharge of storm water and certain types of non-storm water into the water quality areas of Lakes Travis, Austin, Inks, Buchanan, Lyndon B. Johnson, and Marble Falls.

Promulgation and enforcement of these proposed rules will not affect private real property which is the subject of the rules because the proposed new sections will neither restrict or limit the owner's right to the property, nor cause a reduction of 25% or more in the market value of the property. First, the new sections will enable the commission to authorize discharges of storm water, and certain other kinds of non-storm water, which would otherwise not be authorized. Thus, property owner's use of their property will not be restricted.

Secondly, property values will not be decreased because the new sections will not limit the use of the property. Conversely, if the rules are not amended, property values will be decreased because industries that would discharge into the affected water quality areas would be forced to collect and dispose of storm water, and the other authorized non-storm water discharges. The collection and treatment cost would render the property less valuable, thus reducing the property value. Thus, these rules will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed rulemaking and found that the rules are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, nor will they affect any action or authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on September 11, 2000 at 2:00 p.m. at the TNRCC Complex in Building F, Room 2210, located at 12015 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

Comments may be submitted to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, MC 205, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas, 78711-3087, or faxed to (512) 239-4808. All comments must reference Rule Log Number 2000-010-311-WT. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Mary Ambrose, Policy and Regulations Division, at (512) 239-4813.

## SUBCHAPTER A. LAKES TRAVIS AND AUSTIN WATER QUALITY

**30 TAC §311.6**

STATUTORY AUTHORITY

The new section is proposed under Texas Water Code, §5.103 and §26.011, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the Texas Water Code or other laws of this state. Section 26.011 gives the commission the duty to administer the provisions of Texas Water Code, Chapter 26, to establish the level of quality to be maintained in water in the state, and to control the quality of water in the state.

No other codes or statutes will be affected by this proposal.

*§311.6. Allowable Storm Water Runoff and Certain Non-Storm Water Discharges.*

(a) The following discharges of storm water runoff may be authorized by a Texas pollutant discharge elimination system (TPDES) permit:

(1) storm water runoff from industrial facilities;

(2) storm water runoff from municipal separate storm sewer systems; and

(3) storm water runoff from construction activities.

(b) The following non-storm water discharges may be authorized by a TPDES permit:

(1) discharges from fire fighting activities;

(2) discharges from fire hydrant flushings;

(3) discharges from potable water sources, including drinking fountain water and water line flushings;

(4) discharges from uncontaminated air conditioning or compressor condensate;

(5) discharges from lawn watering and similar irrigation drainage;

(6) discharges from pavement washdown without the use of detergents or other chemicals and where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed);

(7) discharges from routine external building wash down that does not use detergents or other compounds;

(8) discharges from uncontaminated groundwater or spring water;

(9) discharges from foundation or footing drains where flows are not contaminated with process materials such as solvents;

(10) discharges from the spray down of lumber and wood product storage yards where no chemical additives are used in the spray down waters and no chemicals are applied to the wood during storage; and

(11) discharges of storm water and groundwater seepage from mine dewatering activities at construction sand and gravel, industrial sand, or crushed stone mining facilities.

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

Filed with the Office of the Secretary of State, on August 10, 2000.

TRD-200005568
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-5017

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## SUBCHAPTER B. LAKES INKS AND BUCHANAN WATER QUALITY

**30 TAC §311.16**

STATUTORY AUTHORITY

The new section is proposed under Texas Water Code, §5.103 and §26.011, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties the Texas Water Code or other laws of this state. Section 26.011 gives the commission the duty to administer the provisions of Texas Water Code, Chapter 26, to establish the level of quality to be maintained in water in the state, and to control the quality of water in the state.

No other codes or statutes will be affected by this proposal.

*§311.16. Allowable Storm Water Runoff and Certain Non-Storm Water Discharges.*

(a) The following discharges of storm water runoff may be authorized by a Texas pollutant discharge elimination system (TPDES) permit:

(1) storm water runoff from industrial facilities;

(2) storm water runoff from municipal separate storm sewer systems; and

(3) storm water runoff from construction activities.

(b) The following non-storm water discharges may be authorized by a TPDES permit:

(1) discharges from fire fighting activities;

(2) discharges from fire hydrant flushings;

(3) discharges from potable water sources, including drinking fountain water and water line flushings;

(4) discharges from uncontaminated air conditioning or compressor condensate;

(5) discharges from lawn watering and similar irrigation drainage;

(6) discharges from pavement washdown without the use of detergents or other chemicals and where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed);

(7) discharges from routine external building wash down that does not use detergents or other compounds;

(8) discharges from uncontaminated groundwater or spring water;

(9) discharges from foundation or footing drains where flows are not contaminated with process materials such as solvents;

(10) discharges from the spray down of lumber and wood product storage yards where no chemical additives are used in the spray down waters and no chemicals are applied to the wood during storage; and

(11) discharges of storm water and groundwater seepage from mine dewatering activities at construction sand and gravel, industrial sand, or crushed stone mining facilities.

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

Filed with the Office of the Secretary of State, on August 10, 2000.

TRD-200005567
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-5017

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## SUBCHAPTER F. LAKES LYNDON B. JOHNSON AND MARBLE FALLS WATER QUALITY

**30 TAC §311.56**

STATUTORY AUTHORITY

The new section is proposed under Texas Water Code, §5.103 and §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the Texas Water Code or other laws of this state. Section 26.011 gives the commission the duty to administer the provisions of Texas Water Code, Chapter 26, to establish the level of quality to be maintained in water in the state, and to control the quality of water in the state.

No other codes or statutes will be affected by this proposal.

*§311.56. Allowable Storm Water Runoff and Certain Non-Storm Water Discharges.*

(a) The following discharges of storm water runoff into or adjacent to water in the state may be authorized by a Texas pollutant discharge elimination system (TPDES) permit:

(1) storm water runoff from industrial facilities;

(2) storm water runoff from municipal separate storm sewer systems; and

(3) storm water runoff from construction activities.

(b) The following non-storm water discharges into or adjacent to water in the state may be authorized by a TPDES permit:

(1) discharges from fire fighting activities;

(2) discharges from fire hydrant flushings;

(3) discharges from potable water sources, including drinking fountain water and water line flushings;

(4) discharges from uncontaminated air conditioning or compressor condensate;

(5) discharges from lawn watering and similar irrigation drainage;

(6) discharges from pavement washdown without the use of detergents or other chemicals and where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed);

(7) discharges from routine external building wash down that does not use detergents or other compounds;

(8) discharges from uncontaminated groundwater or spring water;

(9) discharges from foundation or footing drains where flows are not contaminated with process materials such as solvents;

(10) discharges from the spray down of lumber and wood product storage yards where no chemical additives are used in the spray down waters and no chemicals are applied to the wood during storage; and

(11) discharges of storm water and groundwater seepage from mine dewatering activities at construction sand and gravel, industrial sand, or crushed stone mining facilities.

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

Filed with the Office of the Secretary of State, on August 10, 2000.

TRD-200005566
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 239-5017

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# TITLE 31. NATURAL RESOURCES AND CONSERVATION

## PART 4. SCHOOL LAND BOARD

## CHAPTER 155. LAND RESOURCES
## SUBCHAPTER C. EXPLORATION AND DEVELOPMENT OF GEOTHERMAL ENERGY AND ASSOCIATED RESOURCES ON PERMANENT SCHOOL FUND LAND

**31 TAC §§155.40 - 155.49**

The School Land Board proposes new Subchapter C, relating to Exploration and Development of Geothermal Energy and Associated Resources on Permanent School Fund Land. In 1999, the 76th Legislature amended Chapter 39 of the Public Utilities Code establishing a goal of January 1, 2009, for the addition of 2,000 megawatts of generating capacity using renewable energy technologies including geothermal energy. The School Land Board (SLB) anticipates that there will be requests from industry for permission to explore and lease state lands with geothermal energy potential. The SLB intends that the procedures established in new Subchapter C generally duplicate the procedures used by the General Land Office (GLO) and found in Part 1, Chapter 10, of this title (relating to Exploration and Development of Minerals Other Than Oil and Gas).

New §155.40 relating to Definitions; Exploration and Development Guide, defines terms of art that are used throughout the new Subchapter and describes how each type of state land (Permanent School Fund (PSF) lands, Relinquishment Act Lands, and Land Trade Lands) may be explored and leased (by permit, immediate lease, or sealed bid) for development of geothermal energy and related resources.

New §155.41 relating to Prospect Permits on State Lands, sets forth the procedure an applicant must follow to obtain a prospect permit. Initially, the SLB plans to use a prospect permit system instead of a competitive sealed bid system to explore for geothermal energy on state lands. Permits will be issued for one year at a cost of $1.00 per acre and may be renewed in one-year increments for an additional four years. The geothermal energy industry is new in Texas and the general location of prospective state lands is not yet known. Using a lower cost permitting system ($1.00 per acre) instead of a sealed bid system (minimum $2.00 per acre bonus and $1.00 per acre per year rental payment) will likely encourage more exploration, earlier. At some point in time when the industry has identified the more prospective trends and fairways, the SLB may choose to switch to a competitive sealed bid system.

New §155.42 relating to Mining Leases on Properties Subject to Prospect, defines the requirements and procedures for converting an existing prospecting permit to a lease. The permittee must demonstrate to the commissioner's satisfaction that geothermal energy and related resources are located on the state tract before a prospect permit can be converted to a lease.

New §155.43 relating to Exploration and Mining Leases for Minerals Subject to Sealed Bid, provides that when the SLB holds sealed bid lease sales for geothermal energy, they will be held in the same manner as lease sales for oil, gas, and other minerals. See §9.21 of this title (relating to Leasing Guide); §9.22 of this title (relating to Leasing Procedures); §10.4 of this title (relating to Exploration and Mining Leases for Minerals Subject to Sealed Bid).

New §155.44 relating to Mining Leases on Relinquishment Act Lands, generally duplicates the procedures used for leasing Relinquishment Act lands for oil, gas, and other minerals. See §9.21 of this title (relating to Leasing Guide); §9.22 of this title (relating to Leasing Procedures); §10.5 of this title (relating to Mining Leases on Relinquishment Act Land). Because of the unique relationship created between the "owner of the soil" and the state under the Relinquishment Act and because geothermal energy and related resources are explored for and developed in a manner similar to oil and gas, the SLB believes the procedures for leasing Relinquishment Act lands for oil, gas, and other minerals will be suitable for use in developing geothermal energy.

New §155.45 relating to Unit Agreements for Geothermal Energy and Related Resources, generally duplicates the procedures used for forming units for the development of oil, gas, and other minerals because geothermal energy and related resources are produced and developed in a similar manner. See §9.81 of this title (relating to Pooling and Unitizing of State Property; §10.6 of this title (relating to Sulphur Unit Agreements).

New §155.46 relating to Conduct of Exploration and Mining Operations, sets minimum standards for lessees and permittees with respect to exploration and development operations for geothermal energy and related resources not regulated by the Railroad Commission, the Texas Natural Resources Conservation Commission, the United States Environmental Protection Agency, their successor agencies, or other appropriate agencies. The new section requires permittees and lessees to submit a plan of operations prior to the commencement of any work on the premises. The content of the plan of operations is prescribed in the new section and the procedure for obtaining approval of the plan. The SLB believes that these procedures are appropriate for geothermal energy development because the GLO has had success with these procedures in the context of mineral mining and development. See §10.7 of this title (relating to Conduct of Exploration and Mining Operations).

New §155.47 relating to Assignments, Releases, Reports, Royalty Payments, Inspections, Forfeitures, and Reinstatements, generally duplicates similar provisions in the GLO rules on development of minerals other than oil and gas. See §10.8 of this title (relating to Assignments, Releases, Reports, Royalty Payments, Inspections, Forfeitures, and Reinstatements). The SLB is generally satisfied with the current methods of administering these leasing-related matters used by the GLO and believes that they would be appropriate in the context of geothermal energy development.

New §155.48 relating to Mineral Awards and Patents, was included in this new Subchapter because mineral awards and patents are administered differently and carry unique responsibilities compared with other types of state lands. This new section was included to address the relatively few mineral awards and patents outstanding. It generally duplicates the requirements placed on owners of mineral awards by the General Land Office. See §10.9 of this title (relating to Mineral Awards and Patents).

New §155.49 relating to Consistency with Coastal Management Program, was included to alert permittees and lessees that all actions taken pursuant to these new rules must be consistent with the goals and policies identified in Chapter 16 of this title (relating to Coastal Protection) and that where conflicts arise, the provisions of Chapter 16 of this title (relating to Coastal Management) will control.

Jeffrey Pender, Director, Energy Section, Legal Services, General Land Office, has determined that for each year of the first five years that the rule will be in effect there will be no additional estimated costs or reduction in costs to the state or to local governments as a result of enforcing or administering these proposed new rules. Mr. Pender has also determined that depending on the level of permitting activity as a result of administering the proposed new rules there may be a small increase in revenue to the state for each year of the first five years that they will be in effect.

Mr. Pender also has determined that for each year of the first five years that the proposed new rules will be in effect the public will benefit in the form of increased income to the PSF from permit fees, rental payments, bonus payments, and royalty payments. Additionally, the public will generally benefit from the encouragement of the development of geothermal energy, a renewable energy source.

Mr. Pender has also determined that the proposed new rules will not have an adverse economic effect on small businesses or micro-businesses.

Comments on the proposed new rules may be submitted to Ms. Melinda Tracy, Texas Register Liaison, Legal Services, General Land Office. P.O. Box 12873, Austin, Texas 78711-2873 no later than 30 days from the date that these proposed rules are published in the Texas Register.

The new rules are proposed under authority granted to the SLB under Texas Natural Resources Code, §§141.073, 141.071, 32.062 (b), and 32.205. The SLB interprets §141.073 as authorizing the Board to adopt rules relating to the exploration, development, and production of geothermal energy and associated resources as the Board determines to be in the best interest of the state. The SLB interprets §141.071 and §32.062(b) as authorizing the Board to promulgate rules concerning permits and fees for the exploration, development, and production of geothermal energy and associated resources. The SLB interprets §32.205 as additional authority for establishing, by rule, permit/leasing procedures and reasonable fees necessary to administer a program for the exploration, development, and production of geothermal energy and associated resources.

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

*§155.40. Definitions; Exploration and Development Guide.*

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

(1) commissioner -The commissioner of the General Land Office.

(2) GLO-The General Land Office.

(3) land trade lands--Lands, the surface of which have been sold or traded with both mineral rights and leasing rights retained by the state.

(4) person--Any individual, partnership, corporation, association, or other legal entity.

(5) PSF--The Permanent School Fund.

(6) Relinquishment Act lands--Any public free school or asylum lands, whether surveyed or unsurveyed, sold with a mineral classification or reservation between September 1, 1895, and August 21, 1931. For the purposes of this chapter and for convenience, the term "Relinquishment Act lands" shall encompass any other lands, including vacancy lands, patented with all minerals reserved to the state and expressly made subject to the leasing terms and procedures governing Relinquishment Act lands.

(7) Relinquishment Act leases--Leases of Relinquishment Act land issued for the development of geothermal energy and related resources pursuant to Texas Natural Resources Code, Chapter 141.

(8) RRC--The Texas Railroad Commission.

(9) SLB --The School Land Board.

(10) TDCJ--The Texas Department of Criminal Justice.

(11) TPWD--The Texas Parks and Wildlife Department.

(b) Exploration and development guide. For exploration and development for oil and gas, see Chapter 9 of this title (relating to Exploration and Leasing of State Oil and Gas). For exploration and development for minerals other than oil and gas, see Chapter 10 of this title (relating to Exploration and Development of State Minerals Other Than Oil and Gas). Geothermal Energy and related resources are explored for and leased in the following ways, depending upon the type of land.

(1) PSF lands: upland, submerged, and state-owned riverbeds and channels. Under prospect permits and leases issued by the commissioner and SLB or by sealed bid. See the Texas Natural Resources Code, Chapter 141, Subchapter C; §155.41 of this title (relating to Prospect Permits on State Lands); §155.42 of this title (relating to Mining Leases on Properties Subject to Prospect); and §155.43 of this title (relating to Exploration and Mining Leases for Minerals Subject to Sealed Bid).

(2) Relinquishment Act lands: Leased by surface owner as agent for the state. See the Texas Natural Resources Code, Chapter 53, Subchapter C; Chapter 141, Subchapter C; and §155.44 of this title (relating to Mining Leases on Relinquishment Act Lands).

(3) Land trade lands: Under prospect permits and/or leases issued by the commissioner and SLB. See the Texas Natural Resources Code, Chapter 53, Subchapter B; Chapter 141, Subchapter C; §155.41 of this title (relating to Prospect Permits on State Lands) and §155.42 of this title (relating to Mining Leases on Properties Subject to Prospect).

*§155.41. Prospect Permits on State Lands.*

(a) Lands subject to prospecting. See §155.40 of this title (relating to Definitions; Exploration and Development Guide) to determine which lands are subject to prospect permit procedures. Generally, PSF fee lands and land trade lands are subject to prospecting under this subchapter.

(b) Application requirements and procedures.

(1) Any person, firm, or corporation desiring to apply for a prospect permit shall make written application upon the form prescribed and furnished by the GLO. The application to prospect shall include:

(A) A description of the tract of land which identifies it by the section number, part of section or survey to be prospected, township number, and/or certificate number, if applicable, survey name, block number, number of acres to be prospected, and county or counties in which the land lies and, if land trade lands, the name and address of surface owner of record in the tax assessor's office; and

(B) The name, address, phone number, and taxpayer ID number of the applicant. If the applicant is a corporation, the corporate name, address, phone number, taxpayer ID number, the name of the officer authorized to execute applications for permits and leases, and written evidence confirming that it is not delinquent in paying its franchise taxes.

(2) The application to prospect may be for a part of a section if the part is described by field notes of record in the GLO or if the part can accurately be described as a part of the section such as the NE/4.

(3) The application to prospect shall be accompanied by the filing fee prescribed by §1.3 of this title (relating to Fees) and, except as otherwise provided in §155.44 of this title (relating to Mining Leases on Relinquishment Act Lands), a prospecting fee payment of $1.00 per acre.

(4) Within 10 days of receipt of an application for permit on lands whose surface is owned or leased by TPWD or is subject to a conservation easement in favor of TPWD, the GLO shall notify the executive director of the TPWD that an application for permit has been received.

(5) Permits or immediate leases issued under §155.42(b)(1) of this title (relating to Mining Leases on Properties Subject to Prospect) will be issued on the basis of the order in which applications to prospect are received. An application will be determined to be received on the date and time receipt is acknowledged by the mailroom staff of the GLO.

(6) If an application to prospect is received for a tract of land encumbered by a previously received application or by a valid prospect permit, the application will be rejected and the applicant will be notified and all monies tendered will be refunded upon request.

(7) An applicant may request that the application to prospect be withdrawn. If the request is received prior to processing of the prospect permit, all monies tendered will be refunded.

(8) An applicant may be requested to supplement the application with information in order that the GLO may determine whether prospecting will be conducted in good faith and in an orderly and environmentally responsible manner.

(c) Prospect permit issuance and requirements.

(1) After the application requirements have been satisfied and the commissioner has determined that mineral development is in the best interest of the state, a prospect permit will be issued on a form prescribed and furnished by the GLO.

(2) The prospect permit will be for a term of one year from the date of application.

(3) On the same day a permit is issued under this section on land whose surface is owned or leased by TPWD or is subject to a conservation easement in favor of TPWD, the GLO will notify TPWD of the issuance of the permit. The permit issued on such land will state

that the surface of such land is owned or leased by TPWD or is subject to a conservation easement in favor of TPWD.

(4) On land trade lands, the GLO will notify the surface owner that a permit has been issued if the surface owner requests such notice in writing by furnishing the GLO with a current mailing address and a legal description of each tract on which he desires such notice. Notice will also be sent to the surface owner at the address supplied on the application form. Failure to receive notice will not affect the validity of a permit issued under this section.

(d) Prospect permit renewal.

(1) Permittee may request a renewal of a permit by tendering the appropriate prospecting fee payment and filing fee before the expiration date of the current permit. Prospect permit renewals, if granted, will be issued on a form prescribed and furnished by the GLO and shall extend the term of the permit for one year from the expiration date.

(2) Subject to the discretion of the commissioner, a prospect permit may be renewed up to and including four times, allowing the holder to retain the permit for five consecutive years from the date of issuance of the original prospect permit. At the time a permittee requests renewal of a permit, a determination of whether the permittee has exhibited good faith in prospecting and whether the permittee has complied with all SLB rules and regulations will be considered in the decision to grant or deny a renewal.

(3) If the holder of a prospect permit allows the permit to expire without filing for renewal, a new application must be submitted. Priority of competing applications is governed by subsection (b)(5) of this section.

(e) Assignments and releases. Prospect permits may be assigned or released in accordance with §155.47 of this title (relating to Assignments, Releases, Reports, Royalty Payments, Inspections, Forfeitures, and Reinstatements). The assignment or release must be filed with GLO and must be accompanied by the filing fee prescribed by §1.3 of this title (relating to Fees).

(f) Reports and inspections.

(1) Permittee must comply with all requirements of §155.46 of this title (relating to Conduct of Exploration and Mining Operations) and §155.47 of this title (relating to Assignments, Releases, Reports, Royalty Payments, Inspections, Forfeitures, and Reinstatements).

(2) All prospecting operations shall be subject at any time to inspection by the commissioner or an authorized representative. Information or data pertaining to prospecting operations shall be furnished to the commissioner or an authorized representative upon request.

*§155.42. Mining Leases on Properties Subject to Prospect.*

(a) Lands subject to lease. Those tracts of land subject to prospect permit are subject to lease under this section. See §155.40 of this title (relating to Definitions; Exploration and Development Guide).

(b) Lease application requirements and procedures.

(1) In an application for prospect permit on a state tract, an applicant may indicate that geothermal energy and related resources are located on the state tract and request an immediate issuance of a lease on that tract. A lease may be issued to the applicant in lieu of a prospect permit if the commissioner determines that geothermal energy and related resources are located on the state tract, if applicant's application for prospect permit was received first under §155.41(b)(5) of this title (relating to Prospect Permits on State Fee Lands), and if the SLB approves the application.

(2) At any time during the effective period of a prospect permit, the permittee may submit an application to lease the area covered by the prospect permit or a designated portion thereof.

(3) Application to lease shall include:

(A) An identification of the applicant's prospect permit(s);

(B) The date of issuance of the prospect permit(s);

(C) A description of the tract(s) of land which identifies the area to be leased by section number, part of the section or survey to be leased, block number, township number, and/or certificate number, if applicable, survey name, number of acres contained in the section, and county or counties in which the land lies and, if land trade lands, the name and address of surface owner of record in the tax assessor's office;

(D) The name, address, phone number, and taxpayer ID number of a non-corporate applicant;

(E) The corporate name, phone number, taxpayer ID number, address, the name of the officer authorized to execute permits and leases, and written evidence confirming that a corporate applicant is not delinquent in paying its franchise taxes;

(F) Statement of the applicant's proposed lease terms; and

(G) Field notes prepared by the county surveyor or a licensed state land surveyor describing the area to be leased, if such area is less than that covered by the prospect permit and cannot be accurately described as a part of the section, such as NE/4.

(4) The TPWD may review the leasing of lands whose surface is owned or leased by TPWD or is subject to a conservation easement in favor of TPWD, but whose minerals are subject to lease under this section. Within 10 days of receipt of an application to lease on such lands, the GLO shall notify the executive director of TPWD.

(5) The application to lease shall be accompanied by a filing fee prescribed by §1.3 of this title (relating to Fees) and the proposed lease bonus payment that shall not be less than $2.00 per acre.

(6) In order to fully evaluate the application to lease, GLO staff may request that an applicant submit additional information, including information about the proposed mining operation.

(7) Each application to lease shall be subject to the approval of SLB in order to determine whether the lease is in the best interest of the state by considering the following:

(A) Whether the proposed lease terms and conditions are in conformity with the Texas Natural Resources Code, §141 et seq., and this subchapter;

(B) Whether the proposed lease terms are comparable to the best leases in the area which cover the same mineral or minerals;

(C) Whether the proposed lease terms are compatible with other valuable uses of the leased premises; and

(D) Whether the lease terms adequately compensate the PSF for the loss of other valuable uses of the leased premises.

(8) If the SLB rejects an application to lease, the applicant will be notified and will be advised of the specific reasons for the denial.

(c) Issuance of mining lease.

(1) Leases will be upon a form prescribed and furnished by the GLO and will include those provisions the commissioner considers necessary for the protection of the interests of the state.

(2) Upon approval of an application to lease, a lease will be prepared with the appropriate terms and conditions, signed by the commissioner, affixed with the seal of the GLO, and delivered to the lessee.

(3) On the same day that a lease is issued under this section on land whose surface is owned or leased by TPWD or is subject to a conservation easement in favor of TPWD, the GLO shall notify TPWD of the issuance of the lease. Such lease shall state that the surface of such land is owned or leased by TPWD or is subject to a conservation easement in favor of TPWD.

(4) On land trade lands, the GLO will notify the surface owner that a lease has been issued if the surface owner requests such notice in writing by furnishing the GLO with a current mailing address and a legal description of each tract on which he desires such notice. Notice will also be sent to the surface owner at the address supplied on the application form. Failure to receive notice will not affect the validity of a lease issued under this section.

(5) Leases shall be recorded in each county in which the state's property is located. After recordation, lessee shall obtain a certified copy of the recorded lease from the county clerk. Lessee shall send such certified copies to the GLO within 90 days of the date of recordation.

(d) Minimum terms and conditions.

(1) The term of a mining lease for geothermal energy and related resources shall be determined by the SLB on a case by case basis.

(2) The lease bonus shall be not less than $2.00 per acre.

(3) The annual rental payments thereafter during the primary term shall be not less than $1.00 per acre.

(4) The royalty shall be not less than one-sixteenth of the value of the minerals produced under said lease.

(5) The lease may provide for both an advance royalty provision and a shut-in royalty. The shut-in royalty provision shall allow the lease to be maintained in one-year increments for a total of five consecutive years.

(6) Upland leases must include a provision requiring the payment of damages for the use of the surface in prospecting for, exploring, developing, or producing the leased minerals. The amount of damages for use of the surface will be determined through negotiations with GLO staff, approved by the SLB, and incorporated in each lease form.

(7) Lessee shall conduct all mining operations in compliance with state and federal laws and §155.46 of this title (relating to Conduct of Exploration and Mining Operations).

(e) Assignments, releases, reports, inspections, forfeiture, and reinstatement. Leases issued under this section are subject to all general provisions covered in §155.47 of this title (relating to Assignments, Releases, Reports, Royalty Payments, Inspections, Forfeitures, and Reinstatements).

*§155.43. Exploration and Mining Leases for Minerals Subject to Sealed Bid.*

(a) Lands subject to lease. PSF lands are subject to lease by sealed bid for the development of geothermal energy and related resources. See §155.40 of this title (relating to Definitions; Exploration and Development Guide) for lands that are subject to lease under these sealed bid procedures.

(b) Nomination, advertising, and award of tracts.

(1) Nominations, setting of terms and conditions, evaluation of sealed bids, advertising, and awards are administered by the SLB under Chapter 151 of this title (relating to Operations of the School Land Board).

(2) On land trade lands, the GLO will notify the surface owner that a lease has been issued if the surface owner requests such notice in writing by furnishing the GLO with a current mailing address and a legal description of each tract on which he desires such notice. Failure to receive notice will not affect the validity of a lease issued under this section.

(3) TPWD may review the leasing of lands whose minerals are subject to lease under this section but whose surface is owned or leased by TPWD or is subject to a conservation easement in favor of TPWD. If such lands are nominated for lease, the GLO shall notify the executive director of TPWD of such nomination. On the same day as a lease is issued on such lands, the TPWD will be notified of the issuance of the lease. Such lease will state that the surface of such land is owned or leased by TPWD or is subject to a conservation easement in favor of TPWD.

(c) Minimum terms and conditions.

(1) Terms and conditions of leases will be set by the SLB for each lease sale and will be included in the notice for bids.

(2) The royalty reserved to the state shall be not less than one-sixteenth of the value of the geothermal energy and related resources that may be produced.

(3) Upland leases issued under this section must include a provision requiring the payment of damages for the use of the surface in prospecting for, exploring, developing, or producing the leased minerals. The amount of damages for use of the surface will be included in the notice for bids and incorporated in each lease form.

(4) Lessee shall conduct all mining operations and reporting requirements in compliance with state and federal laws and §155.46 of this title (relating to Conduct of Exploration and Mining Operations).

(d) Assignments, releases, reports, inspections, forfeitures, and reinstatements. Leases issued under this section are subject to all general provisions covered in §155.47 of this title (relating to Assignments, Releases, Reports, Royalty Payments, Inspections, Forfeitures, and Reinstatements).

*§155.44. Mining Leases on Relinquishment Act Lands.*

(a) Lands subject to lease.

(1) Any survey or portion of a survey of Relinquishment Act land, as this term is uniquely defined in §155.40(a)(6) of this title (relating to Definitions; Exploration and Development Guide), is subject to lease under this section.

(2) All minerals are subject to lease by the surface owner as agent for the state. For purposes of this section, minerals include all substances commonly classified as minerals including geothermal energy and related resources even though they may be extracted by methods that destroy the surface. Minerals other than oil and gas may be leased together or separately. Oil and gas must be leased under the terms of Chapter 9 of this title (relating to Exploration and Leasing of State Oil and Gas).

(b) Authority and duties of agent. Authority and duties of the owner of the soil are described in Texas Natural Resources Code

§53.074 (Authority and Duties of Agent). The owner of the soil may lease Relinquishment Act land pursuant to Texas Natural Resources Code §53.081.

(c) Lease negotiation procedure.

(1) The surface owner is authorized to act as the state's leasing agent with any person, firm, or corporation desiring to develop PSF lands for geothermal energy and related resources.

(2) The lease shall be negotiated by the surface owner and the prospective lessee on a form prepared and furnished by the GLO, which will incorporate the terms and conditions prescribed by the SLB.

(3) The proposed lease shall be submitted to the GLO for approval prior to recording the lease in the county records.

(d) Approval and filing of lease.

(1) The SLB may reject or refuse for filing any lease deemed not in the best interest of the state.

(2) Upon rejection of a proposed lease by the SLB, the prospective lessee will be given written notice which will specify the reasons for the rejection and any changes, deletions, or additions which would render the lease acceptable.

(3) Upon receipt of approval of the lease, the prospective lessee shall finalize the lease and have the lease recorded in the county or counties in which the land lies and shall file a certified copy of the lease with the GLO. Leases are not effective until approved and filed in the GLO.

(4) The state's share of the approved bonus payment and the filing fee prescribed by §1.3 of this title (relating to Fees) shall be submitted along with the certified copy of the lease. Any lease is void unless it recites the actual consideration paid or promised for the lease.

(5) A surface owner, as the state's agent, owes the state a fiduciary duty. This fiduciary responsibility must be of paramount concern when a surface owner enters lease negotiations.

(e) Lease terms and conditions.

(1) Lessee shall pay bonus, rentals, royalties, and other lease considerations as follows.

(A) On leases executed before September 1, 1987, lessee shall pay to the state 60% of all bonuses, rentals, and royalties and other considerations agreed upon. Lessee shall pay to the surface owner 40% of all consideration agreed upon.

(B) On leases executed on or after September 1, 1987, lessee shall pay to the state 80% of all consideration agreed upon. Lessee shall pay to the surface owner 20% of all consideration agreed upon.

(2) In the event of production, the state must receive not less than one-sixteenth of the value of the geothermal energy and related resources produced. The combined royalty payable to the surface owner and the state will be expressly provided for in the lease negotiated by the surface owner.

(3) All royalties and other payments accruing to the state shall be paid to the state through the commissioner at Austin, and shall be deposited to the PSF.

(f) Reports, assignments, releases, inspection, forfeitures, and reinstatements. Leases issued under this section will be governed by all general provisions found in §155.46 of this title (relating to Conduct of Exploration and Mining Operations) and §155.47 of this title (relating to Assignments, Releases, Reports, Royalty Payments, Inspections, Forfeitures, and Reinstatements). However, a lease issued under this section cannot be assigned to the surface owner who executed the lease.

(g) Leasing procedure when agent cannot be located. If a potential lessee cannot locate a surface owner, such lessee can follow the procedures set out in the Texas Natural Resources Code, §52.186. Once these procedures have been followed, Relinquishment Act land will be leased for minerals other than oil and gas through the prospect permit and leasing procedures found in §155.41 of this title (relating to Prospect Permits on State Lands) and §155.42 of this title (relating to Mining Leases on Properties Subject to Prospect). The state will receive all the consideration paid under such a lease.

(h) Leasing procedure when agent's rights are forfeited.

(1) When a surface owner's agency rights have been forfeited, the land shall be subject to lease for minerals other than oil and gas under the procedures set out in §155.40 of this title (relating to Definitions; Exploration and Development Guide) and §155.41 of this title (relating to Prospect Permits on State Lands).

(2) When a new lease is executed under subsection (h)(1) of this section, the surface owner shall not be entitled to any share of the revenue generated by such lease, but the surface owner's agency rights will be ipso facto reinstated upon expiration of the new lease.

*§155.45. Unit Agreements for Geothermal Energy and Related Resources.*

(a) Application for production agreement. A proposed unit agreement for geothermal energy and related resources shall set out:

(1) The total acreage in the unit, the number of state acres in the unit, and number of privately owned acres in the unit;

(2) A listing of the leases included within the proposed unit and recording information for such leases in the public records;

(3) A plat outlining the entire unit and showing in red the state acreage included in the unit;

(4) How production is to be allocated to each lease; and

(5) For each state lease, the state's royalty interest and any costs or deductions allowed against that interest.

(b) Approval of unit agreement.

(1) Any unit agreement that proposes to commit royalty interests in PSF lands or state agency lands shall be submitted to the GLO pooling committee for examination, investigation, and presentation to the SLB or the appropriate board for lease.

(2) Upon determination by the SLB that the unit agreement applied for is in the best interests of the state, the unitization will be approved.

(3) Any unit agreement that covers lands leased under §155.44 of this title (relating to Mining Leases on Relinquishment Act Lands) shall be executed by the surface owner before consideration by the SLB. Any such unit agreement must be approved by the SLB under this section before it is effective.

(4) Any unit agreement that proposes to commit royalty interests in state lands or areas other than PSF lands must be approved by the appropriate board for lease and must be found to be in the best interests of the state.

(c) Provisions of unit agreement. A unit agreement may contain the following provisions:

(1) That operations incident to the drilling of a well upon any portion of the unit shall be deemed for all purposes to be the conduct of such operations upon each tract in the unit;

(2) That the production allocated by the agreement to each tract included in a unit shall, when produced, be deemed for all purposes to have been produced from such tract;

(3) That the state's royalty interest shall be paid only on that portion of the production from the unit which is allocated to the tract in accordance with the agreement;

(4) That each lease included in the unit shall remain in effect so long as the agreement remains in effect, and that upon termination of the agreement each lease shall thereafter continue in effect under its own terms and provisions;

(5) Such other terms, conditions, and provisions as may be deemed to be in the best interest of the state.

(d) Rule of construction. No term, condition, or provision of an approved unit agreement shall be read to burden an interest of the state with any cost, liability, or be read to otherwise adversely impact upon the state's interest unless such burden or adverse impact was expressly raised before and approved by the SLB or appropriate board for lease.

*§155.46. Conduct of Exploration and Mining Operations.*

(a) Purpose and scope.

(1) It is the intent of this section to set minimum standards of conduct for lessees on state properties leased or permitted under this subchapter with respect to exploration and development operations for resources associated with geothermal energy that are not regulated by the RRC, Texas Natural Resources Conservation Commission, the United States Environmental Protection Agency, their successor agencies, or other appropriate authorities.

(A) The GLO may include specific and express restrictions and standards concerning exploration and development in each lease and in each plan of operations it approves;

(B) If the minimum standards of conduct in this section conflict with express provisions in a lease form or in an approved plan of operations, then the express provisions will control; and

(C) The commissioner may grant, in accordance with the law, written exceptions to the minimum standards and procedural rules found in this section if the commissioner makes a written determination that such exceptions are in the best interests of the PSF.

(2) This section shall not apply to leases executed prior to the date of acceptance of these rules unless the lease specifically requires a plan of operations. Holders of active permits shall be required to comply with the provisions of this section regardless of the date of issue.

(3) Operations for geothermal energy are regulated by the RRC. However, as a mineral owner, the GLO may need information that is not required by or submitted to the RRC. Consequently, the GLO reserves the right to request additional information on operations for the exploration and development of geothermal energy and related resources. If additional information is needed, the GLO will notify the lessee or permittee in writing.

(4) This section references statutes and the rules and regulations of regulatory agencies that govern mineral development on state lands. By such references the SLB does not intend to usurp authority or substitute its judgment for that of the other agencies. These references are included to put permittees and lessees on notice that state lands are not exempt from such regulation, including all relevant environmental safeguards.

(5) If any provision of this section conflicts with state or federal statutes, regulations, or rules of the RRC, Texas Natural Resources Conservation Commission, or the United States Environmental Protection Agency, their successor agencies, or other appropriate authorities, then such other statutes, regulations, or rules shall control.

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

(1) Lease--A mining lease issued under §155.42 of this title (relating to Mining Leases on Properties Subject to Prospect), §155.43 of this title (relating to Exploration and Mining Leases for Minerals Subject to Sealed Bid), or §155.44 of this title (relating to Mining Leases on Relinquishment Act Lands).

(2) Lessee--The initial holder of a valid lease or a successor, assignee, devisee, or heir who acquires any right of the initial holder.

(3) Operations--Any activities other than reconnaissance activities, associated with mineral exploration or development that require substantially disturbing or destroying the surface or subsurface of the leased or permitted areas. Operations shall include drilling test holes or core holes; excavating test pits; moving heavy machinery over the leased or permitted area; sinking shafts; and extracting, storing, processing, and shipping minerals.

(4) Operator--A permittee or lessee or any employee, agent, servant, contractor, or subcontractor of either a permittee or lessee.

(5) Permit--A prospect permit issued by the commissioner under §155.41 of this title (relating to Prospect Permits on State Fee Lands).

(6) Permittee--The initial holder of a valid prospect permit or a successor, assignee, devisee, or heir who acquires any right of a permittee.

(7) Premises--Any state property subject to a lease or to a permit.

(8) Reconnaissance activities--Hand sampling, geologic mapping, surveying, and other activities which do not significantly impact the surface and which are necessary to gather data to formulate the plan of operations.

(9) TPWD lands--(As used in this section only) premises whose surface is owned or leased by TPWD or is subject to a conservation easement in favor of TPWD.

(c) Overview of exploration and mining procedures.

(1) Reconnaissance activities. After a permit or lease has been granted for exploration and development of the premises, an operator may begin reconnaissance activities. The permits or leases may contain rules and restrictions on reconnaissance activities. In conducting reconnaissance activities on state premises, an operator shall also comply with the rules found in subsection (f) of this section. In conducting reconnaissance activities on TPWD lands, an operator shall comply with additional rules found in subsection (g) of this section.

(2) Operations.

(A) Before an operator may commence operations on any premises, the permittee or lessee of those premises must submit an initial plan of operations to the GLO. Information required to be included in an initial plan will be controlled by the type of state property involved. If operations extend over several state properties, permittee or lessee may submit one unified plan of operations. No operations

may commence until such a plan of operations has been filed with the GLO in accordance with subsection (d) of this section and approved by the GLO in accordance with subsection (e) of this section.

(B) The initial plan of operations shall include all reasonably foreseeable exploration, extraction, mining, and processing activities. Whenever the permittee or lessee wishes to undertake activities beyond the scope of the initial plan of operations, a supplemental plan must be filed with the GLO. Whenever the permittee or lessee wishes to change any activity found in an approved plan, an amended plan must be filed with the GLO. An amended or supplemental plan of operation shall have the same requirements and be subject to the same approval process as the initial plan.

(C) Operations must be conducted in accordance with an approved plan of operations and also with the rules found in subsection (f) of this section.

(D) Failure to submit a plan before conducting operations, to submit a supplemental or amended plan before conducting additional or different operations, or to conduct operations on the premises in compliance with the approved plan of operations or these rules shall subject the permit or lease to forfeiture.

(d) Content of plan of operations.

(1) For state property permitted or leased under this chapter, the plan of operations must include the following:

(A) The name and legal mailing address of the permittee or lessee and of any operators who will be on the premises;

(B) A 7 1/2 minute USGS topographic map showing:

*(i)* Information sufficient to locate the proposed areas of operations on the ground;

*(ii)* Existing and/or proposed roads or access routes to be used in connection with the operations; and

*(iii)* The approximate location and size of any other areas where surface resources or improvements might be disturbed;

(C) Information sufficient to describe or identify:

*(i)* The precise nature and extent of all proposed operations including all prospecting/exploration activities and all mining/processing activities; and

*(ii)* The period during which each proposed activity will take place;

(D) If the permittee or lessee proposes to commingle minerals produced under the permit or lease with privately-owned minerals or with other state-owned minerals:

*(i)* A specification of the proposed manner of commingling; and

*(ii)* A comparison of the quality of the geothermal energy and related resources produced under the lease or permit to the quality of the geothermal energy and related resources with which it will be commingled;

(E) If subsurface excavation is planned, a statement of what possible effect such excavations could have on water, as defined by Texas Civil Statutes, Article 8866, §1(11) (Vernon, 1989).

(2) For state property permitted or leased under this subchapter, except property leased under §155.44 of this title (relating to Mining Leases on Relinquishment Act Lands), the plan of operations must also include the following:

(A) Type, design, and location of existing and proposed roads or access routes;

(B) Transportation equipment and other heavy equipment to be used on the premises;

(C) Measures to be taken to protect and preserve environmental resources;

(D) A statement of whether operations are planned on steep slopes that may be subject to erosion and specific plans to control erosion, the flow of run-off water, landslides, and drainage;

(E) A specification of what reclamation efforts will be undertaken to minimize the impact of operations on the surface, including vegetation, topsoil, wildlife habitats, caused by operations.

(3) For TPWD lands, the plan of operations must also include the following:

(A) A statement of whether any of the drilling muds and fluids proposed to be used are toxic to fish or wildlife;

(B) A listing of all known natural historic and prehistoric resources, archeological resources, and biological resources (including vegetation, fish, and animal life, especially endangered plants and wildlife) found on the premises; and

(C) Specific plans to remove toxic materials, and to rehabilitate fisheries, wildlife habitats, and vegetation.

(e) Requirements for approval of plan of operations.

(1) The proposed plan of operation shall be submitted to the GLO, which shall promptly acknowledge its receipt to the permittee or lessee. GLO staff will analyze the proposal and, if necessary, inspect the premises. In order to evaluate the plan, the GLO staff may require additional information from the lessee or permittee. Within 90 days after the GLO receives both a plan and any requested additional information, the GLO shall:

(A) Notify permittee or lessee that the plan of operations has been approved; or

(B) Notify the permittee or lessee of the necessary additions and/or changes to the plan which are required for approval.

(2) The GLO may require a permittee or lessee to furnish a bond as a condition to approval of a plan of operations but only if the lease or permit has reserved this right to the GLO. The performance bond shall be in an amount to be determined by and forfeitable to the GLO as a guarantee for the strict performance of reclamation obligations found in the plan of operations. In determining the amount of the bond, consideration shall be given to the estimated cost of reclaiming the land to the condition it would have been in had the plan of operations or the regulations been strictly followed.

(3) If subsurface excavations are involved, the commissioner will issue a finding in the approved plan of operations as to whether such excavations will affect water as defined by Texas Civil Statutes, Article 8866, §1(11) (Vernon, 1989).

(4) In evaluating all plans of operations, the GLO will consider the following factors:

(A) The general economics of the operations;

(B) The reasonableness and effectiveness of the plans to develop the state's geothermal energy and related resources;

(C) The prevailing industry standards; and

(D) The methods and standards employed by similar operations in the same area as the state property.

(5) In evaluating all plan of operations except those on leases issued under §155.44 of this title (relating to Mining Leases on Relinquishment Act Lands) the GLO will also consider:

(A) The reasonableness of the provisions made for surface resource protection; and

(B) The value and uses of the surface of the state property.

(6) In evaluating plan of operations covering lands leased under §155.44 of this title (relating to Mining Leases on Relinquishment Act Lands), the GLO will not evaluate the impact of operations on the surface but it will evaluate such plans based upon its interests as a mineral owner.

(7) In evaluating all plan of operations covering TPWD lands, the GLO will also consider:

(A) Whether sites and roadways should be adjusted and realigned to avoid significant disturbance of biological, archeological, or aesthetic features;

(B) Whether the methods for disposing of vegetation which must be cleared and for disposing of topsoil are adequate;

(C) Whether proposed drilling muds and fluids should be changed to require use of those muds and fluids that are not toxic to fish or wildlife;

(D) Whether permittee or lessee should be required to take action to mitigate any unavoidable impacts to fish and wildlife resources and habitat caused by operations;

(E) Whether slope stabilization should be required during operations;

(F) Whether security fencing to protect the public from hazardous sites or conditions should be required;

(G) Whether full restoration, including spreading of topsoil stockpile, of all areas disturbed during permitted activity to pre-operation elevations, contours, and substrata should be required;

(H) Whether steep slopes that are subject to damaging erosion should be modified to facilitate re-vegetation and prevent erosion;

(I) Whether replanting of disturbed native vegetation should be required; and

(J) Whether seeding and mulching plans should be modified so that different materials are used or applied at different rates or times.

(f) Minimum standards of conduct on state premises.

(1) These minimum standards of conduct will apply whenever a lessee, permittee, or other operator is on state premises even if only reconnaissance activities are taking place.

(2) All activities shall be conducted so as to minimize adverse environmental impact on surface resources.

(3) Operator shall comply with applicable federal and state air quality standards and emission permit requirements.

(4) Operator shall comply with applicable federal and state water quality standards and waste water discharge permit requirements and federal permitting requirements applicable to disturbance of wetlands, watercourses, and flood plains. Operator shall in its construction activities, to the greatest extent possible, avoid disturbance within natural water courses and their immediate flood plains. Operator shall use only so much of underground water as may be reasonably necessary. If water-bearing strata or underground aquifers are encountered during drilling activities, shaft construction, or subsurface excavation, measures shall be taken by the operator to prevent pollution of such underground water sources. Operator shall comply with all applicable Texas Natural Resources Conservation Commission and RRC rules for the protection of usable quality water within the premises.

(5) Operator shall comply with applicable federal and state standards for the disposal and treatment of all solid wastes. All garbage, refuse, or trash shall either be removed from premises or disposed of, or treated so as to minimize, so far as practicable, its impact on the environment and surface resources. All waste rock, deleterious materials or substances and other waste produced by operations shall be deployed, arranged, disposed of, or treated in accordance with federal and state requirements and so as to minimize adverse impact upon the environment and surface resources.

(6) Operator shall comply with the National Historical Preservation Act of 1966, 16 United States Code §470 (1985 and Supplement 1988) and the Antiquities Code of Texas, Title 9, Chapter 191, Texas Natural Resources Code, where applicable.

(7) Operator shall comply with the United States Endangered Species Act of 1973, 16 United States Code §§1531-1543 (1985 and Supplement 1988) and the Texas Parks and Wildlife Code, Chapters 67, 68, and 88, which relate to endangered plants or wildlife and protected non-game.

(8) Preservation of existing vegetation shall be maximized at all times.

(9) These provisions concerning roads do not apply to premises leased under §155.44 of this title (relating to Mining leases on Relinquishment Act Lands). Operator shall, if possible, use existing roadways for access to and across the premises. Operator must justify construction of new roads by demonstrating that there is no feasible and prudent alternative. Operator shall construct and maintain all roads so as to assure adequate drainage and to minimize damage to soil, water, and other natural resources. Roads utilized shall be left in as good a condition as they were prior to use by operator.

(10) During all operations the operator shall maintain structures, equipment, and other facilities in a safe, neat, and workmanlike manner. Hazardous or dangerous sites or conditions resulting from operations shall be fenced, marked by signs, or otherwise identified to protect the public in accordance with all state and federal laws and regulations.

(11) Unless the RRC or other duly authorized agency regulates reclamation efforts or unless a written notification to the GLO under subsection (h) of this section states otherwise, permittee or lessee shall reclaim the surface as specified in the plan of operations within six months of the expiration of the permit or lease.

(g) Minimum standards of conduct on TPWD lands.

(1) Operators on premises whose surface is owned, or leased by TPWD or is subject to a conservation easement in favor of TPWD are also subject to the additional regulations found in this subsection.

(A) Operator is subject to all TPWD rules in effect for the park or wildlife management area on which operations are conducted to the extent that the park or management area rules are not inconsistent with rules or regulations found in this section or with the reasonable development of PSF minerals.

(B) No operations shall be commenced without notification of the park superintendent or area manager 48 hours in advance of entering TPWD premises. Permittee or lessee shall allow only those operators that are necessary for operations to access the TPWD premises.

(C) No firearms or archery equipment shall be permitted at any time on TPWD lands by any operator. Permittee or lessee shall be liable for any taking of fish, wildlife, plants, or archeological resources by any operator.

(D) Unless an approved plan of operations provides otherwise, no materials required for construction of roads shall be taken or borrowed from TPWD lands. There shall be no vehicular travel off existing roads during wet weather. Where travel is permitted by drilling buggies and water wagons, such vehicles shall use high flotation tires.

(E) Operator shall permanently stake limits of proposed access roads on the ground a minimum of 30 days prior to and throughout actual operations or other activities. Each access road is subject to review and approval by the GLO. The area disturbed during construction activity shall be strictly minimized. Access roads shall not exceed 30 feet in width and operator shall use existing roads whenever possible.

(F) The following rules apply to new roads constructed by or improved and used by operator unless otherwise requested by TPWD and approved by the GLO in a plan of operations.

*(i)* Roads no longer needed for operations shall be closed to normal vehicular traffic.

*(ii)* Bridges and culverts shall be removed.

*(iii)* Cross-drains, dips, or water bars shall be constructed.

*(iv)* The road surface shall be shaped to as near a natural contour as practicable and be stabilized.

(G) If a diversion between all drilling sites, pads, and all upslope areas is required in an approved plan of operations, the diversion shall be constructed with a flared outlet stabilized by rock or other grade stabilization structures as necessary to prevent erosion. Drilling sites should be sloped with a minimum grade 0.3-0.5% to drain into such diversions so the run-off does not flow over the fill area. Sediment shall be cleaned out of diversion and properly disposed of periodically. A temporary straw bale barrier containing no noxious weed shall be constructed along the base of the drill site where it follows a natural water course. A temporary bale barrier shall be established immediately after the drill site is constructed to prevent erosion while side slopes are being stabilized. The bale barrier must be maintained, sediment removed and bales replaced. Sedimentation on areas adjacent to the drill site shall be minimized. Topsoil to a maximum depth not to exceed 18 inches shall be stockpiled on the upslope edge of each drill pad and separated from upslope run-off by a diversion, or with other erosion control as necessary.

(H) Unless an approved plan of operation states otherwise, no explosives shall be used within 750 feet of any building, utilities, or water well or within 1, 000 feet of any water retention structures. All proposed use of explosives shall be specifically described in an approved plan of operations.

(I) Restoration of the disturbed area to approximate original contours and revegetation with appropriate native vegetation may be required.

(J) Operator shall, at all times, keep lands under permit or lease, access roads, and prospect sites free of trash and litter generated by operations. No vegetation or topsoil shall be pushed, windrowed, or abandoned except in preparation for disposal by means approved by the GLO in the plan of operations. Operator shall keep muds, cuttings, and all other fluids, including all contaminants and saline fluids, in tanks or containers for removal from the site. All drilling muds and fluids shall be water-based and nontoxic to fish and wildlife; provided, however, that other drilling muds and fluids may be used if, in the plan of operations, the GLO determines that there is no prudent or feasible alternative. Soil-damaging petroleum and other chemicals shall be hauled from the TPWD lands and disposed of lawfully. Dumping of any such materials on TPWD lands is prohibited.

(K) Operator shall, to the extent practicable, harmonize operations with scenic values through such measures as the design and location of operating facilities, including roads and other means of access, screening of operations by native vegetation, if possible, and construction of structures and improvements which blend with the landscape.

(L) In addition to compliance with water quality and solid waste disposal standards required by this section, operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations.

(M) Operator shall comply with all applicable state and federal fire laws and regulations and shall take all reasonable measures necessary to prevent and suppress fires in the area of operations.

(2) As soon as the GLO receives a plan of operations which covers TPWD lands and which supplies all the data required in subsection (d) of this section, the GLO shall mail a copy of the plan of operations to the TPWD for review and comment.

(3) TPWD must submit its comments, if any, to the GLO within 30 days of TPWD's receipt of a plan of operations.

(4) Plan of operations on TPWD land may not be approved until at least 30 days after the TPWD receives the plan of operations. When the GLO approves a plan of operations on TPWD land, GLO will send TPWD a copy of the approved plan on the day the plan is approved.

(h) Completion of operations and abandonment of premises.

(1) This subsection shall apply to all exploration and development operations for resources associated with geothermal energy that are not regulated by the RRC, Texas Natural Resources Conservation Commission, the United States Environmental Protection Agency, their successor agencies, or other appropriate authorities.

(2) Within two weeks after all operations and all reclamation activities addressed in the plan of operations have been completed, permittee, or lessee shall send the GLO the following information:

(A) Date when operations ceased;

(B) Date when reclamation activities ceased;

(C) Problems encountered during reclamation activities;

(D) Success of reclamation efforts in improving the surface condition;

(E) Any additional reclamation activities that permittee or lessee believes are necessary to restore or improve the surface, vegetation, topsoil, or wildlife habitat;

(F) Date on which any proposed additional reclamation activities, if any, shall begin and end; and

(G) Date on which the premises shall be ready for initial GLO inspection.

(3) The GLO will inspect the premises to verify that the reclamation required in the plan of operations has been completed. If a performance bond guaranteeing reclamation has been required in the plan of operations, it will be returned upon completion of reclamation activities.

*§155.47. Assignments, Releases, Reports, Royalty Payments, Inspections, Forfeitures, and Reinstatements.*

(a) Assignments and releases.

(1) After obtaining written approval of the commissioner, a lease or permit issued under this chapter, except a Relinquishment Act lease may be assigned in quantities of not less than 40 acres. If, however, less than 40 acres remain of the tract originally leased, then the entire remaining acreage may be assigned. Assignments shall be recorded in each county in which the state tract is located. Relinquishment Act leases are not subject to these restrictions and may be assigned at any time.

(2) After recordation, lessee or permittee shall obtain a certified copy from the county clerk of each recorded assignment covering the state lease or permit. Lessee or permittee shall send such certified copies to GLO within 90 days of the date of recordation, accompanied by the filing fee prescribed in §1.3 of this title (relating to Fees).

(3) An assignment of any lease except a Relinquishment Act lease is not effective until a certified copy of such assignment has been filed with the GLO. Failure to file a certified copy of an assignment of any lease, including a Relinquishment Act lease, shall subject the lease to forfeiture. An assignment shall not have the effect of releasing the assignor from any liability incurred or claim previously accrued in favor of the state.

(4) The lessee or permittee may release the lease or permit back to the state at any time. To release a lease or permit, a lessee or permittee must record the release in each county where the state tract is located and mail a certified copy of each recorded release to GLO accompanied by the filing fee prescribed in §1.3 of this title (relating to Fees).

(5) A release is not effective until a certified copy of the release is filed by the GLO. A release shall not have the effect of releasing lessee or permittee from any liability incurred or claim previously accrued in favor of the state.

(b) Reports and payment of royalties.

(1) A log, sample analysis, or other information obtained from each test drilled on the area covered by the lease or permit shall be filed with the GLO upon request. Lessee or permittee shall furnish annually on the anniversary date of the lease or permit a map or plat showing all activities on the state lease or permit. In addition, an evaluation map or plat shall be filed in the GLO within 90 days after any drilling program shall have been completed or abandoned, and the correctness of such map shall be sworn to by lessee or permittee or his representative. The map or plat shall show geologic formations penetrated, the depth, thickness, presence of geothermal energy and related resources, the water-bearing strata, the elevation and location of all test holes, and other pertinent information.

(2) Unless the lease provides otherwise, on or before the last day of the month after the month when production started, the lessee shall file a production and royalty report showing production and royalty for the calendar month when production started. Subsequently, a production and royalty report shall be filed before the last day of each month for production from the preceding calendar month. Such report shall be on a form prescribed and furnished by the GLO and shall show:

(A) The amount of geothermal energy and related resources produced during the preceding month;

(B) If any geothermal energy or related resource has been sold during the preceding month, then:

*(i)* The amount of geothermal energy and related resource sold;

*(ii)* The purchaser(s) and if the purchaser(s) is in any way related to the lessee, the details of such relationship or affiliation;

*(iii)* The selling price of geothermal energy and related resources as shown by copies of gas plant receipts, sale receipts, invoices, or other sale documents attached thereto; and

*(iv)* The method and figures used by lessee to calculate the value of each mineral sold as shown by any relevant documents, records, or schedules;

(C) If any geothermal energy or related resource has been used as permitted under the terms of the lease during the preceding month, then:

*(i)* The amount of such geothermal energy and related resources used; and

*(ii)* The method and figures used by lessee to calculate the value of each as shown by any relevant documents, records, or schedules.

(3) Unless otherwise provided by the lease, royalty payments are to be received in the GLO on or before the last day of the month following the month in which leased minerals are produced. However, for the purposes of this paragraph only, "produced" shall mean actually sold or used by lessee. Upon termination, forfeiture, or release of the lease, unpaid royalty for any stockpiled leased minerals shall be due and payable within one month of the effective date of said termination, forfeiture, or release.

(4) Except when royalty is taken in-kind, and subject to subparagraphs (A)-(F) of this paragraph, relating to electronic funds transfer, lessees may pay royalties and other monies due by cash or check, money order, or sight draft made payable to the commissioner. Lessees may also pay by electronic funds transfer or in any manner that may be lawfully made to the state comptroller. Information regarding alternative payment methods may be obtained from the GLO Royalty Management Division. Payors are required to make payments by electronic funds transfer in compliance with Title 34, Chapter 15 of this code in the following circumstances:

(A) For leases executed or amended after May 11, 1989, but before September 1, 1991, payors that have made over $500,000 in a category of payments, defined in subparagraph (D) of this paragraph, to the GLO during the preceding state fiscal year shall make payments of $10,000 or more in the current fiscal year for those leases and in that category by electronic funds transfer.

(B) For leases executed or amended after August 30, 1991, but before June 9, 1995, payors that have made over $250,000 in a category of payments, defined in subparagraph (D) of this paragraph, to the GLO during the preceding state fiscal year shall make payments of $10,000 or more in the current fiscal year for those leases and in that category by electronic funds transfer.

(C) For leases executed or amended on or after June 9, 1995, payors that have made over $25,000 in a category of payments, defined in subparagraph (D) of this paragraph, to the GLO during the

preceding state fiscal year shall make all payments in the current fiscal year for those leases and in that category by electronic funds transfer.

(D) For purposes of subparagraphs (A)-(C) of this paragraph, each of the following is a separate category of payments:

*(i)* Royalties (including shut-in and minimum royalties);

*(ii)* Penalties;

*(iii)* Other payments to the state agency, excluding interest and extraordinary payments such as payments made in settlement of litigation.

(E) The GLO anticipates that those payors that have exceeded the threshold sums set out in subparagraphs (A)-(C) of this paragraph in the preceding state fiscal year will also exceed those sums in the current state fiscal year. The application of subparagraphs (A)-(C) to a specific payor may be waived at the commissioner's discretion to the extent allowed by law, upon a showing that a payor will not exceed the threshold sums set out in subparagraphs (A)-(C) in the current fiscal year, or for other good cause.

(F) The GLO will notify each payor to whom this paragraph applies in compliance with Title 34, Chapter 15 of this code.

(c) Inspections.

(1) The books, accounts, records, contracts, and other documents pertaining to production, transportation, sale, and marketing of geothermal energy and related resources leased shall at all times be subject to inspection and examination by the commissioner, or his authorized representative, and copies of such records shall be furnished to the commissioner upon request.

(2) All exploration, development, and processing operations shall be subject at any time to inspection by the commissioner or his authorized representative and copies of records or other documents pertaining to these operations shall be furnished to the commissioner upon written request.

(d) Forfeiture and reinstatement.

(1) If the owner of a lease or permit shall fail or refuse to make payment of any sum due, or if the owner or his authorized agent should knowingly make any false return or false report concerning the lease or permit, or if the owner or his agent should refuse the commissioner or his authorized representative access to the records or other data pertaining to operations under the lease or permit, or if any of the material terms of the lease or permit should be violated, the lease or permit shall be subject to forfeiture by the commissioner.

(2) A lease or permit shall be considered forfeited when it has been endorsed "forfeited" and the endorsement signed by the commissioner.

(3) Upon forfeiture, the commissioner will give written notice to the lessee or permittee stating the date of forfeiture and the reasons for the forfeiture. The notice of forfeiture will be sufficient if mailed to the last known address of the lessee or assignee shown of record in the GLO.

(4) A forfeiture may be set aside and all rights under a lease or permit may be reinstated before the rights of another party intervene, upon satisfactory evidence to the commissioner of future compliance with the provisions of the law, of the lease or permit, and of any rules adopted relative to the lease or permit, and any conditions placed upon the reinstatement. Lessee or permittee shall offer the evidence required for reinstatement within 30 days after the date the notice of forfeiture was mailed and after such 30 days shall have no future right of reinstatement. If a lease or permit issued under §155.44 of this title (relating to Mining Leases on Relinquishment Act Lands) is not reinstated within the 30-day period, the surface owner is entitled to act as the state's agent for leasing the minerals.

(e) Reduction of penalty and/or interest. The School Land Board may reduce penalties and/or interest assessed under the Texas Natural Resources Code, §52.131, and/or any other penalties or interest relating to delinquent or unpaid royalties that have been assessed by the commissioner in the following circumstances:

(1) When a lessee brings a deficiency to the General Land Office's attention voluntarily; and/or

(2) When a lessee and the General Land Office have reached an agreement regarding the reduction as part of a resolution of an outstanding audit issue.

*§155.48. Mineral Awards and Patents.*

(a) General. Anyone who was issued a mineral award prior to March 15, 1967, under former Texas Civil Statutes, Articles 5388-5403, may patent the mineral award upon proper compliance with the statutory requirements and the rules promulgated by the GLO.

(b) Lands and minerals subject to patent.

(1) All valuable mineral-bearing deposits, placers, veins, lodes, geothermal energy and related resources, and rock carrying metallic or nonmetallic substances of value except oil, natural gas, coal, and lignite, shall be subject to patenting.

(2) Only those lands which are presently encumbered by a mineral award are subject to patenting.

(c) Maintaining a mineral award; annual assessment work.

(1) The owner of an award shall have the exclusive right to the possession and use of the minerals within the area of the claim so long as he continues to do or causes to be done the annual assessment work for each claim.

(2) The annual assessment work shall consist of an excavation in the form of a shaft or tunnel or an open cut to the extent of 10 feet in depth or length and at least four feet by five feet for the other dimensions. In the event the mineral sought is usually and customarily produced from drilling holes by means of machinery, except such minerals as oil, natural gas, coal, or lignite, then the drilling of a hole to such depth or length in lieu of the digging of a shaft or tunnel or open cut shall constitute the annual assessment work required.

(3) During the month of January, the owner of a mineral award shall file an annual assessment affidavit on a form prescribed and furnished by the GLO. The affidavit shall be signed and notarized and shall describe the assessment work which was completed during the previous year. If the assessment work accomplished is deemed insufficient or if the form is improperly completed, the owner of the mineral award will be notified.

(4) The annual assessment work for a contiguous group of mineral awards may be done on one mineral award.

(d) Rental payments.

(1) The owner of a mineral award shall pay annually $.50 per acre. This annual rental payment shall be due during the month of January of each year succeeding the year the mineral award was issued.

(2) Annual rental payments will be applied to the purchase price of the mineral patent.

(e) Royalty payments.

(1) In addition to rental payments, the owner of a mineral award shall pay a royalty of 6.25% of the value of the production of the minerals upon such award as shown by the net smelter, mill, mint, or refinery returns or of the gross sums arising from the sale of the ore or products from the award and received by the owner.

(2) Royalty payments arising from the sale of ores, minerals, or other products shall be due quarterly in January, April, July, and October for the quarters preceding.

(3) Royalty payments shall be accompanied by a production and royalty report filed on a form prescribed and furnished by the GLO.

(f) Inspection.

(1) The books, accounts, records, and contracts pertaining to production, transportation, sale, and marketing of minerals awarded will at all times be subject to inspection and examination by the commissioner, or his authorized representative, and copies of such records shall be furnished to the commissioner upon request.

(2) All mining, milling, and processing operations shall be subject at any time to inspection by the commissioner or his authorized representative and copies of records pertaining to these operations shall be furnished to the commissioner upon written request.

(g) Forfeiture of mineral award.

(1) If the owner of a mineral award shall fail or refuse to make payment of any sum within 30 days after it becomes due, or if the owner or his authorized agent should knowingly make any false return or false report concerning production, mining, or development, or if the owner should fail or refuse the proper authority access to the records pertaining to the operations, or if the owner or authorized agent should knowingly fail or refuse to give correct information to the proper authority, or knowingly fail or refuse to submit to the GLO all correct reports required by statute, the rights acquired under the award shall be subject to forfeiture by the commissioner.

(2) Upon forfeiture of a mineral award, notice shall be mailed to the person, firm, or corporation shown by the records of the GLO to be the owner of the mineral award.

(3) Upon satisfactory evidence of future compliance with the law and with the GLO rules and regulations, the forfeiture may be set aside and all rights thereto reinstated.

(4) If a mineral award is forfeited and not reinstated, the land covered by the mineral award is not subject to being claimed or patented.

(h) Patenting a mineral award.

(1) At any time after five years from the date of a mineral award, the owner of the award may pay the balance due on the purchase price of the award and request a patent thereto.

(2) The owner of the mineral award shall make written request that the award be patented. The request shall be accompanied by three separate remittances: the balance of the purchase price, a patenting fee, and a recording fee. The appropriate patenting and recording fees are found in §1.3 of this title (relating to Fees).

(3) The purchase price of the mineral patent shall be $10 per acre, and the annual payments of $.50 per acre on the mineral award shall be applied to the purchase price.

(i) Mineral patent requirements.

(1) After the issuance of a mineral patent, no further assessment work will be required.

(2) The royalty due the state on a mineral patent shall be perpetual and shall be 6.25% of the value of the production of the minerals as shown by the net smelter, mill, mint, or refinery returns or of the gross sum, arising from the sale of the ore or products from the mineral patent and received by the owner.

*§155.49. Consistency with Coastal Management Program.*

Except as otherwise provided in §16.1(c) of this title (relating to Definitions and Scope), an action listed in §16.1(b) of this title (relating to Definitions and Scope) taken or authorized by the GLO or SLB pursuant to this chapter that may adversely affect a coastal natural resource area, as defined in §16.1 of this title (relating to Definitions and Scope), is subject to and must be consistent with the goals and policies identified in Chapter 16 of this title (relating to Coastal Protection) in addition to any goals, policies, and procedures applicable under this chapter. If the provisions of this chapter conflict with and can not be harmonized with certain provisions of Chapter 16 of this title (relating to Coastal Protection), such conflicting provisions of Chapter 16 of this title (relating to Coastal Protection) will control.

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

Filed with the Office of the Secretary of State, on August 9, 2000.

TRD-200005557
Larry R. Soward
Chief Clerk, General Land Office
School Land Board
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 305-9129

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# TITLE 37. PUBLIC SAFETY AND CORRECTIONS

## PART 11. TEXAS JUVENILE PROBATION COMMISSION

### CHAPTER 341. TEXAS JUVENILE PROBATION COMMISSION STANDARDS

**37 TAC §§341.1-341.12, 341.21-341.23**

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

The Texas Juvenile Probation Commission proposes the repeal of Chapter 341, §§341.1-341.12 and §§341.21-341.23, relating to Texas Juvenile Probation Commission standards. The repeal is in an effort not to overlap with proposed new standards which provide structural and substantive changes from the current standards.

Erika Sipiora, Staff Attorney, has determined that for the first five year period the repeal is in effect, there will be no fiscal implications for state or local government or small businesses as a result of enforcement or implementation.

Ms. Sipiora has also determined that for each year of the first five years the repeal is in effect, the public benefit expected as a result of the repeal and adoption of new proposed standards is consistent standards to all counties across the State of Texas

which will provide TJPC with a more accurate account in evaluating the effectiveness and services provided within the juvenile probation system. There will be no impact on small business or individuals as a result of the amendments.

Public comments on the repeal may be submitted to Kristy M. Carr at the Texas Juvenile Probation Commission, P.O. Box 13547, Austin, Texas, 78711-3547.

The repeal is proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the repeal.

*§341.1. Establishing Code of Ethics for Juvenile Probation Services Personnel and Providing for Enforcement of Code.*

*§341.2. Local Juvenile Board Administration.*

*§341.3. Juvenile Probation Services.*

*§341.4. Juvenile Probation Personnel.*

*§341.5. Local Juvenile Boards--Advisory Councils.*

*§341.6. State Administration.*

*§341.7. Waiver to Standards--This Standard Is Mandatory.*

*§341.8. Vehicle Exemption--This Standard Is Mandatory.*

*§341.9. Guidelines for Informal Adjustment Fees--This Standard Is Recommended.*

*§341.10. Complaints against Juvenile Boards--This Standard Is Mandatory.*

*§341.11. Coordinated Services for Multiproblem Children and Youth--This Standard Is Mandatory.*

*§341.12. Participation in Community Resource Coordination Groups--This Standard Is Mandatory.*

*§341.21. Memorandum of Understanding on Service Delivery to Runaways.*

*§341.22. Memorandum of Understanding on Certain Abused or Neglected Children.*

*§341.23. Memorandum of Understanding Regarding Service Delivery to Dysfunctional Families.*

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005403

Lisa Capers

Deputy Executive Director and General Counsel

Texas Juvenile Probation Commission

Earliest possible date of adoption: September 24, 2000

For further information, please call: (512) 424-6710

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# CHAPTER 341. TEXAS JUVENILE PROBATION COMMISSION STANDARDS

The Texas Juvenile Probation Commission proposes new Chapter 341, §§341.1-341.6, 341.13-341.17, 341.24-341.31, 341.38-341.41, 341.48-341.51, 341.58-341.61, 341.68, 341.75, 341.82-341.91, 341.98-341.106, 341.113, 341.114, 341.121-341.125, 341.132-341.143, 341.150, 341.157, and 341.158 relating to Texas Juvenile Probation Commission Standards. The proposed standards provide structural and substantive changes from the current standards.

Erika Sipiora, Staff Attorney, has determined that for the first five year period the new sections are in effect, there will be no fiscal implications for state or local government or small businesses as a result of enforcement or implementation.

Ms. Sipiora has also determined that for each year of the first five years the new sections are in effect, the public benefit expected as a result of enforcement will be the consistent standards to all counties across the State of Texas which will provide TJPC with a more accurate account in evaluating the effectiveness and services provided within the juvenile probation system. There will be no impact on small business or individuals as a result of the new sections.

Public comments on the proposed new sections may be submitted to Kristy M. Carr at the Texas Juvenile Probation Commission, P.O. Box 13547, Austin, Texas, 78711-3547.

## SUBCHAPTER A. DEFINITIONS

**37 TAC §341.1**

The new section is proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new section.

*§341.1. Definitions.*

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

(1) Chief Administrative Officer--Regardless of title, the person hired by a juvenile board who is responsible for oversight of the day-to-day operations of a juvenile probation department or a multi-county juvenile judicial district.

(2) Commission--The Texas Juvenile Probation Commission

(3) Courtesy Supervision--Practice where a juvenile probation department agrees to supervise a juvenile who is under the jurisdiction of another county's juvenile probation department.

(4) Financial Records--Any documentation associated with the expenditure of state dollars that would be required to substantiate a purchase

(5) Internal Controls--The process designed to provide reasonable assurance regarding the achievement of objectives in the following categories: effectiveness and efficiency of operations, reliability of financial reporting, safeguarding of assets and compliance with laws and regulations.

(6) Juvenile Justice Program--A non-residential program operated for the benefit of juveniles referred to a juvenile probation department that is either directly administered by the juvenile probation department, or is operated under contract with a juvenile board. A juvenile justice program does not include any program operated in a facility that is licensed or operated by a state agency other than the Texas Juvenile Probation Commission.

(7) Mechanical Restraint Devices--Devices used for the physical restraint of juveniles including but not limited to handcuffs, wristlets, anklets, ankle cuffs, plastic cuffs, and waistbands.

(8) Referral--A referral to the juvenile court for conduct defined in Texas Family Code §51.03 that results in a face-to-face interview between the juvenile and the authorized staff of the juvenile probation department.

(9) State Aid--Funds allocated by the Commission to a juvenile board to financially assist the board in achieving the purposes of Chapter 141 of the Texas Human Resources Code and in conforming to the Commission's standards or policies.

(10) Video Training--Pre-recorded training materials or conferences. Video training does not include video teleconferences.

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005405
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER B. JUVENILE BOARD RESPONSIBILITIES

**37 TAC §§341.2-341.6**

The new sections are proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

*§341.2. Administration.*

(a) Local juvenile probation services administration.

(1) The juvenile board shall hire a chief administrative officer for each autonomous juvenile probation department.

(2) The juvenile board shall specify the responsibilities and functions of the juvenile probation department as well as the authority, responsibility, and function of the position of the chief administrative officer.

(3) When probation services for adult and juvenile offenders are provided by a single probation office, the juvenile board shall ensure that the juvenile probation department policies, programs, and procedures are clearly differentiated.

(b) Referral ratio. The juvenile board shall employ at least one certified juvenile probation officer for each 100 referrals made to the juvenile probation department annually.

(c) Compliance with State and Federal Law. The juvenile board shall abide by and shall assure that the juvenile probation department abides by all applicable state, federal and local laws including any applicable standards promulgated by the Commission.

(d) Conflict of interest. A juvenile board member shall not participate in any decision, which would create a pecuniary benefit to the individual member.

(e) Participation in Community Resource Coordination Groups. Juvenile boards shall participate in the system of community resource coordination groups and the procedures in the memorandum of understanding adopted in §341.157 of this title (relating to Coordinated Services for Multiproblem Children and Youth). The chair of the juvenile board or a judicial member of the juvenile board designated by the chair shall serve as representative to the interagency dispute resolution process described in the memorandum of understanding.

*§341.3. Fiscal Responsibilities.*

(a) Fiscal Policies. The juvenile board shall develop and maintain fiscal policies and procedures. These policies shall include at a minimum the following subjects: salary provisions, employee benefits, travel and reimbursement procedures, collection of probation fees and restitution funds, authorized signatures for disbursements, petty cash and bonding.

(b) Fiscal Officer. The juvenile board shall assign accounting responsibility for fiscal affairs to an appropriate county or district fiscal officer. The fiscal officer shall not be an employee of the juvenile probation department.

*§341.4. Policy and Procedures.*

(a) Personnel Policies. The juvenile board shall adopt written personnel policies. These personnel policies shall include but not be limited to:

(1) a salary scale for all juvenile probation department personnel. Juvenile probation department personnel shall receive all applicable benefits and allowances paid to county employees. Salary scale levels shall be reasonable and comparable with prevailing salaries in the public and private sectors for similar occupations, educational and professional requirements;

(2) an annual employee appraisal; and

(3) an employee grievance procedure.

(b) Department Policies and Procedures. The juvenile board shall adopt written department policies and procedures. These policies shall include but not be limited to:

(1) intake and preliminary investigation;

(2) detention;

(3) transportation including the use of mechanical restraint devices during transportation;

(4) deferred prosecution. The deferred prosecution policy shall at a minimum include the following policies;

(A) The maximum supervision fee for deferred prosecution cases is $15.00 per month.

(B) The monthly fee shall be determined after obtaining a financial statement from the parent or guardian. The fee schedule shall be based on total parent/guardian income.

(C) The Chief Administrative Officer, or the Chief Administrative Officer's designee shall approve in writing the fee assessed for each child including any waiver of deferred prosecution fees.

(D) A deferred prosecution fee shall not be imposed if the juvenile court does not adopt a fee schedule and rules for waiver of the deferred prosecution fee.

(5) pre-disposition reports and social history;

(6) court procedures;

(7) sex offender registration;

(8) progressive sanctions;

(9) probation supervision;

(10) restitution;

(11) community service restitution;

(12) courtesy supervision;

(13) probation modification/revocation;

(14) residential placements

(15) TYC commitments and transportation;

(16) discharge procedures, exit plans and sealing information;

(17) Interstate Compact;

(18) Juvenile Justice Information System;

(19) Volunteers and Interns. If a juvenile probation department has or develops a volunteer or internship program, the juvenile board at a minimum shall adopt the following polices for the volunteer program:

(A) a description of the authority, responsibility and accountability of volunteers who work with the department;

(B) screening including performing a criminal history all state and federal databases;

(C) selection and termination criteria;

(D) orientation and training requirements;

(E) a requirement that volunteers meet minimum professional requirements; and

(F) a provision for a volunteer sign in log; and

(20) Mechanical Restraints Devices used for behavior intervention in Juvenile Justice Programs. The mechanical restraint devices policy shall at a minimum include the following policies:

(A) Mechanical restraints may only be used by a law enforcement officer, certified juvenile probation officer, certified detention officer, or certified correctional officer.

(B) Mechanical restraint devices shall not be used for punishment, discipline, or intimidation.

(C) The use of mechanical restraint devices shall be fully documented.

(D) Use of a mechanical restraint device shall be terminated as soon as the youth's behavior indicates that threat of imminent self-injury or injury to others are absent.

*§341.5. Facilities and Support Services.*

(a) Minimum facilities. Adequate office space shall be provided for all juvenile probation personnel. There shall be a private office or a place for interviewing and counseling clients. Each office shall have adequate lighting, air conditioning, heating, telephones, furniture, equipment, and square footage to provide services. The location of the juvenile probation facility and other field offices shall be reasonably accessible to children, families, and the general community.

(b) Minimum Support Services. Juvenile probation officers shall have adequate support services and staff in order to carry out their duties and responsibilities.

*§341.6. Waiver to Standards.*

(a) Who May Request. Unless expressly prohibited by another standard, the juvenile board, or chief administrative officer may make an application for waiver of any standard or standards adopted by the Commission. If the chief administrative officer makes a request for waiver, the chief administrative officer shall in writing notify the juvenile board of the request simultaneous with the request's submission to the Commission.

(b) Contents of Request. The written request for waiver shall:

(1) explain why said standard or standards cannot be complied with immediately;

(2) explain the impact the waiver if granted, would have on other standards; and

(3) provide a plan to ensure compliance within a period not to exceed one year including where applicable how the health and safety of juveniles would be maintained during the duration of the waiver.

(c) Length of Waiver. Waivers granted by Commission staff under this section shall not exceed one year. The juvenile board may request one subsequent waiver.

(d) Review of Request. In the event a request for waiver is denied, the juvenile board, or chief administrative officer may request a review by the Commission. The review of the waiver request shall occur at the next regularly scheduled Commission meeting.

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005406
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER C. CHIEF ADMINISTRATIVE OFFICER RESPONSIBILITIES

**37 TAC §§341.13-341.17**

The new sections are proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

*§341.13. Administrative Manual.*

(a) The chief administrative officer shall maintain an administrative manual for the juvenile probation department. The administrative manual shall include:

(1) the policies, procedures, and regulations of the juvenile probation department as adopted by the juvenile board; and

(2) a current organizational chart depicting structure, lines of authority, and responsibility.

(b) The chief administrative officer shall ensure that all employees are provided with a copy of or access to the administrative manual, update the manual on an annual basis and enforce all policies in the manual.

*§341.14. Identification.*

The chief administrative officer shall furnish each juvenile probation officer with proper official identification.

*§341.15. Supervision.*

The chief administrative officer shall ensure that all juveniles given court ordered probation or deferred prosecution are supervised by a certified juvenile probation officer.

*§341.16. Treatment and Safety.*

(a) Serious Incidents. The chief administrative officer shall report the death, attempted suicide, and any serious injury that requires medical treatment by a physician or physician's assistant that occurs in a juvenile justice program or juvenile probation department within 24 hours of discovering the incident.

(b) Child Abuse and Neglect. The chief administrative officer shall ensure that any allegation of abuse or neglect occurring in a juvenile justice program or juvenile probation department is reported to the Commission within 24 hours of having cause to believe a child has been abused or neglected. The chief administrative officer shall also ensure that a report is made to local law enforcement in accordance with Texas Family Code Chapter 261.

(1) Internal Investigation. The chief administrative officer shall maintain written policy and procedure requiring an internal investigation of all allegations of child abuse or neglect in the department or any juvenile justice program.

(A) The policy shall require:

*(i)* all staff members to fully cooperate with any investigation of alleged child abuse or neglect in the department or program;

*(ii)* any person alleged to be a perpetrator of child abuse or neglect be put on administrative leave or reassigned to a position having no contact with children in the department or program until the conclusion of the internal investigation;

*(iii)* the alleged perpetrator have no contact with the alleged victim(s) pending the conclusions of the internal investigation.

(B) At the conclusion of the internal investigation of child abuse or neglect, the chief administrative officer shall take appropriate measures to provide for the safety of children.

(C) The chief administrative officer shall submit a copy of the internal investigation to TJPC within two working days following the completion of the internal investigation.

(2) Treatment and Safety. The chief administrative officer shall ensure that juveniles under supervision of the juvenile probation department or participating in a juvenile justice program shall not be subjected to abuse or neglect as defined in Chapter 261, Texas Family Code.

*§341.17. Participation in Community Resource Coordination Groups.*

The chief administrative officer or the chief administrative officer's designee shall serve as the liaison to the community resource coordination group in accordance with the memorandum of understanding relating to coordinated services for multiproblem youth adopted in §341.157 of this title.

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005407
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER D. FISCAL OFFICER RESPONSIBILITIES

**37 TAC §§341.24-341.31**

The new sections are proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

*§341.24. Accounting.*

The fiscal officer shall conduct the business affairs of the department utilizing generally accepted accounting principles and best business practices.

*§341.25. Interest on State Funds.*

The fiscal officer shall ensure that state funds are held in an interest bearing account that provides for necessary protection of principle. Interest earnings on state funds shall be accounted for separately and expended for the sole benefit of the juvenile probation department.

*§341.26. Purchasing.*

The fiscal officer shall ensure that purchases made for the juvenile probation department are made in accordance with county procurement procedures. The fiscal officer shall ensure that written contracts are executed with any public and private service provider where services are purchased in whole or in part with any funds received from the Commission.

*§341.27. Expenditure of State Funds.*

The fiscal officer shall ensure that all program activities and expenditures of state funds are consistent with the purposes outlined in the budget documents of all applicable financial agreements with the Commission.

*§341.28. Internal Controls.*

The fiscal officer shall establish and maintain the internal controls for the juvenile probation department. The fiscal officer shall ensure that all employees with access to monies are bonded.

*§341.29. Financial Reporting.*

The fiscal officer is responsible for completion and submission of the following in accordance with Commission guidelines:

(1) quarterly expenditure reports for grant funds received from the Commission;

(2) annual certification of local expenditure reports;

(3) annual independent financial compliance audit of all funds received from the Commission; and

(4) other financial reports as requested by the Commission.

*§341.30. Refunds to the Commission.*

(a) The fiscal officer shall ensure that TJPC is reimbursed immediately for each dollar of unallowable costs if unallowable expenditures are discovered by any means.

(b) Unspent grant funds at the end of each contract period shall be returned to the Commission.

*§341.31. Records Retention.*

The fiscal officer shall ensure that financial records are retained and made available for inspection by the Commission for a minimum of three years after the end of the applicable contract period.

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005408
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER E. EMPLOYMENT OF JUVENILE PROBATION OFFICERS

**37 TAC §§341.38-341.41**

The new sections are proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

*§341.38. Qualifications for Employment.*

(a) Certified juvenile probation officer qualifications for employment shall adhere to the Texas Human Resources Code §141.061(a) and any additional standards promulgated by the Commission.

(b) One Year of Graduate Study Defined. The phrase "one year of graduate study," in Texas Human Resources Code §141.061(a)(3)(A), is interpreted to mean at least 24 post-graduate credit hours earned in a behavioral science field with certification from the school of enrollment attesting that the student has an acceptable scholastic standing. The fields of graduate study presently approved by the Commission are: criminology; corrections, counseling, law, social work, psychology, sociology, cultural anthropology, business management, public administration, and education.

(c) Internships. Internships may be considered as experience, where the duties performed were related to the field of juvenile justice.

*§341.39. Exemption from Qualifications.*

(a) The juvenile board, or chief administrative officer shall apply to the Commission for exemption of the requirements of one year of experience or graduate study prior to the employment of any individual who is hired for the position of juvenile probation officer. If the chief administrative officer makes a request for exemption under this section, the chief administrative officer shall in writing notify the juvenile board of the request simultaneous with the request's submission to the Commission.

(b) The exemption application shall document that reasonable efforts were made to employ a probation officer with one year of experience or graduate study and state why, in their opinion, the efforts were unsuccessful.

*§341.40. Criminal Records Check.*

Prior to employing a person as a certified juvenile probation officer, the chief administrative officer shall conduct a criminal history check of all state and federal databases.

*§341.41. Disqualification from Employment.*

(a) A person who has been convicted of or placed on deferred adjudication for a felony offense under the laws of this State, another State, or the United States is not eligible for employment as a juvenile probation officer. A request for waiver under §341.6 of this title may not be requested for this section unless the person received a pardon based upon proof of innocence.

(b) This subchapter applies to all individuals hired on or after the effective date of this subchapter.

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005409
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER F. CERTIFICATION OF JUVENILE PROBATION OFFICERS

**37 TAC §§341.48-341.51**

The new sections are proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

*§341.48. Persons Who Must be Certified.*

The chief administrative officer of a juvenile probation department, and any person hired as a juvenile probation officer, or as a supervisor to juvenile probation officers shall obtain and maintain an active juvenile probation officer certification from the Commission.

*§341.49. Certification.*

(a) Eligibility. A person, including the chief administrative officer, is eligible for certification as a juvenile probation officer when the person:

(1) meets the eligibility requirements under §341.38 of this title;

(2) has completed 40 hours of certification training in accordance with §341.60 of this title; and

(3) has not been convicted or placed on deferred adjudication for a felony against the laws of this state, another state, or the United States. A request for waiver under §341.6 of this title may not be requested for this requirement unless the person received a pardon based upon proof of innocence.

(b) Certification Procedures.

(1) Juvenile Probation Officers and Supervisors of Juvenile Probation Officers. The chief administrative officer or the chief administrative officer's designee shall submit a certification application to the Commission for all juvenile probation officers and supervisors of juvenile probation officers. The certification application shall include verification that a criminal history check of all state and federal databases was conducted within the 60 days prior to submitting the certification application. A copy of the criminal history check shall be retained in the juvenile probation department's records.

(2) Chief Administrative Officers. The chairman of the juvenile board shall submit the chief administrative officer's certification application to the Commission. The certification application shall include verification that a criminal history check of all state and federal databases was conducted within the 60 days prior to submitting the certification application. A copy of the criminal history check shall be retained in the juvenile probation department's records.

(c) Length of Certification. A certification is valid for two years from the date of issue.

(d) Reinstatement of Certification after Suspension. An individual whose certification has been suspended under §341.88(d)(2) of this title may apply for certification once the suspension period has expired and the individual meets the certification eligibility requirements listed under subsection (a) of this section.

*§341.50. Recertification.*

(a) Eligibility. A certified juvenile probation officer, including a supervisor of juvenile probation officers and the chief administrative officer, is eligible for recertification if the officer:

(1) has not been convicted or placed on deferred adjudication for a felony offense against the laws of this state, the laws of another state or the laws of the United States; and

(2) has within the past two years completed 80 hours of recertification training in accordance with §341.61 of this title.

(3) If the person applying for re-certification is the chief administrative officer, 20 hours of the required recertification training shall be in management and supervisory skills

(b) Recertification Procedures.

(1) Submission. The chief administrative officer or the chief administrative officer's designee shall submit a recertification application to the Commission for all certified juvenile probation officers and supervisors of juvenile probation officers. The juvenile board, or the juvenile board's designee shall submit the chief administrative officer's recertification application.

(2) Timeline for Submission. Unless a request for extension has been made under paragraph (4) of this subsection, the recertification application shall not be sent more than 30 days before or 60 days after the certification expiration date.

(3) Verification of Criminal History. All recertification applications shall include verification that a criminal history check of all state and federal databases was conducted within the 60 days prior to submitting the certification application. A copy of the criminal history check shall be retained in the juvenile probation department's records.

(4) Extension.

(A) Requests for Extension. The juvenile board, the chief administrative officer or either's designee may request an extension of time to allow a certified juvenile probation officer additional time to meet the recertification eligibility requirements listed in subsection (a) of this section or for the submission of recertification applications listed in paragraph (2) of this subsection. The request shall include an explanation showing cause while an extension is needed.

(B) Grants of Extension. Commission staff may grant an extension for a period not to exceed 90 days from the date the certification expired.

(C) Failure to complete the training or submission requirements within the extension period shall result in the Commission's denial of the recertification application.

(c) Length of Recertification. A recertification is valid for two years from the date of issue.

*§341.51. Transfer of Certification.*

(a) Notification Upon Resignation or Termination.

(1) The chief administrative officer, the juvenile board or either's designee shall notify the Commission within seven working days after a certified juvenile probation officer, including the chief administrative officer, resigns or is terminated from employment.

(2) The chief administrative officer, the juvenile board or either's designee shall require surrender of any county identification and the TJPC certification card upon the resignation or termination of any certified juvenile probation officer, including the chief administrative officer

(b) Inactive Certifications. Upon receipt of notice under subsection (a) of this section, the Commission shall place the probation or chief administrative officer's certification on inactive status. A person may not perform the duties of a juvenile probation officer, including those duties listed under §341.68 of this title, while on inactive status.

(c) Transfer of Certification. When a person with an inactive certification obtains employment as a juvenile probation officer, or a chief administrative officer, the juvenile board, the chief administrative officer or either's designee may request a transfer of certification to active status. The request for certification transfer shall be in writing and shall include a verification that a criminal history check of all state and federal databases was conducted within the 60 days prior to submitting the transfer request. A copy of the criminal history check shall be retained in the juvenile probation department's records.

(d) Expiration of Certification while on Inactive Status. If a juvenile probation officer's or chief administrative officer's certification expires while on inactive status, the officer will not be eligible for transfer of certification until the officer meets the eligibility requirements listed under §341.50(a) of this title.

(e) Transfer of Training Records. The chief administrative officer shall forward a certified juvenile probation officer's training records, upon a request from the chief administrative officer in the county where the certified juvenile probation officer's certification was transferred.

(f) Except for §341.50(a)(3) of this title this Section applies to all certification and re-certifications received on or after the effective date of this Section. Any felony conviction or deferred prosecution occurring before the effective date of this section will not disqualify a juvenile probation officer from receiving a recertification under this section. Section 341.50(a)(3) of this title does not become effective until January 1, 2002.

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005410
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER G. TRAINING OF JUVENILE PROBATION OFFICERS

**37 TAC §§341.58-341.61**

The new sections are proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

*§341.58. Training Hours.*

All training intended to count toward certification and recertification requirements shall be approved by Commission staff. TJPC reserves the right to refuse to grant approval for training hours that do not comply with the guidelines under this subchapter. No more than 40 training hours in one topic may count toward certification or recertification. No more than 15 hours of video training may count toward certification requirements. No more than 30 hours of video training may count toward recertification requirements.

*§341.59. Training Hours for Trainers.*

An individual who provides approved juvenile probation officer training under §341.58 of this title is eligible to claim training credit for each hour of course development. A trainer may only claim course development one time per course topic. No more than a total of 20 hours of course development may be credited toward certification or recertification requirements under §341.49 and §341.50 of this title. It is not a requirement under this section that the individual claiming training hours be employed by a juvenile probation department as a trainer.

*§341.60. Certification Training.*

A person filling an application for certification as a juvenile probation officer, a supervisor of juvenile probation officers, or a chief administrative officer shall have completed 40 hours of certification training. Certification Training shall include but not be limited to the following subjects:

(1) role of the juvenile probation officer;

(2) case planning and management;

(3) officer safety;

(4) transportation;

(5) juvenile law;

(6) courtroom proceedings and presentation;

(7) law enforcement processing;

(8) local programs and services including access procedures; and

(9) interagency collaborations and memoranda of understanding.

*§341.61. Recertification Training.*

(a) Juvenile Probation Officers and Supervisors of Juvenile Probation Officers. A certified juvenile probation office or supervisor of juvenile probation officers, shall receive 80 hours of recertification training every two years.

(b) Chief Administrative Officers shall receive 80 hours of recertification training every two years. Twenty of the 80 recertification hours for shall be in management and supervisory skills.

(c) Nature of Training. Recertification training shall be related to job responsibilities or the field of juvenile justice. A three-hour graduate course in any approved field of study listed in §341.38(b) of this title shall count as 40 hours of recertification training.

(d) This section applies to all training hours accrued on or after the effective date of this section.

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005411
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER H. DUTIES OF CERTIFIED JUVENILE PROBATION OFFICERS

**37 TAC §341.68**

The new section is proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new section.

*§341.68. Duties of Certified Juvenile Probation Officers.*

In addition to any duties, responsibilities or powers granted by Title III of the Texas Family Code, the following duties and responsibilities shall be performed by only certified juvenile probation officers:

(1) representation of the juvenile probation department in all formal court proceedings;

(2) preparation of written social history reports;

(3) acting as the primary supervising officer for all court ordered or deferred prosecution case;

(4) writing and administering case plans in accordance with the Commission's Case Management Standards; and

(5) completing an assessment instrument required to be completed by law or Commission standards

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005412
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER I. JUVENILE PROBATION OFFICER CODE OF ETHICS

**37 TAC §341.75**

The new section is proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new section.

*§341.75. Code of Ethics.*

The people of Texas expect of juvenile probation officers, supervisors of juvenile probation officers, and chief administrative officers unfailing honesty, respect for the dignity and individuality of human beings, and a commitment to professional and compassionate service. To this end the Commission subscribes to the following principles.

(1) Juvenile Probation Officers shall endeavor to:

(A) respect the authority and follow the directives of the court, recognizing at all times that they are an extension of the court;

(B) respect and protect the civil and legal rights of all children and their parents;

(C) serve each case with concern for the child's welfare and with no purpose of personal gain;

(D) encourage relationships with colleagues of such character to promote mutual respect within the profession and improvement of its quality of service;

(E) respect the significance of all elements of the justice and human services systems and cultivate a professional cooperation with each segment;

(F) respect and consider the right of the public to be safeguarded from juvenile delinquency;

(G) be diligent in their responsibility to record and make available for review any and all case information which could contribute to sound decisions affecting a client or the public safety;

(H) report without reservation any corrupt or unethical behavior which could affect either a child or the integrity of the department;

(I) maintain the integrity of private information and not seek personal data beyond that needed to perform their responsibilities, nor reveal case information to anyone not having proper professional use for such;

(J) not discriminate against any employee, prospective employee, child, child care provider, or parent on the basis of age, race, sex, creed, disability, or national origin;

(K) respect, serve and empathize with the victims of law violations allegedly committed by children;

(L) abide by all federal, state, and local laws and Commission standards.

(2) Juvenile Probation Officers shall not:

(A) use official position to secure privileges or advantages; make statements critical of colleagues or their departments unless these are verifiable and constructive in purpose;

(B) permit personal interest to impair in the least degree the objectivity which is to be maintained in their official capacity;

(C) use their official position to promote any partisan political purpose;

(D) accept any gift or favor of a nature to imply an obligation that is inconsistent with the free and objective exercise of professional responsibilities;

(E) make appointments, promotions or dismissals in furtherance of partisan political interests; and

(F) maintain an inappropriate relationship with juveniles assigned to their caseload or supervised by the juvenile probation department. An inappropriate relationship can include but is not limited to: bribery, solicitation or acceptance of gifts, favors, or services from juveniles or their families, and the appearance of an inappropriate relationship.

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005413
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER J. ENFORCEMENT PROCEDURES--CODE OF ETHICS

**37 TAC §§341.82-341.91**

The new sections are proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

*§341.82. Request for Disciplinary Hearing.*

Unless the standards in Subchapter K relating to mandatory revocation apply, the chief administrative officer or juvenile board may forward a copy of an internal investigation based on a code of ethics violation to the Commission. The internal investigation shall serve as a request for a disciplinary hearing.

*§341.83. Notifications Made to Commission.*

In the event the Commission or Commission staff receive notice from an individual or entity other than the chief administrative officer or juvenile board that a certified juvenile probation officer, or the chief administrative officer has violated the code of ethics, Commission staff shall notify the chief administrative officer or the local juvenile board. Upon receipt of notification from the Commission, the chief administrative officer, or the juvenile board may conduct an internal investigation and may make a request for a disciplinary hearing in accordance with §341.82 of this title.

*§341.84. Effect of Request for Disciplinary Hearing .*

When the Commission receives a request for disciplinary hearing under §341.82 of this title, the Commission shall give the officer alleged to have committed an ethics violation written notice and an opportunity for a hearing conducted by the Commission in accordance with the procedures set out below.

*§341.85. Procedure for Hearings.*

Hearings under this section shall be conducted pursuant to the Administrative Procedure Act, Texas Government Code Annotated, Chapter 2001. The Commission shall have the power to take depositions, administer oaths or affirmations, examine witnesses, receive evidence, and conduct hearings and issue subpoenas or summons.

*§341.86. Notice.*

(a) The Commission shall provide a minimum of ten days notice to the certified juvenile probation officer or chief administrative officer subject to a disciplinary hearing. Notice shall be sent by certified mail return receipt requested.

(b) The notice shall include:

(1) a statement of the time, place, and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved; and

(4) a short plain statement of the matters asserted.

*§341.87. Right to Counsel.*

A juvenile probation officer and chief administrative officers are entitled to the assistance of counsel during the hearing. The officer may expressly waive the right to the assistance of counsel. The officer may also be represented by a designated person. Written notice at least five days in advance of the hearing shall be given by each party intending to be represented, including the name of the representative. Failure to give such notice may result in postponement of the hearing.

*§341.88. Conduct of Disciplinary Hearing.*

(a) The juvenile probation officer, chief administrative officer or his/her representative, shall be given the opportunity to show compliance with the code of ethics and all requirements of the law, including Commission standards.

(b) The hearing shall be conducted in executive session with only the members of the Commission, Commission staff, the officer, the chief administrative officer, their representatives and such witnesses as may be called in attendance, unless the officer requests that it be open. Witnesses may be excluded from the hearing until is it their turn to present evidence.

(c) The conduct of the hearing shall be under the Commission chairman's control, and in general, shall be conducted in accordance with the following steps:

(1) The hearing shall begin with the presentation of investigatory findings by the designated Commission staff, supported by such proof as is deemed necessary.

(2) The officer may cross-examine any witnesses for the Commission;

(3) The officer may then present such testimonial or documentary proof as desired in rebuttal or in support of the contention that the code of ethics has not bee violated;

(4) The designated Commission staff may cross-examine any witnesses for the officer and offer rebuttal testimony of the officer's witnesses;

(5) Each party may make closing arguments;

(6) The hearing shall be recorded and transcribed by means including but not limited to a stenographic record of the proceedings.

(d) Ruling by the Commission. The Commission may consider only such evidence as is presented at the hearing, if the Commission determines that the evidence presented is insufficient, the Commission may ask for additional information from the officer or chief administrative officer, or Commission staff and may ask questions on their own motion. After all the evidence has been presented, the Commission must determine whether the allegation against the officer is supported by substantial evidence. Based on the Commission's ruling the Commission may assign one of the following dispositions:

(1) Reprimand. The Commission may issue a written reprimand of the juvenile probation officer or chief administrative officer.

(2) Suspension. The Commission may suspend the certification of a juvenile probation officer for a specified period not to exceed 24 months.

(3) Revocation. The Commission may permanently revoke the certification of the juvenile probation officer or chief administrative officer.

(e) Notice of Disposition. The Commission shall notify an individual whose conduct was the subject of a disciplinary hearing. The Commission may notify the individual either in person or in by certified mail return receipt requested. The notice of disposition shall include:

(1) which acts or omissions by the officer, if any violated the code of ethics;

(2) a statement of the evidence relied upon;

(3) a statement of which section or sections of the code of ethics, if any, were violated by the acts or omissions of the officer;

(4) the commission's dispositional ruling concerning the officer's certification; and

(5) the officer's right to rehearing and appeal.

*§341.89. Motion for Rehearing.*

An individual wishing to appeal the Commission's ruling may file a motion for rehearing with the Commission no later than the 20th day after receiving notice of the revocation. The Commission shall rule on the Motion for Rehearing no later than the 45th day after receiving the motion.

*§341.90. Judicial Review.*

A person whose certification has been revoked and whose motion for rehearing has been denied by the Commission is entitled to judicial review of the Commission's Action.

*§341.91. Record.*

The Commission shall create a record for each hearing conducted. The record shall include:

(1) the request for disciplinary hearing received under §341.82 of this title;

(2) the transcript of the hearing, which may take the form of the minutes of the Commission meeting;

(3) any documentary proof submitted during the hearing;

(4) all staff memoranda and documentation submitted to the Commission in making its decision;

(5) a copy of the final order issued by the Commission;

(6) any motions for rehearing;

(7) the Commission's ruling on any motions for rehearing.

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005414

Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER K. CERTIFICATION REVOCATION

**37 TAC §§341.98-341.106**

The new sections are proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

*§341.98. Duty to Notify.*

(a) The chief administrative officer, the juvenile board or either's designee shall in writing request a certification revocation from the Commission within 10 working days after obtaining notice that a certified juvenile probation officer, or chief administrative officer has been convicted or given deferred adjudication for any felony based on the laws of this state, the laws of another state or the laws of the United States. Notice provided under this section constitutes a request for certification revocation.

(b) A request for waiver under §341.6 of this title may not be requested for this section unless the certified juvenile probation officer, or chief administrative officer received a pardon based upon proof of innocence.

(c) Notifications Made to Commission. In the event the Commission, or Commission staff receive notice from an individual or entity other than the Chief administrative officer, juvenile board or their respective designees that a certified juvenile probation officer, or chief administrative officer has been convicted or given deferred adjudication for any felony based on the laws of this state, the laws of another state, or the laws of the United States, Commission staff shall notify the Chief administrative officer or the juvenile board. Upon receiving notice from Commission staff the Chief administrative officer, or juvenile board shall request for certification revocation in accordance with subsection (a) of this section.

*§341.99. Effect of Notification.*

Upon receipt of request for certification revocation under §341.92 of this title, the Commission shall conduct a hearing for certification revocation at the next regularly scheduled board meeting.

*§341.100. Procedure for Certification Revocation Hearings.*

Hearings for revocation under this section shall be conducted pursuant to the Administrative Procedure Act, Texas Government Code Annotated, Chapter 2001. The Commission shall have the power to take depositions, administer oaths or affirmations, examine witnesses, receive evidence, and conduct hearings and issue subpoenas or summons.

*§341.101. Notice.*

(a) The Commission shall provide a minimum of ten days notice to the certified juvenile probation officer or chief administrative officer subject to a revocation hearing. Notice shall be sent by certified mail return receipt requested.

(b) The notice shall include:

(1) a statement of the time, place, and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved; and

(4) a short plain statement of the matters asserted.

*§341.102. Right to Counsel.*

A juvenile probation officer and chief administrative officer are entitled to the assistance of counsel during the revocation hearing. The officer may expressly waive the right to the assistance of counsel. The officer may also be represented by a designated person. Written notice at least five days in advance of the hearing shall be given by each party intending to be represented, including the name of the representative. Failure to give such notice may result in postponement of the hearing.

*§341.103. Conduct of Revocation Hearing.*

(a) The juvenile probation officer, chief administrative officer or his/her representative, shall be given the opportunity to show compliance with the code of ethics and all requirements of the law, including Commission standards.

(b) The hearing shall be conducted in executive session with only the members of the Commission, Commission staff, the officer, the chief administrative officer, their representatives and such witnesses as may be called in attendance, unless the officer requests that it be open. Witnesses may be excluded from the hearing until is it their turn to present evidence.

(c) The conduct of the hearing shall be under the Commission chairman's control, and in general, shall be conducted in accordance with the following steps:

(1) The hearing shall begin with the presentation of findings by the designated Commission staff, supported by such proof as is deemed necessary.

(2) The officer may cross-examine any witnesses for the Commission;

(3) The officer may then present such testimonial or documentary proof as desired in rebuttal or in support of the contention that the officer has not been convicted or placed on deferred adjudication for a felony, or has been pardoned based upon proof of innocence;

(4) The designated Commission staff may cross-examine any witnesses for the officer and offer rebuttal to the testimony of the officer's witnesses;

(5) Each party may make closing arguments;

(6) The hearing shall be recorded and transcribed by means including but not limited to a stenographic record of the proceedings.

(d) Ruling by the Commission. The Commission may consider only such evidence as is presented at the hearing, if the Commission determines that the evidence presented is insufficient, the Commission may ask for additional information from the officer or chief administrative officer, or Commission staff and may ask questions on their own motion. After all the evidence has been presented, the Commission shall revoke the officer's certification if substantial evidence indicates the officer has been convicted or placed on deferred adjudication for a felony against this state, another state or the United States.

(e) Notice of Disposition. The Commission shall notify an individual whose conduct was the subject of a revocation hearing of the Commission's ruling. The Commission may notify the individual either in person or in by certified mail return receipt requested. The notice of disposition shall include:

(1) the Commission's dispositional ruling

(2) a statement of the evidence relied upon;

(3) a statement of which section or sections of the code of ethics, or other Commission standards, if any, were violated by the acts or omissions of the officer; and

(4) the officer's right to rehearing and appeal.

*§341.104. Motion for Rehearing.*

An individual wishing to appeal the Commission's disposition may file a motion for rehearing with the Commission no later than the 20th day after receiving notice of the revocation. The Commission shall rule on the Motion for Rehearing no later than the 45th day after receiving the motion.

*§341.105. Judicial Review.*

An individual whose certification has been revoked and whose motion for rehearing has been denied by the Commission is entitled to judicial review of the Commission's Action.

*§341.106. Record.*

(a) The Commission staff shall create a record for each revocation hearing conducted. The record shall include:

(1) the initial notification received under §341.98 of this title;

(2) the transcript of the revocation meeting which may take the form of the minutes of the Commission meeting;

(3) any documentary proof submitted during the hearing;

(4) all staff memoranda and documentation submitted to the Commission in making its decision;

(5) a copy of the final order issued by the Commission;

(6) any motions for rehearing; and

(7) the Commission's ruling on any motions for rehearing.

(b) This section applies to all felony convictions and deferred adjudications that occur on or after the effective date of this standard.

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005415
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER L. COMPLAINTS AGAINST JUVENILE BOARDS

**37 TAC §341.113, §341.114**

The new sections are proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

*§341.113. Notice of Complaint Procedures.*

The Commission staff shall prepare and distribute to each juvenile board with which it contracts a sign describing the procedures for filing a complaint against the juvenile board with the Commission. The juvenile board shall post the sign in a public area of the juvenile probation department and any facility operated by the juvenile board, or operated by a private entity through contract with the juvenile board.

*§341.114. Complaint Process.*

When Commission staff receive a written, signed complaint about a juvenile board, the Commission staff shall review the circumstances surrounding the complaint to determine whether the juvenile board has violated the rules or standards of the Commission.

(1) If the staff determines the complaint is about the juvenile services within the discretion of the juvenile board, the complaint will be referred to the juvenile board. The complainant shall be notified of the referral in writing.

(2) If the staff determines the juvenile board has violated the Commission's rules or standards, it will inform the juvenile board in writing and give the juvenile board an opportunity to come into compliance. If, within 90 days of the date on which the juvenile board received written notice of the staff determination, the juvenile board does not propose its own means of achieving compliance which is acceptable to the staff, the staff will propose a solution to the board and attempt to negotiate a mutually agreeable solution.

(3) If the Commission's staff and the juvenile board cannot reach an agreement, the staff will give the juvenile board written notice of its intent to refuse, reduce, or suspend state aid, under authority of the Texas Human Resources Code, §141.085. The juvenile board shall have 15 days after receipt of the notice to notify the executive director how it will comply with the staff's solution, or that it appeals the staff decision.

(4) The juvenile board's appeal must be in writing, and must state specifically its differences of opinion with the Commission's staff concerning the facts in dispute and the solution necessary under the standards or rules of the commission. The appeal must state whether the juvenile board requests a hearing before the Commission.

(5) The Commission shall set the appeal on the agenda for its next regularly scheduled meeting. If the juvenile board has requested a hearing, the juvenile board and the commission's staff may appear and make oral presentations concerning the appeal. If the juvenile board does not request a hearing before the Commission, the Commission will make its decision based upon the record.

(6) The complainant shall be notified in writing of the progress of the investigation and resolution of the complaint at least quarterly until the complaint is resolved, and shall be notified of the resolution.

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005416
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER M. CASE MANAGEMENT STANDARDS

**37 TAC §§341.121-341.125**

The new sections are proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

*§341.121. Definitions.*

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

(1) Assessment--Assessment is the process by which relevant and valid information is compiled in order to determine the juvenile's needs, risk of offending, strengths, and weaknesses. The assessment process is intended to assist the supervising juvenile probation field officer in developing and implementing an effective case plan, appropriate level of supervision, and utilization of appropriate resources.

(2) Case Planning--Case planning involves the process of determining the post-adjudication needs of a juvenile. This includes all appropriate and available assessment and intake information, SJS findings, preliminary investigation information, family dynamics, school history, and victim impact statements. A written case plan outlines services to be provided during the juvenile's term of court ordered probation. Case planning also includes the reassessment, reevaluation, and review of the juvenile's risks, needs and initial case plan, in order to make any subsequent changes necessary to best meet the juvenile's status and circumstances over time.

(3) Comprehensive Assessment Instrument (COMPASS)--An instrument developed by the Texas Juvenile Probation Commission that assesses the juvenile's needs in the areas of mental health, education and family domains and the juvenile's risk of re-offending.

(4) Formal Intake Interview--The interview with the juvenile who is the subject of the referral and the juvenile's parent, guardian or custodian wherein the intake officer or juvenile probation officer develops a dispositional recommendation for the juvenile's case. The formal intake interview occurs subsequent to the formal referral.

(5) Formal Referral--A referral of a juvenile to the juvenile court for conduct defined in Texas Family Code §51.03 that results in a face to face interview between the juvenile and the authorized staff of the juvenile probation department.

(6) Progressive Sanctions Assigned Level--The level of sanctions actually assigned to a juvenile by the juvenile court that corresponds with the progressive sanctions guidelines contained in Chapter 59, Texas Family Code.

(7) Exit Plan--The exit plan is the written document developed for each juvenile that identifies the juvenile's needs for post-supervision reintegration and specifies the community resources available to meet those needs. The purpose of the exit plan is to facilitate a continuum of community services to the juvenile and the juvenile's family after probation supervision ends.

(8) Strategies in Juvenile Supervision (SJS)--A case assessment and correctional management process designed to provide a structured method for gathering and organizing information about the juvenile and translating that information into appropriate case management strategies.

(9) Supervision--Supervision involves the case management of a juvenile by the assigned juvenile probation supervising field officer or designee through contacts (face to face, telephone, office, home, collateral) with the juvenile, juvenile's family, and other case planning participants.

(10) Title IV-E Standards--Standards promulgated by the Texas Juvenile Probation Commission as detailed in Chapter 347 of this title (relating to Title IV-E Federal Foster Care Program).

*§341.122. Assessment.*

(a) COMPASS. TJPC Comprehensive Assessment Instrument (COMPASS), or an assessment tool approved by TJPC, shall be completed for all juveniles who receive a disposition from the juvenile court or juvenile probation department. If the COMPASS (or a comparable instrument approved by TJPC) has been completed within the previous six months and contained in the juvenile's case record, the department is not required to complete an additional assessment.

(1) Time of Assessment. The assessment instrument shall be administered at the formal intake interview.

(2) Administration of Instrument. The instrument shall be administered by a certified juvenile probation officer that conducts the formal intake interview.

(b) SJS. A Strategies in Juvenile Supervision (SJS) worksheet may be completed for all juveniles on court ordered probation. The SJS worksheet should be completed subsequent to the disposition of the juvenile's case and shall be completed prior to the formulation of the written case plan. The juvenile probation supervising field officer should administer the SJS worksheet.

*§341.123. Case Planning and Review.*

(a) Case Plan. A written case plan shall be developed and implemented for juveniles assigned to Progressive Sanctions levels two through five. The written case plan shall be developed with all appropriate and available parties present and participating including, but not limited to, the juvenile; any parent, guardian, or custodian of the child and the supervising juvenile probation field officer. A written case plan for each juvenile assigned to Progressive Sanctions level two shall be developed within thirty calendar days of the juvenile's disposition. Written case plans for juveniles assigned to Progressive Sanctions levels three through five shall be developed within 60 calendar days of the disposition. The original case plan shall be maintained in the juvenile's case file. Copies of the written case plan shall be provided to the juvenile and the juvenile's parent, guardian, or custodian.

(b) Case Review. It is recommended that written case plans be reviewed every 90 days after implementation of the initial case plan or at any time when significant changes take place in the juvenile's situation. The juvenile and at least one parent, guardian or custodian shall be present for the case review. The written case plan shall be revised to address any changes in risks and needs identified during the review process. Upon acceptance a juvenile's case from other county for courtesy supervision, a review of the current written case plan shall be conducted by the receiving county in accordance with this section. All original revised case plans shall be maintained in the juvenile's case file. Copies of the revised written case plan shall be provided to the juvenile and the juvenile's parent, guardian, or custodian. This does not apply to Title IV-E cases, which shall comply with Title IV-E standards. The case review, with appropriate documentation in the case file, shall discuss and consider the following:

(1) Appropriateness of the juvenile's current level of supervision and services;

(2) Extent of compliance with the individualized case plan;

(3) Extent of compliance with the conditions of probation;

(4) Extent of progress made with the juvenile and family toward solving or reducing the factors that necessitated the juvenile's placement on probation;

(5) A projection of a likely date by which the juvenile may be ready for court-ordered release from probation supervision; and

(6) Services accessed, offered or provided to the juvenile and family to address risks and needs identified on the COMPASS or equivalent assessment tool.

*§341.124. Supervision.*

The level of supervision provided to a juvenile by the probation department shall be defined by the results of the COMPASS (or other approved assessment tool), SJS (where applicable), and the juvenile's written case plan. A minimum of one face to face contact per month with the juvenile is mandatory unless otherwise noted in the case plan.

*§341.125. Exit Plan.*

An exit plan is to be provided following the successful completion of a juvenile's probation period. A written exit plan shall be developed prior to the juvenile's scheduled release from probation. The written exit plan shall be formulated by all involved and available parties. The original exit plan shall be placed in the juvenile's case file. Copies of the exit plan shall be provided to the juvenile and the juvenile's parent, guardian, or custodian. The exit plan shall include a copy of the notification given to the juveniles regarding sealing rights as required by the Texas Family Code §58.003(i).

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005417
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER N. DATA COLLECTION STANDARDS
## DIVISION 1. CASEWORKER SYSTEMS

**37 TAC §§341.132-341.137**

The new sections are proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

*§341.132. Definitions.*

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

(1) CASEWORKER--A personal computer-based tracking and case management system, developed and supported by the Texas Juvenile Probation Commission (TJPC), that provides juvenile probation officers a systematic method to track and manage juvenile offender caseloads.

(2) Data Coordinator--A person employed by a juvenile probation department who is designated by the juvenile board to serve and function as the primary contact with TJPC on all matters relating to data collection and reporting.

(3) TJPC Monthly Folder Extract--An automated process to extract and submit modified case records from the department's CASEWORKER system to TJPC. The extract created by CASEWORKER follows in accordance with the Electronic Data Interchange Specifications.

(4) Comprehensive Folder Edit--A report generated in CASEWORKER that performs an extensive edit of the folder information. This report identifies incorrectly entered data, unrecoverable files, and questionable data that impact the accuracy of the reports and programs.

(5) Annual Resource Survey--A manual report designed to gather supplemental data in relation to juvenile activity and the services and/or programs that are available within the department or community. This report also captures each department's staff size, salary range and caseload.

(6) Electronic Data Interchange Specifications--document developed by TJPC outlining the data fields and file structures that each department is required to follow in submitting the TJPC monthly folder extract. The Electronic Data Interchange Specifications are published in Subchapter O, §341.150 of this title.

*§341.133. Data Coordinator.*

(a) Designation. Each juvenile board shall designate an employee of the juvenile probation department to serve as data coordinator to function as the primary contact with TJPC on all matters relating to data collection, reporting and the CASEWORKER system. If the designation of the data coordinator is changed by the juvenile board, TJPC shall be notified in writing within ten working days.

(b) Training Requirements. The data coordinator shall have a thorough understanding of TJPC reporting requirements and shall be trained on CASEWORKER by TJPC. Within 90 days from date of a new designation as data coordinator, the new data coordinator shall attend CASEWORKER training provided by TJPC.

(c) Duties. The data coordinator is responsible for ensuring that all data submitted to TJPC by the local juvenile probation department is accurate, timely, and consistent with TJPC reporting requirements. The data coordinator shall ensure that the TJPC Monthly Folder Extract is received on or by the applicable due date.

*§341.134. TJPC Monthly Folder Extract.*

The TJPC Monthly Folder Extract shall be sent to TJPC via the Internet. The extract is due to TJPC on the tenth day of each month following the reporting period (example: extract of February data is due to TJPC on March 10).

*§341.135. Other Reports.*

(a) Annual Resource Survey. All juvenile probation departments are required to complete the Annual Resource Survey. The report must be completed in the format provided by TJPC and shall be submitted by January 31 of the following year for which the resource survey pertains.

(b) Special Requests. Information from juvenile probation departments is periodically requested by TJPC. Departments shall comply with these requests, whether on paper or electronically by e-mail or the Internet, in the format specified by TJPC.

*§341.136. Accuracy of Data.*

(a) Required Fields. The probation department shall fill in all applicable data fields for each referral in their CASEWORKER system to minimize missing information.

(b) Comprehensive Folder Edit. Probation departments shall run the Comprehensive Folder Edit on a monthly basis.

(c) Errors. Errors detected by the Comprehensive Folder Edit, the annual TJPC monitoring visit, or the TJPC Research and Planning Division upon analysis shall be corrected prior to the next submission of the TJPC Monthly Folder Extract.

*§341.137. Security of Data.*

(a) Passwords. Passwords shall be assigned by the CASEWORKER administrator or management information systems administrator for each individual user and should not be shared by employees or other persons. Each department shall have a limited number of employees that are authorized to delete information contained within CASEWORKER. Access to the department's CASEWORKER system shall be removed concurrent with the termination of the person's employment.

(b) Backup and Restoration. All juvenile probation departments shall adopt and follow a written policy for the backup and restoration procedures relating to data, requiring, at a minimum, a system backup once per week. Departments must maintain at least five generations (copies) of data backups.

(c) Off-Site Storage. All juvenile probation departments shall store a system backup off-site to be accessible in case of a disaster at the department (fire, tornado, etc). An updated backup for off-site storage must be run at a minimum of once a month, in addition to the five generations of backup.

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005418
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## DIVISION 2. NON-CASEWORKER SYSTEMS

**37 TAC §§341.138-341.143**

The new sections are proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

*§341.138. Definitions.*

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

(1) Data Coordinator--A person employed by a juvenile probation department who is designated by the juvenile board to serve and function as the primary contact with TJPC on all matters relating to data collection and reporting.

(2) TJPC Monthly Folder Extract--An automated process to gather data relating to all case files in the case management system designed to analyze crime and juvenile trends, program success, and profiling of juvenile offenders. The extract shall be submitted in the format specified by the TJPC Electronic Data Specifications.

(3) Electronic Data Interchange Specifications--Document developed by TJPC outlining the data fields and file structures that each department is required to follow in submitting the TJPC Monthly folder extract. The Electronic Data Interchange Specifications are published in Subchapter O, §341.150 of this title.

(4) Annual Resource Survey--A manual report designed to gather supplemental data in relation to juvenile activity and the services and/or programs that are available within the department or community. This report also captures the department's staff size, salary range and caseload.

*§341.139. Data Coordinator.*

(a) Designation. Each juvenile board shall designate an employee of the juvenile probation department to serve as data coordinator to function as the primary contact with TJPC on all matters relating to data collection and reporting. If the designation of the data coordinator is changed by the juvenile board, TJPC shall be notified in writing within ten working days.

(b) Training Requirements. The data coordinator shall attend training, as required and deemed necessary by TJPC, relating to updates on statistical and research-based information and requirements.

(c) Duties. The data coordinator is responsible for ensuring that the data submitted to TJPC by the local juvenile probation department is accurate, timely, and consistent with TJPC reporting requirements. The data coordinator shall ensure that the TJPC Monthly Folder Extract is received on or by the applicable due date.

*§341.140. TJPC Monthly Folder Extract.*

The TJPC Monthly Folder Extract data shall be sent to TJPC via the internet and shall include all data fields required by the TJPC Electronic Data Interchange Specifications. The extract is due to TJPC on the tenth day of each month following the reporting period (example: extract of February data is due to TJPC on March 10).

*§341.141. Other Report.*

(a) Annual Resource Survey. All juvenile probation departments are required to complete the Annual Resource Survey. The report must be completed in the format provided by TJPC and shall be submitted by January 31 of the following year for which the resource survey pertains.

(b) Special Requests. Information from juvenile probation departments is periodically requested by TJPC. Departments shall comply with these requests, whether on paper or electronically by e-mail or the Internet, in the format specified by TJPC.

*§341.142. Accuracy of Data.*

(a) Required Fields. Departments shall fill in all applicable fields as specified in the CASEWORKER Extract File Layout. If TJPC requires additional fields, each department shall update their case management system to include such information.

(b) Maintaining Accuracy. Each department shall have a written policy and procedure to maintain accuracy of data submitted and methods of correcting errors. Each department shall report data elements that are consistent with TJPC definitions.

(c) Errors. Errors detected by the department during daily operation, or by TJPC during the annual monitoring visit or by the TJPC Research and Planning Division analysis shall be corrected prior to the next submission of the TJPC Monthly Folder Extract.

*§341.143. Security of Data.*

(a) Passwords. Department users shall be required to obtain a password to their case management system. Each department shall have a written policy and procedure to ensure secured access and to limit the number of employees that have access to delete information from the case management system. Access to the department case management system shall be terminated for people no longer employed by the department.

(b) Backup and Restoration. All juvenile probation departments shall adopt and follow a written policy.

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005419
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER O. ELECTRONIC DATA INTERCHANGE SPECIFICATIONS

**37 TAC §341.150**

The new section is proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new section.

*§341.150. TJPC Monthly Folder Extract.*

The TJPC Monthly Folder Extract data shall include all data fields required by TJPC Electronic Data Interchange Specifications found in the figures below.

Figure 1: 37 TAC §341.150

Figure 2: 37 TAC §341.150

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005420
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## SUBCHAPTER P. TEXAS JUVENILE PROBATION COMMISSION

**37 TAC §341.157, §341.158**

The new sections are proposed under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

*§341.157. Memoranda of Understanding--Coordinated Services for Multiproblem Children and Youth.*

(a) The Texas Juvenile Probation Commission adopts by reference a joint memorandum of understanding with the Texas Commission for the Blind, Texas Department of Health, Texas Department of Protective and Regulatory Services, Texas Department of Mental Health and Mental Retardation, Texas Education Agency, Texas Rehabilitation Commission, and the Texas Youth Commission concerning coordinated services for multiproblem children and youth which provides for the implementation of a system of community resource coordination groups.

(b) The memorandum of understanding was published in the November 15, 1988, issue of the *Texas Register* (13 TexReg 5727) by the Texas Department of Human Services, 40 TAC §72.701. Copies of the memorandum of understanding are available from the Texas Juvenile Probation Commission.

*§341.158. Memoranda of Understanding--Service Delivery to Dysfunctional Families*

(a) The Texas Juvenile Probation Commission adopts by reference a joint memorandum of understanding with the Texas Department of Human Services and the Texas Youth Commission regarding service delivery to dysfunctional families.

(b) The memorandum of understanding was published in the *Texas Register* by the Texas Department of Human Services on October 29, 1991 (16 TexReg 6126). Copies of the memorandum of understanding are available from the Texas Juvenile Probation Commission.

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

Filed with the Office of the Secretary of State, on August 2, 2000.

TRD-200005421
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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## CHAPTER 347. TITLE IV-E FEDERAL FOSTER CARE PROGRAM

**37 TAC §§347.1, 347.3, 347.5, 347.7, 347.9, 347.11, 347.13, 347.15, 347.17, 347.19, 347.21**

The Texas Juvenile Probation Commission proposes amendments to Chapter 347, §347.1, §347.3, §347.5, §347.7, §347.9, §347.11, §347.13, §347.15, §347.17, and §347.19 concerning standards relating to Title IV-E. The amendments are being proposed in an effort to come in to compliance with Adoption and Safe Families Act, Public Law 105-89, as enacted in January 2000.

Cynthia Weisinger, Federal Programs Manager, has determined that for the first five year period the amendment is in effect, there will be no fiscal implications for local government as a result of enforcement or implementation.

Ms. Weisinger has also determined that for each year of the first five years the amendment is in effect, the public benefit expected

as a result of enforcement or implementation will be a clarification of the new requirements with federal standards and places an increased focus on safety and permanency for children who have been placed outside of their homes. There will be no impact on small business or individual as a result of the amendments.

Public comments on the proposed amendment may be submitted to Kristy M. Carr at the Texas Juvenile Probation Commission, P.O. Box 13547, Austin, Texas 78711-3547.

The amendment is mandated under Texas Family Code §261.401(b)and proposed under Texas Human Resources Code §141.042, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules that provide minimum standards for juvenile boards and that are necessary to provide adequate and effective probation services.

No other code or article is affected by the amendment.

*§347.1. Introduction.*

(a) The Texas Department of Protective and Regulatory Services (TDPRS) is the [~~single~~] state agency in Texas that administers Title IV-E of the Social Security Act (42 United States Code §§670 et seq.). The federal government reimburses TDPRS for part of the foster care costs of eligible children served by TDPRS. This law was enacted to establish a program of adoption assistance, to strengthen the program of foster care assistance for needy and dependent children, to improve the programs for child welfare, social services, and aid to families with dependent children, and for other purposes. In addition, to be eligible for this program, TDPRS must manage the cases of eligible children in compliance with standards set in the Social Security Act, §42 USC §§622[~~§427~~]. These requirements ensure careful management of a child's case. They require a case plan and a case review system designed to return children to their families or some other permanent plan at the earliest possible date. They require a system to track the location of children in placement, even when they run away. It also includes protection of families' and children's rights.

(b) The Texas Juvenile Probation Commission (TJPC) has contracted with TDPRS to make these federal funds available to reimburse part of the foster care costs of eligible children in the juvenile justice system. TJPC is willing to contract with any juvenile board which meets the federal requirements for Title IV-E and the Social Security Act, §42 USC §§622[~~§427~~]. A juvenile board that wants to contract with TJPC to access these funds must perform in the ways described in the following rules, and in certain rules of the TDPRS referred to in these rules.

*§347.3. Definitions.*

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

(1) Administrative review--A review open to the participation of the caregiver and parents of the child. The purposes of the review are to determine the safety of the child, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, the extent of progress on issues that led to the child's removal from the home, and to project a likely date for permanency. [~~and conducted by a panel of no more than 10 persons, one of whom acts as the designated facilitator and is not responsible for the case management of or the delivery of services to either the child or the parents who are the subject of the review. The persons in attendance may include:~~]

[~~(A) the juvenile probation officer;~~]

[~~(B) the parent(s) of the child;~~]

[~~(C) the juvenile probation officer's supervisor;~~]

[~~(D) the child's caregiver;~~]

[~~(E) the child;~~]

[~~(F) the child's counselor;~~]

[~~(G) the child's attorney;~~]

[~~(H) the child's guardian ad litem; and~~]

[~~(I) a representative from the child's school. The review is a meeting of interested persons concerning the child's case that determines the items set out in §347.15 of this title (relating to Case Plan and Review System) and of this text.~~]

(2) Aid to families with dependent children (AFDC)--A financial assistance program available to low-income families who meet categorical requirements described in 40 TAC Part 1, Chapter 3 [~~(concerning Income Assistance Services)~~].

(3) Billing level of care--Rate of payment based on the level of services a facility is licensed or approved to provide. [~~A numerical rating given to each IV-E approved facility to determine the rate of payment.~~]

(4) Caregiver or substitute care facility--Any IV-E approved facility or foster family.

(5) Date of actual placement--The date the child enters an eligible foster care setting. [~~The date the facility accepts the child for placement as per the written agreement between the juvenile probation department and the IV-E approved facility.~~]

(6) Disposition order--A court order that results in the child's placement in substitute care [~~a IV-E approved facility~~].

(7) TJPC eligibility specialist--A person employed and trained by TDPRS to make IV-E eligibility determinations.

(8) Initial order of removal--The first order that removes the child from the home and which culminates in the child's placement in substitute care without the child having returned to the home.

(9) Juvenile board--An administrative body established by state statute that is responsible for the provision of juvenile probation services within a defined jurisdiction.

(10) Juvenile court--A court designated by the juvenile board under the Texas Family Code, §51.04, or other state law, which hears cases involving delinquent conduct or conduct indicating a need for supervision.

(11) Level of care--A numerical rating based on an assessment of the services a child will need while in substitute care.

(12) Permanency hearing--A judicial hearing required by 42 §675. The hearing must be held no later than 12 months after the child's date of actual placement in a Title IV-E approved facility, and every 12 months thereafter throughout the child's stay in substitute care.

(13) Permanency plan--A description of the planned living arrangement for the child following a stay in substitute care. It may include, but is not limited to:

(A) return to parent;

(B) placement with a relative(s);

(C) emancipation/independent living;

(D) long-term institutional care; or

(E) adoption.

(14) Reasonable efforts--Judicial findings regarding efforts made to prevent or eliminate the need to remove the child from the

home, and if the child must be removed, judicial findings regarding efforts made to finalize the permanency plan.

(15) Specified relative--A relative within the degree of relationship specified under AFDC rules with whom the child lived within six months prior to removal from the home.

(16) Substitute care--the placement of a child in a foster home, residential treatment center, or other child care institution.

(17) Texas Department of Protective and Regulatory Services (TDPRS)--the state agency responsible for the administration of the Title IV-E program in Texas.

(18) Title IV-E (IV-E)--A federal foster care program established under 42 USC §§670 et seq. which, among other things, assists states with the cost of care for children who qualify for financial assistance through the Aid to Families with Dependent Children Program, and who meet the eligibility requirements described in 42 USC §672(a).

(19) Title IV-E approved facility--Facilities licensed and/or approved by the Texas Department of Protective and Regulatory Services (TDPRS) for Title IV-E participation.

[(7) Forms for information collecting--]

[(A) Child/Family Service Plan Form--TJPC-IV-E-F1;]

[(B) Review of Child/Family Service Plan Form--TJPC-IV-E-F2;]

[(C) Foster Care Assistance Application Form--TJPC-IV-E-F3;]

[(D) Foster Care Assistance Review Form--TJPC-IV-E-F4;]

[(E) Placement Information/Discharge Form--TJPC-IV-E-F5;]

[(F) Six Month Administrative Case Review Form--TJPC-IV-E-F6;]

[(G) Foster Care, Adoption, and Conservatorship Tracking System; (FACTS) Form--TJPC-IV-E-F7;]

[(H) Request for Reimbursement Form--TJPC-401;]

[(I) Request for Reimbursement Correction Form--TJPC-401-C;]

[(J) Documentation of IV-E Administrative Costs--TJPC-402.]

[(8) IV-E--A federal foster care program for children who qualify for financial assistance through the Aid to Families with Dependent Children Program, and who meet judicial requirements as stated in Public Law 96-272, §472(a). Program benefits include Medicaid coverage and foster care benefits.]

[(9) IV-E approved facility--There are two categories of facilities. One category includes a public residential child care institution which is licensed or certified for no more than 25 children, and is not a lock-up facility, a long-term secure detention program, or a forestry camp. Another category includes any non-profit residential facility that is licensed by Texas Department of Protective and Regulatory Services (TDPRS) as one of the following as they are defined in 40 TAC Part I, Chapter 83 (concerning Twenty-four-Hour Care Licensing):]

[(A) an emergency shelter;]

[(B) a foster family home;]

[(C) a foster group home;]

[(D) a therapeutic foster family home;]

[(E) a therapeutic foster group home;]

[(F) a residential treatment center;]

[(G) a maternity home;]

[(H) a halfway house;]

[(I) a child placing agency;]

[(J) a therapeutic camp; or]

[(K) a basic child care facility.]

[(10) Incapacity--To be eligible for AFDC based on a parent's incapacity, one parent in the family group must have a medically determined mental or physical impairment. This impairment must have kept or will keep him from performing his usual work for at least 30 days from the application date. The disability determination section (DDS), state office, determines incapacity for AFDC based primarily upon socioeconomic and medical information. The applicant's age, education, work experience, vocational training, and ability to speak English are evaluated to determine the level of work the person can do in spite of mental or physical impairment. The applicant's usual work is his main occupation for the last 15 years. His usual work is evaluated to determine the level of activity. Then, if medical information shows the applicant cannot perform this work, he meets the AFDC definition of incapacity until he recovers or is trained for another occupation.]

[(11) Initial court order that removes the child from home--If a child is detained before a disposition hearing, and does not return home, the detention order is the initial court order that removes the child from home. If a child is not detained before a disposition hearing, the disposition order is the initial court order that removes the child from home.]

[(12) Juvenile board--An administrative body established by state statute that is responsible for providing juvenile probation services within a defined jurisdiction.]

[(13) Juvenile court--A court designated by the juvenile board under the Texas Family Code, §51.04, or other state law, which hears cases involving delinquent conduct or conduct indicating a need for supervision.]

[(14) Level of care--A numerical rating that determines the child's level of service needs as described in the State of Texas Common Application for Placement of Children in Residential Care.]

[(15) Plan for permanent placement--The determination required by Public Law 96-272, §475(5)(C), concerning a child's future status. It may include, but is not limited to:]

[(A) return to parent;]

[(B) placement with a relative(s);]

[(C) emancipation;]

[(D) independent living;]

[(E) long-term institutional care;]

[(F) permanent foster care; or]

[(G) long-term custodial care.]

[(16) Reasonable efforts--A judicial determination regarding efforts made prior to a child's placement in substitute care to prevent or eliminate the need to remove the child from the home, and if the child is removed from the home, to make it possible for the child to return to the home.]

[(17) Specified relative--Any blood relative, including those of half blood, and including first cousins, nephews, or nieces; persons of preceding generations as denoted by prefixes of grand, great, or great-great; stepfather, stepmother, stepbrother, and stepsister; persons who legally adopt a child or his parent as well as the natural and other legally adopted children of such persons, and other relatives of the adoptive parents in accordance with state law; spouses of any persons named in this definition even after the marriage is terminated by death or divorce.]

[(18) TJPC eligibility specialist--A person employed or contracted by TJPC who determines the IV-E status of children referred.]

[(19) Twelve-month motion to modify hearing--A judicial hearing required by 42 United States Code 675. The hearing must be held no later than 12 months after the child's date of actual placement in a IV-E facility, and every 12 months thereafter throughout the child's stay in substitute care.]

*§347.5. Eligibility Requirements Documented in the Initial Court Order That Removes the Child from Home or the Subsequent Court Order.*

(a) The initial order of removal shall be issued no later than six months after the last day on which a child lived with a specified relative and shall include one of the following findings: [If a juvenile court finds that it is in a child's best interest to be removed from home, and includes this finding in the initial court order that removes the child from the home, then the child may be eligible for federal foster care payments. In addition, the court must find that reasonable efforts were made to prevent the child's removal from the home, that the child has been removed and the court approves the removal, and must order that responsibility for the child's care and placement rests with the juvenile probation department. The court may make the reasonable efforts finding at any time, but federal foster care payments may not begin until the finding is made. The order that places responsibility for the child's care and placement with the juvenile probation department must be entered within the first six months after the last day on which the child lived with a specified relative.]

(1) "The court finds that it is in the best interest of the child for the child to be placed outside of (his or her) home"; or

(2) "The court finds that continuation in the home is contrary to the child's welfare";

[(b) The juvenile board must seek to ensure that the juvenile court determines whether it is in a child's best interest to be removed from home, or that continuation in the home is contrary to the child's welfare; whether responsibility for the child's care and placement should be given to the juvenile probation department; whether reasonable efforts have been made to prevent the child's removal from the home; and that the child has been removed and the court approves the removal. The juvenile board must seek to ensure that the juvenile court uses the following language to express its findings:]

[(1) "The court finds that it is in the best interest of the child for the child to be placed outside of (his or her) home"; or]

[(2) "The court finds that continuation in the home is contrary to the child's welfare"; and]

(b) The initial order of removal or any subsequent orders shall include the following additional findings:

(1) "The court finds that reasonable efforts have been made to prevent or eliminate the need for the child to be removed from (his or her) home, and to make it possible for the child to return to (his or her) home." The safety of the child is of paramount concern when determining the level of reasonable efforts that are necessary. This finding must be entered within 60 days of the child's removal from the home; and

(2) "It is ordered that the (name of county in which the court's jurisdiction arises) juvenile probation department be responsible for the child's care and placement"; and

(3) "The court finds that the child has been removed from (his or her) home and the court approves the removal."

[(3) "It is ordered that the (name of county in which the court's jurisdiction arises) juvenile probation department be responsible for the child's care and placement";]

[(4) "The court finds that reasonable efforts have been made to prevent or eliminate the need for the child to be removed from (his or her) home, and to make it possible for the child to return to (his or her) home"; and ]

[(5) "The court finds that the child has been removed from (his or her) home and the court approves the removal."]

(c) A child is not IV-E eligible until the findings described in subsection (a) and (b) of this section have been made and all other IV-E eligibility requirements are met. [IV-E eligibility begins the month:]

[(1) the juvenile court enters into court orders the reasonable efforts, best interest, approval of removal, and care and placement responsibility findings as described in subsections (a) and (b) of this section; and]

[(2) all other IV-E eligibility requirements are met, as specified in the rules of the Texas Department of Protective and Regulatory Services (TDPRS), 40 TAC §49.316(3) and (5)-(8); §49.317(1)(A) and (B), (3), and (4); §49.320(1), (3), and (4); §49.322; §49.323(1)-(4); §49.329(a)-(c); and §49.332 (concerning Eligibility Requirements for AFDC, MAO, and State-Paid Foster Care Assistance; Additional Eligibility Requirements for AFDC Foster Care; Eligibility in Medical Facilities before Placement; Eligibility in Placements Provided by Relatives; Eligibility During Absences from the Foster Care Facility; Effective Dates of Foster Care Assistance; and Effect of SSI Eligibility on AFDC Foster Care).]

*§347.7. Screening and Certification of IV-E Juveniles.*

(a) The juvenile board shall ensure [ensures] that the juvenile probation department develops and implements a procedure to screen all children placed outside the home by the juvenile court for the following IV-E eligibility criteria: [performs the functions described in subsections (b), (c), and (e) of this section in the cases of children who are placed by orders that comply with §347.5 of this title (relating to Eligibility Requirements Documented in the Initial Court Order That Removes the Child from Home or the Subsequent Court Order).]

(1) whether court orders used to remove the child from the home contain language required by §347.5; and

[(b) The juvenile probation department reviews the child's case and determines the following:]

(2) [(1)] whether the child would have been eligible for AFDC at the time of removal from a specified relative; and [child's parents were on aid to families with dependent children (AFDC) during the month court proceedings were initiated; or]

(3) whether the child has been placed in a IV-E eligible setting as described in §347.9.

[(2) whether the parents would have been eligible for AFDC if they had applied during the month court proceedings were initiated; and]

[(3) whether the child's deprivation meets one or more of the following conditions:]

[(A) the parents never married;]

[(B) one of the child's parents is absent from the home due to divorce, death, or incarceration;]

[(C) the child's family's primary wage earner is unemployed;]

[(D) one of the child's parents is incapacitated as verified through Texas Rehabilitation Commission or Texas Department of Protective and Regulatory Services (TDPRS);]

[(E) the child was living with one parent due to separation or desertion of other parent; or]

[(F) the child was living with a specified relative.]

(b) [(c)] If a child meets the requirements in subsection (a) [(b) of this section, then within 30 working days of the child's date of actual placement,] the juvenile probation department shall [must:]

[(1)] complete and submit to TJPC within 30 working days of the child's date of actual placement a foster care assistance application with all required attachment [the Foster Care Assistance Application Form which includes:]

[(A) copies of the initial court order that removes the child from home and any subsequent court orders;]

[(B) the Foster Care, Adoption, and Conservatorship Tracking System (FACTS) Form;]

[(C) verification of date of birth;]

[(D) documentation of the child's placement in a IV-E approved facility at a level of care determined by the definitions in the State of Texas Common Application for Placement of Children in Residential Care; and]

[(E) the child's Social Security number or, if none, a completed Social Security application;]

[(2) submit the completed Foster Care Assistance Application Form and all attachments to the TJPC designated eligibility specialist.]

(c) [(d)] TJPC shall forward the application to the Eligibility Specialist who shall determine the child's IV-E eligibility and notify TJPC in writing of the child's IV-E eligibility status. TJPC shall notify the juvenile probation department of the determination. [Upon receipt of the Foster Care Assistance Application Form, the TJPC eligibility specialist completes the following functions within 30 working days:]

[(1) determines the child's eligibility for IV-E; and]

[(2) notifies the juvenile probation department in writing of the child's IV-E eligibility status.]

[(e) If a child meets the requirements in subsection (b) of this section, then the juvenile board must ensure that the juvenile probation department completes a service plan as described in §347.15 of this title (relating to Case Plan and Review System).]

*§347.9. Placement in IV-E Approved Facilities.*

(a) Facilities shall be licensed or approved by TDPRS to be eligible for Title IV-E participation.

(b) Facilities eligible for IV-E participation include:

(1) private residential facilities which are licensed or certified as:

(A) an emergency shelter;

(B) a foster family home;

(C) a foster group home;

(D) a therapeutic foster family home;

(E) a therapeutic foster group home;

(F) a residential treatment center;

(G) a maternity home;

(H) a halfway house;

(I) a child placing agency;

(J) a therapeutic camp; or

(K) a basic child care facility as these facilities are defined in 40 TAC §720.

(2) public residential child care institutions which:

(A) meet the definition of one of the facilities in subsection (b)(1);

(B) are licensed or certified for no more than 25 children; and

(C) are not operated primarily for the detention of children determined to be delinquent.

(c) Facilities not licensed by TDPRS shall comply with minimum licensing standards equivalent to those described in 40 TAC §720.

(d) A juvenile board may assist a facility who meets the requirements of subsection (b)(1) or (b)(2) in obtaining approval from TDPRS for IV-E participation by ensuring that the following information is provided to TJPC:

(1) the type of license or certification held by the facility;

(2) the agency that issued the certification or license;

(3) whether the facility is a private residential facility or a public residential child care institution as those terms are defined in (b)(1)(2);

(4) a description of the facility;

(5) a description of the services provided by the facility and corresponding per diem rates; and

(6) a copy of the written agreement between the facility and the juvenile probation department, if one exists.

(e) For programs operated by a juvenile board and administered by a juvenile probation department, the juvenile board shall verify that upon approval for participation in the Title IV-E program, the department shall:

(1) complete cost reports as required by TDPRS and obtain approval of the report by an independent auditor;

(2) implement procedures to ensure compliance with TDPRS or equivalent licensing standards; and

(3) allow TJPC or its designee to conduct quality assurance monitoring to measure compliance with levels of service provision as determined by TDPRS standards.

(f) For private facilities that are approved for participation in the Title IV-E program but that are not under contract with TDPRS, the juvenile board shall ensure that the provider:

(1) completes a cost report as required by TDPRS and obtains approval of the report by an independent auditor;

(2) implements procedures to ensure compliance with TDPRS or equivalent minimum licensing standards; and

(3) contracts with an independent party to measure compliance with levels of service provision in accordance with TDPRS standards.

[(a) If a facility is not approved by Texas Department of Protective and Regulatory Services (TDPRS) for participation under 40 TAC §49.328 (concerning Foster Care Assistance Payments), the juvenile board must ensure that the juvenile probation department notifies the local TDPRS Institutional Placement Coordinator and provides the following:]

[(1) the type of license or certification held by the facility, and the juvenile probation department's method of verification;]

[(2) the agency that issued the certification or license, and the juvenile probation department's method of verification;]

[(3) whether the facility is a private nonprofit child care institution or a public facility for less than 25 and the juvenile probation department's method of verification;]

[(4) the billing level of care for the facility;]

[(5) that the written agreement between the facility and the juvenile probation department includes:]

[(A) the name, address, and telephone number of the facility;]

[(B) the facility's agreement to accept the State of Texas common application for placement of children in residential care document;]

[(C) the facility's agreement to submit a completed cost report to TDPRS upon request;]

[(D) the facility's agreement that reimbursement for substitute care is contingent on the completion and submission of the cost report to TDPRS upon request; and]

[(E) the facility's agreement that failure to complete or submit a cost report is grounds for not paying, or contract termination.]

[(b) The juvenile board ensures that daily rates paid to the facilities shall be in accordance with the TDPRS standard rates for level of care.]

*§347.11. Aid to Families with Dependent Children Foster Care Recertification.*

(a) The juvenile board shall [must] ensure that the juvenile probation department administers a process to recertify a [an eligible] child's IV-E eligibility status [every] six months from the child's date of actual placement and every six months thereafter [original certification date].

(b) The juvenile board shall [must] ensure that the juvenile probation department [performs the following functions for each IV-E eligible child]:

(1) develops and implements procedures to track each child's IV-E eligibility status and recertification date; and [maintains a system for keeping track of the IV-E status;]

(2) submits to TJPC the foster care assistance review information every six months or when changes affecting eligibility occur. [maintains a system for keeping track of the IV-E redetermination date;]

[(3) completes a Foster Care Assistance Review Form every six months or when changes affecting eligibility occur; and]

[(4) submits to the Texas Juvenile Probation Commission (TJPC) the Foster Care Assistance Review Form within 30 working days of completion.]

(c) [The] TJPC shall forward the foster care assistance review information to the Eligibility Specialist who shall make a redetermination of the child's IV-E eligibility and notify TJPC in writing of the child's eligibility status. TJPC shall notify the department of the determination. [eligibility specialist performs the following within 30 working days of receipt of the Foster Care Assistance Review Form:]

[(1) makes a redetermination of the child's IV-E status; and]

[(2) notifies the juvenile probation department of the results in writing.]

*§347.13. Family Reunification.*

(a) The Child/Family Case [Service] Plan includes family reunification services. The juvenile board shall [must] ensure that the juvenile probation department:

(1) assesses the home situation and offers services to the family [parents] to help them safely resume supervision, care, and control of the child;

(2) plans for permanent placement for a child, if a child cannot safely return home; and

(3) documents in the child's case record a chronology of all contacts and services offered to the family [parent], child, and caregiver.

(b) The juvenile board shall [must] ensure that the juvenile probation department [performs the following throughout the child's stay in substitute care:]

[(1)] maintains contact with the child, the child's family, and the caregiver monthly, or more frequently as required by the child/family case plan.[;]

[(2) maintains contact with the child monthly, or more frequently as required by the child's case plan; and]

[(3) maintains contact with the child's caregiver monthly, or more frequently to address the needs of the child while in substitute care.]

*§347.15. Case Plan and Review System*

(a) The juvenile board shall [must] ensure that the juvenile probation department develops a service plan that meets the requirements of 42 USC §675 for each IV-E eligible child [the Child/Family Service Plan] within 30 working days of the child's date of actual placement. The case plan shall outline actions designed to facilitate the safe return of the child to his or her own home or other permanent placement and assure that the child received safe and proper care while in substitute care.

(b) The status of each IV-E eligible child shall be reviewed periodically but no less frequently than once every six months from the date of actual placement. The purpose of the review is to determine the safety of the child, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, the extent of progress on issues that led to the child's removal from the home, and to project a likely date for permanency. The review may be a judicial review or an administrative review, and shall be open to the participation of the parent and the caregiver. If the review is an administrative

review, it shall be conducted by a panel of appropriate persons, at least one of whom is not responsible for the case management of or the delivery of services to either the child or the parents who are the subject of the review. Others with a legitimate interest in the child's welfare who may participate in the review include the juvenile probation officer, the probation officer's supervisor, the child's counselor, the child's attorney, guardian ad litem, and a representative from the child's school.

(c) A permanency hearing open to the participation of the parent and the caregiver shall be held for each child no later than 12 months after the child's actual date of placement and every 12 months thereafter. The juvenile board shall ensure that the juvenile probation department provides sufficient information for the court to review the child's status as described in subsection(b)and to determine whether:

(1) the permanency plan for the child is appropriate;

(2) reasonable efforts to finalize the permanency plan have been made;

(3) for a child 16 or older, services are needed to assist the child in the transition to independent living;

(4) for a child placed outside the state, whether the placement continues to be in the best interests of the child; and

(5) procedural safeguards have been applied regarding parental rights to notification regarding removal of the child from the home, any change in the child's placement, and any determination affecting parental visitation privileges.

(d) In accordance with 42 USC 675(5)(E) the juvenile probation department shall notify the appropriate local entity responsible for filing a petition to terminate parental rights for any child who has been in substitute care under the responsibility of the juvenile court for 15 of the most recent 22 months unless:

(1) the child is being cared for by a relative; or

(2) the child's case plan includes documentation of the compelling reason that such a petition would not be in the best interests of the child; or

(3) the family has not been provided services described in the case plan as being necessary for the safe return of the child to the child's home.

[(b) The juvenile board must seek to ensure that the juvenile probation department or the juvenile court conducts an administrative review or a judicial review, for each IV-E eligible child six months from the child's date of actual placement and every six months thereafter during the child's stay in the substitute care.]

[(c) If the six month review is an administrative review, the juvenile board must ensure that the juvenile probation department accomplishes the following:]

[(1) prior to or during the review, the juvenile probation officer completes the Review of Child/Family Service Plan and provides a copy to the designated facilitator;]

[(2) designates a person who:]

[(A) develops and maintains a tracking system to schedule timely reviews;]

[(B) schedules the review at least three weeks prior to the actual review date;]

[(C) arranges the review by:]

*[(i)* informing parents, caregiver, and all persons who are listed in the administrative review definition about when and where the review will be conducted;]

*[(ii)* invites them;]

*[(iii)* documents the notice in the case record; and]

[(D) documents in the case record who participated in the review;]

[(3) during the review, the designated facilitator ensures that the following are discussed:]

[(A) continuing necessity for the child's placement;]

[(B) appropriateness of the child's placement;]

[(C) extent of compliance with the service plan;]

[(D) extent of progress which has been made toward solving or reducing the causes necessitating the child's placement in substitute care; and]

[(E) a likely date by which the child may be returned to the home; or]

[(F) a likely date by which the child's permanency plan will be achieved;]

[(4) the facilitator documents the results of the review on the Six-month Administrative Case Review Form.]

[(d) If the six-month review is a judicial review, the juvenile court performs the functions of the designated facilitator that are described in subsection (c) of this section, except that instead of documenting the results of the review on the Six-month Administrative Case Review Form, the juvenile court documents the results in a court order. The juvenile court may delegate to its staff any responsibilities except documenting the results of the review in a court order.]

[(e) The juvenile board must seek to ensure that the juvenile court holds a hearing on a motion to modify the child's disposition 12 months after the child's date of actual placement and every 12 months thereafter during the child's stay in substitute care. For the hearing to qualify as a IV-E disposition hearing, the juvenile court must review the Child/Family Service Plan and enter an order that finds:]

[(1) the child's plan for permanent placement discusses the child's future status, and is appropriate;]

[(2) the projected time frame for accomplishment of the child's plan for permanent placement is appropriate;]

[(3) the juvenile probation department has made reasonable efforts to reunite the child with the family; and]

[(4) if the child is 16 years of age or older, whether an independent living plan has been developed to assist the child with the transition into adulthood;]

[(5) the parents' rights to be notified of the following have been protected:]

[(A) removal of the child from the home of his parents;]

[(B) change in the child's placement; and]

[(C) determination affecting visitation privileges for the parents;]

[(6) the Child/Family Service Plan was reviewed and updated and supplied to the caregivers each time the child was placed in substitute care, including medical and education information.]

*§347.17. Information System.*

(a) The juvenile board shall [must] ensure that the juvenile probation department establishes and maintains a [an information] system to track at least the following for children in substitute care [that captures the child's]:

(1) current level of care;

(2) name, date of birth, ethnicity, and sex;

(3) present location;

(4) permanency plan [for permanent placement while in substitute care]; and

(5) who is responsible for the child's care and placement.

(b) The juvenile board shall [must] ensure that the juvenile probation department notifies TJPC within 5 days of any changes in the child's location or any other change that would affect the child's eligibility. [performs the following functions:]

[(1) completes and submits to the Texas Juvenile Probation Commission (TJPC) the FACTS form within 30 working days of the child's date of actual placement; and]

[(2) completes and submits to TJPC the Placement Information/Discharge Form within 30 working days of a child's movement from one placement to another, and upon discharge from placement.]

*§347.19. Foster Care Assistance Payments.*

[(a)] A juvenile board shall [must] ensure that the juvenile probation department submits to TJPC: [the Texas Juvenile Probation Commission (TJPC) the]

(1) a request for reimbursement of substitute care costs [form] by the tenth of the month following the month in which the services were provided.

(2) [(b) The juvenile board must ensure that the juvenile probation department submits] a request for reimbursement of IV-E related administrative expenses within 30 working days of the close of each TJPC fiscal quarter; and[.]

(3) a request for correction of a prior month's reimbursement as soon as any discrepancy or need for adjustment is discovered.

[(c) A juvenile board must ensure that the juvenile probation department submits to TJPC a request for reimbursement correction form when discrepancies are discovered on its request for reimbursement form.]

[(d) The effective date for discontinuing IV-E payments for substitute care is the date before the day the child leaves the facility.]

[(e) A child is eligible for IV-E reimbursement during an absence from a substitute care facility, except an emergency shelter, if the following conditions are met:]

[(1) the absence does not exceed five days. The child may be absent for up to 30 days if the chief juvenile probation officer, or his designee, approves the extended absence in writing;]

[(2) the child plans to return to the facility;]

[(3) the facility is retaining space for the child; and]

[(4) the juvenile probation department is not paying someone else or another facility for the child's care.]

[(f) The juvenile board must ensure that reimbursement funds received by the juvenile probation department are accounted for in accordance with generally accepted accounting principles. The Office of Management and Budget (OMB) Circular A-128 establishes audit requirements for local governments that receive more than $25,000 in federal aid a year. The juvenile board must ensure that copies of audits be submitted to TJPC within 30 working days of the completion of the audit.]

[(g) When the juvenile board submits the request for reimbursement or the request for reimbursement correction form to TJPC, and TJPC receives federal reimbursement, then TJPC passes through to each juvenile board the reimbursement it receives for the juvenile board's IV-E eligible children in placement.]

*§347.21. Program Monitoring Compliance with IV-E.*

[(a) The juvenile board must ensure that the juvenile probation department:]

[(1) designates a case reader to monitor compliance with these rules;]

[(2) the case reader reads records of IV-E eligible children at least quarterly;]

[(3) the results of the reading are reported to the case reader's supervisor;]

[(4) if any rules are not met, the supervisor submits a written corrective action plan to the chief juvenile probation officer; and]

[(5) the juvenile probation department submits a report to the Texas Juvenile Probation Commission (TJPC) about its monitoring results on or before the tenth of the following month.]

[(b) TJPC staff monitors juvenile probation departments operated by participating juvenile boards as needed, but not less than biannually.]

(a) [(c)] The juvenile board shall allow staff [monitors] from TJPC to review IV-E case management systems and case records, fiscal operations, and Title IV-E approved residential programs operated by the juvenile board for compliance with TJPC, TDPRS, and related federal standards. These reviews shall be conducted on a regular basis as determined by TJPC [and department systems for compliance, documentation, and verification with these rules].

(b) [(d)] TJPC shall notify [notifies] the juvenile board in writing of the monitoring results [any noncompliance].

(c) [(e)] The juvenile board shall [must] ensure that the juvenile probation department responds to written notice of noncompliance with a written corrective action plan that includes a projected date of compliance within 30 working days of receipt of the notice.

(d) [(f)] If a juvenile probation department fails to respond to the written notice of noncompliance, or continues to be out of compliance with one or more of these rules, then TJPC may pursue further action, which may include one or more of the following:

(1) arranging a meeting with the juvenile probation department to discuss:

(A) problems with noncompliance and reasons for noncompliance;

(B) identification of needed resources to assist with correcting problem areas; and

(C) strategies to correct problem areas;

(2) requiring a written corrective action plan and expected date of compliance to be submitted to TJPC within 30 working days of conference date [with the juvenile probation department or receipt of written notice of noncompliance];

(3) suspending federal funds to the juvenile probation department temporarily until compliance with federal standards is accomplished;

(4) requiring the juvenile probation department to reimburse funds to TJPC; and

(5) terminating the IV-E contract between TJPC and the juvenile board.

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

Filed with the Office of the Secretary of State, on August 10, 2000.

TRD-200005559
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 424-6710

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# TITLE 40. SOCIAL SERVICES AND ASSISTANCE

## PART 3. TEXAS COMMISSION ON ALCOHOL AND DRUG ABUSE

### CHAPTER 142. INVESTIGATIONS AND HEARINGS

**40 TAC §§142.11, 142.21, 142.22, 142.31, 142.32**

The Texas Commission on Alcohol and Drug Abuse proposes the repeal of §§142.11, 142.21, 142.22, 142.31, and 142.32 concerning Investigations and Hearings. These sections contain definitions, information on complaints and investigations, information regarding investigations of abuse or neglect of children, the elderly or the disabled, procedures for facility and chemical dependency counselor disciplinary hearings, and administrative penalties. The repeal is proposed because extensive changes in these rules made it more feasible to repeal the entire chapter and propose a new one concurrently.

Jay Kimbrough, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of the proposed repeals.

Mr. Kimbrough has also determined that for each year of the first five years the repeal is in effect the anticipated public benefit will be elimination of unnecessary rules. There will be no effect on small businesses. There is no anticipated economic cost to current providers.

Comments on the proposal may be submitted to Tamara Allen, Rules Manager, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments must be received no later than 30 days from the date the proposal is published in the *Texas Register.*

*(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 Commission on Alcohol and Drug Abuse or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The repeal is proposed under the Texas Health and Safety Code, Chapter 464, which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities and under Texas Occupations Code, Chapter 504, which provides the commission with the authority to establish procedures for the licensure of chemical dependency counselors.

The codes affected by the proposed repeals are the Texas Health and Safety Code, Chapter 464 and Texas Occupations Code, Chapter 504.

*§142.11. Definitions.*

*§142.21. Complaints and Investigations.*

*§142.22. Investigations of Abuse or Neglect of Children, the Elderly, or the Disabled.*

*§142.31. Procedure for Facility and Chemical Dependency Counselor Disciplinary Hearings.*

*§142.32. 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 August 9, 2000.

TRD-200005533
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 349-6733

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The Texas Commission on Alcohol and Drug Abuse proposes new §§142.11, 142.21, 142.31 and 142.32 concerning Investigations and Hearings. These sections contain definitions and information regarding complaints and investigations, the procedure for contested cases for counselor and facility licenses, and administrative penalties for licensed facilities and counselors.

These new sections are proposed to establish the processes for investigations and hearings for facilities and counselors licensed by the commission. Changes from the current Chapter 142, which is simultaneously proposed for repeal include: unnecessary definitions are deleted; two sections on different types of investigations have been combined into one; unnecessary provisions about abuse/neglect investigations have been eliminated; the complaint category definitions now include allegations of fraud or misuse of state funds; circumstances under which the commission may require an agency to conduct an internal investigation have been delineated; the rule regarding provider notification has been clarified to defer notification when it might jeopardize investigation of the complaint; provisions for default orders are now included; deadlines are now specified in relation to the effective date of the notice and that is defined as five days after the date of mailing; the system for determining administrative penalties has been restructured so that dollar amounts are attached to violations based on the seriousness of the violation, the number of previous violations, and the person's history of disciplinary action; administrative penalties will no longer be reduced if corrective action is taken and repeat violations will result

in substantially higher penalties; there is no longer a provision for waiving administrative penalties; the base amount assessed for a Category B violation has been reduced from $600 to $500; if a person surrenders the license in lieu of paying an administrative penalty relicensure is now prohibited for a two-year period; and, finally, failure to pay an administrative penalty will result in suspension of the license.

Jay Kimbrough, Executive Director, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing the rules.

Mr. Kimbrough has also determined that for each year of the first five years the rules are in effect the anticipated public benefit will be better protection of those who access services from persons licensed by the commission through fair, effective and efficient processes for investigations, administrative hearings and penalties. There is no additional effect on small businesses. There is no anticipated economic cost to persons required to comply with the proposed amendments. Of course, there will be an economic cost to those who fail to comply with applicable licensure rules and are subsequently assessed administrative penalties.

Comments on the proposal may be submitted to Tamara Allen, Rules Manager, Texas Commission on Alcohol and Drug Abuse, P. O. Box 80529, Austin, Texas 78708-0529. Comments must be received no later than 30 days from the date the proposal is published in the *Texas Register.*

These new sections are proposed under the Texas Health and Safety Code, Chapter 464, which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities and under Texas Occupations Code, Chapter 504, which provides the commission with the authority to establish procedures for the licensure of chemical dependency counselors.

The codes affected by the proposed new sections are the Texas Health and Safety Code, Chapter 464 and Texas Occupations Code, Chapter 504.

*§142.11. Definitions.*

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

(1) Administrative hearing - An appeals hearing conducted by a State Office of Administrative Hearings administrative law judge on behalf of the commission.

(2) Board - The commissioners of the Texas Commission on Alcohol and Drug Abuse.

(3) Child - A person under the age of 18.

(4) Commission - The Texas Commission on Alcohol and Drug Abuse.

(5) Days - Calendar days, unless otherwise specified.

(6) Disabled person - A person with a mental, physical, or developmental disability that substantially impairs the person's ability to provide adequately for the person's care or protection and who is:

(A) 18 years of age or older; or

(B) under 18 years of age and who has had the disabilities of minority removed.

(7) Elderly person - A person 65 years of age or older.

(8) Executive director - The chief administrative officer of the commission.

(9) Person - An individual, partnership, corporation, association, governmental subdivision or public or private organization that is not a state agency.

(10) Respondent - A person against whom the commission seeks adverse action.

*§142.21. Complaints and Investigations.*

(a) A person alleging that a provider or licensee has violated commission statute or rules may file a complaint with the commission. Complaints about licensed counselors must be submitted in writing and under oath.

(b) The commission accepts oral or written reports concerning acts of abuse or neglect of children, the elderly, or the disabled relating to persons funded or licensed by the commission.

(1) When it receives such a report, the commission notifies any other known agencies which license or fund the alleged perpetrator.

(2) When it receives a report of abuse or neglect of a child, the commission also notifies the appropriate state or local law enforcement agency.

(c) The commission may initiate an investigation or disciplinary action against a provider or licensee if it receives information that a violation has or may have occurred.

(d) The commission documents, evaluates, and prioritizes complaints based on the seriousness of the alleged violation and the level of client or participant risk. The commission uses the following categories.

(1) Category I: Alleged violations that pose an immediate threat to the health or safety of individuals receiving prevention, intervention, or treatment services from persons licensed or funded by the commission.

(2) Category II: Alleged violations that pose a potential threat to the health or safety of individuals receiving prevention, intervention, or treatment services from persons licensed or funded by the commission and allegations of fraud or misuse of state funds.

(3) Category III: Alleged violations that do not pose a potential threat to the health or safety of individuals receiving prevention, intervention, or treatment services from persons licensed or funded by the commission.

(4) Category IV: Alleged violations that are not related to commission rules or funding requirements and are not within the jurisdiction of the commission.

(g) The commission will refer complaints outside its jurisdiction to the appropriate agency for action, as appropriate.

(h) The commission will conduct a prompt and thorough investigation of all Category I and Category II complaints, including all allegations of abuse, neglect, and exploitation.

(i) The commission will evaluate Category III complaints. Based on the nature and severity of the alleged incident, the commission will determine whether to investigate the complaint directly or require the provider or facility to conduct an internal investigation and submit its findings to the commission. The results of a provider's internal investigation will be reviewed and may result in additional investigation by commission staff.

(j) The commission shall inform the person in writing of the nature of the complaint unless it would jeopardize the investigation.

(k) The person under investigation shall provide commission staff access to all documents, evidence, and individuals related to the alleged violation, including the results of any internal investigations.

(l) Until the case is resolved, the commission shall send quarterly written status reports to all parties.

(m) The commission shall prepare a complete written report of its investigative findings and conclusions.

(1) The commission shall inform the person under investigation and the complainant of the results of the investigation.

(2) If the commission has found evidence that a child may have been abused or neglected, it shall report the evidence to the appropriate state or local law enforcement agency.

(3) If the investigation reveals that an elderly or disabled person has been abused by another person in a manner that constitutes a criminal offense under any law, including §22.04 Penal Code, the commission shall submit a copy of the investigative report to the appropriate state or local law enforcement agency.

*§142.31. Procedure for Contested Cases for Counselor and Facility Licenses.*

(a) At any stage of a disciplinary case, the commission and a respondent may resolve the case by entering into an agreed order.

(b) The commission, upon investigation/inspection and development of information indicating that grounds may exist to take disciplinary action, shall issue a notice of intent notifying the respondent of the proposed action.

(1) The notice letter shall be sent via regular first-class and certified mail to the respondent's address of record.

(2) The notice shall specify:

(A) the statutes, rules, or orders allegedly violated;

(B) the factual basis of the alleged violations;

(C) the disciplinary action the commission intends to take; and

(D) notice of an opportunity for a hearing to be held under Subchapter C, Chapter 2001 of the Texas Government Code.

(3) If the commission is seeking an administrative penalty, the letter shall also inform the respondent of the amount of the recommended penalty and of the opportunity for a hearing on the violation, the amount of the penalty, or both.

(4) The letter shall also include the following notices.

(A) If the respondent does not request a hearing on or before the 20th day after notice is effective, the allegations will be deemed true and the commission will issue a default final order implementing the proposed action.

(B) If the respondent requests a hearing but fails to appear at the scheduled hearing, the allegations will be deemed true and the State Office of Administrative Hearings (SOAH) will recommend a default proposal for decision to implement the proposed action.

(C) Notice is effective five days after the date of mailing.

(d) A respondent must submit a timely written request for a hearing to avoid having the allegations in the notice letter deemed true and a default order implementing the proposed action issued by the commission. The request for hearing is timely if filed with the commission or postmarked on or before the 20th day after the notice is effective.

(e) If the respondent fails to request a hearing on or before the 20th day after effective notice, the factual allegations of the notice letter may be deemed true and shall form the basis of a default final order implementing the proposed action.

(f) If the respondent requests a hearing, the commission may offer the respondent an optional informal conference with commission staff prior to the hearing date.

(1) At the informal conference, the respondent will be given an opportunity to show compliance with all requirements of statute, rule, or commission order cited in the notice letter.

(2) After the informal conference, the commission may withdraw or amend charges contained in the notice letter, offer the respondent an opportunity to dispose of the case through an agreed order, or proceed to hearing under SOAH rules.

(g) The commission shall send written notice of the hearing to the respondent's address of record at least ten days before the date of the hearing. The notice shall include:

(1) the date, time, place and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved;

(4) a short, plain statement of the matters asserted; and

(5) a statement that if the respondent does not appear at the hearing, the allegations will be deemed true and the action proposed in the notice of hearing may be granted by default.

(h) If the respondent fails to appear at a scheduled SOAH hearing after being given proper notice of the hearing, SOAH shall issue a proposal for decision recommending the proposed action.

(i) If the case is not resolved through an informal hearing or default decision and goes forward to administrative hearing, the hearing shall be conducted by an administrative law judge employed by the SOAH and shall comply with the requirements of the Texas Government Code, Chapter 2001, Subchapter C and SOAH Rules of Procedure, 1 Texas Administrative Code, Chapter 155.

(1) At the hearing, parties in attendance shall be allowed to present evidence, to examine witnesses, to cross-examine adverse witnesses, to make argument, and to submit legal authority.

(2) After the hearing, the administrative law judge shall issue a proposal for decision containing a statement of the reasons for the proposed decision and of each finding of fact and conclusion of law necessary to the proposed decision.

(3) Exceptions to the proposal for decision, if filed, must be filed with the administrative law judge within 20 days after the date the proposal for decision is mailed. Replies to the exceptions, if any, must be filed with the administrative law judge within 30 days after the date the proposal for decision is mailed.

(j) The commission's board will consider the proposal for decision in all matters other than an administrative penalty for a chemical dependency counselor at a public meeting and issue an order.

(k) The executive director will consider the proposal for decision regarding an administrative penalty for a chemical dependency counselor.

(l) A motion for rehearing, if filed, must be filed in accordance with the Texas Government Code, Chapter 2001, Subchapter F. When

a motion for rehearing is directed at a default final order, the motion must be supported by evidence and address the following factors:

(1) failure to answer or appear at the hearing was due to an accident or mistake and was not intentional or the result of a conscious indifference;

(2) the respondent can present a meritorious defense to the fact findings and legal conclusions in the order; and

(3) granting the rehearing will not work any injury to the commission or its mission.

(m) The respondent appealing a final order shall pay to the commission the cost of preparing the original or a certified copy of the record that is to be transmitted to the reviewing court at rates approved by the General Services Commission.

*§142.32. Administrative Penalties For Licensed Facilities and Counselors.*

(a) Violations are categorized according to the seriousness of the violation and the actual or potential harm to the health, safety, and welfare of the public. The commission has established specific guidelines for assigning categories. These guidelines show how various offenses are categorized, but do not limit the commission's authority to categorize any particular offense that is not already included in the guidelines or to modify those offenses already categorized. These guidelines are available for review on the commission's website (www.tcada.state.tx.us) and at the commission's administrative offices at 9001 North IH 35, Suite 105, Austin, Texas, 78753.

(b) Administrative penalties are not assessed for the most serious violations, which are assigned to Category A. Instead, the commission will seek to deny, refuse to renew, revoke or suspend the license.

(c) The base administrative penalty for a first time offense is $500 for a Category B violation, $200 for a Category C violation, and $40 dollars for a Category D violation.

(1) The base administrative penalty is doubled for a second-time violation and tripled for a third-time violation. If the same violation is identified four times, the commission may seek to revoke or suspend the license or assess an administrative penalty of four times the base amount.

(2) An additional $250 will be assessed if the person's license has been suspended or revoked during the past five years.

(3) If the total dollar value of administrative penalties assessed during a single inspection or investigation is over $5,000 for a facility or $2,000 for a counselor, the commission may seek to revoke or suspend the license instead of imposing an administrative penalty.

(d) The commission may also charge the licensee for any enforcement costs related to subsequent follow-up compliance visits.

(e) When administrative penalties are recommended, the executive director or designee shall report staff findings and recommendations to the board, including the amount of the recommended penalty.

(f) The executive director shall give written notice to the licensee adversely affected. The notice will be by certified mail. The notice shall include:

(1) a brief summary of the alleged violations;

(2) a statement of the amount of the recommended penalty; and

(3) a notification that the licensee has a right to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(g) A request for hearing must be filed in writing within 20 days of the effective date of notice. Notice is effective five days after mailing.

(h) Section 142.31 of this chapter apply to these proceedings.

(i) Failure to pay an administrative penalty will result in suspension of the license. A licensee who has not paid final administrative penalties is not eligible for licensure renewal.

(j) A licensee may surrender the license in lieu of paying administrative penalties. The licensee may reapply for licensure if:

(1) administrative penalties are paid prior to application; and

(2) two years have passed since the date of surrender.

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

Filed with the Office of the Secretary of State, on August 9, 2000.

TRD-200005532
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 349-6733

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# PART 4. TEXAS COMMISSION FOR THE BLIND

## CHAPTER 159. ADMINISTRATIVE RULES AND PROCEDURES

## SUBCHAPTER A. GENERAL INFORMATION

**40 TAC §159.7**

The Texas Commission for the Blind proposes new §159.7 concerning payment of shift differentials. Authorization to pay shift differentials to employees in the vocational rehabilitation program was granted to the Commission during the 76th Legislature (1999). The section establishes the agency's system for determining positions eligible to receive shift differential payments and the rate allowed to be paid.

Alvin Miller, Chief Financial Officer, has determined that the fiscal implications relating to cost or revenues of the state will not be material each year for the first five years the rules are in effect. There will be no fiscal implications on local governments as a result of enforcing or administering the rules.

Mr. Miller has also determined that for each year of the first five years the rules are in effect the anticipated public benefits will be an increased pool of individuals applying for jobs within the vocational rehabilitation program that require the individual to work hours outside the normal work day. There will be no economic cost to small businesses or individuals as a result of the rule.

Questions about the content of this proposal may be directed to Jean Crecelius at (512) 377-0611, and written comments on the proposal may be submitted to Policy and Rules Coordinator, P.O. Box 12866, Austin, Texas 78711, within 30 days from the date of this publication.

The rule is proposed under the authority of Human Resources Code, Title 5, Chapter 91, §91.016, which authorizes the Commission to develop rules and implement policies allowing shift differentials to be paid to employees in the vocational rehabilitation program.

The proposal affects no other statutes.

*§159.7. Payment of Shift Differentials.*

(a) The executive director is authorized to pay a shift differential to eligible employees in the vocational rehabilitation program. The shift differential shall be paid in addition to the employee's regular base pay, exclusive of longevity and benefit replacement pay.

(b) The executive director is authorized to determine the agency positions which are eligible to receive shift differential payments. The rate of payment shall be a percentage of the employee's monthly regular base pay, not to exceed the maximum allowed by state law, in relation to the number of hours the employee regularly works outside the work hours of Monday through Friday, 8:00 a.m. to 5:00 p.m.

(c) This section shall not apply to those employees whose work hours have been adjusted according to agency policies concerning staggered work hours.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005603
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 377-0611

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## CHAPTER 161. APPEALS AND HEARING PROCEDURES
## SUBCHAPTER A. VOCATIONAL REHABILITATION AND INDEPENDENT LIVING PROGRAMS

**40 TAC §161.24**

The Texas Commission for the Blind proposes the amendment of §161.24, pertaining to witness fees. The amendment is needed to update the TAC citation included in the rule that has subsequently been repealed and adopted under a new section number.

Alvin Miller, Chief Financial Officer, has determined that for the first five-year period the rule is in effect there will be no foreseeable implications relating to cost or revenues of the state or local governments as a result of enforcing or administering the rules.

Mr. Miller has also determined that for each year of the first five years the rules are in effect the anticipated public benefits will be current references for public reference. There will be no economic cost to small businesses or individuals as a result of the rule.

Questions about the content of this proposal may be directed to Jean Crecelius at (512) 377-0611, and written comments on the proposal may be submitted to Policy and Rules Coordinator, P. O. Box 12866, Austin, Texas 78711, within 30 days from the date of this publication.

The amendment is proposed under the authority of Human Resources Code, Title 5, Chapter 91, §91.011, which authorizes the Commission to adopt rules prescribing the policies and procedures followed by the commission in the administration of its programs.

The proposal affects no other statute.

*§161.24. Witness Fees.*

(a) Any witness or deponent who is not a party to and who is subpoenaed or otherwise appears at any hearing or proceeding at the instance of the Commission is entitled to receive reimbursement according to §159.3 [~~§159.22~~] of this title (relating to Reimbursement of Expenses of Witnesses).

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

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005621
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 377-0611

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## CHAPTER 163. VOCATIONAL REHABILITATION PROGRAM
## SUBCHAPTER C. VOCATIONAL REHABILITATION SERVICES

**40 TAC §163.35**

The Texas Commission for the Blind proposes amendments to §163.35 of the agency's vocational rehabilitation program rules pertaining to occupational licenses, tools, equipment, and initial stocks and supplies. The amendments clarify items that are not considered as equipment and are not purchased for consumers as a part of an individualized plan for employment. The amendments also clarify that the consumer may not sell or otherwise voluntarily relinquish possession of tools and equipment provided to the consumer at state and federal expense.

Alvin Miller, Chief Financial Officer, has determined that there will be no foreseeable implications relating to cost or revenues of the state or local governments as a result of enforcing or administering the rules.

Mr. Miller has also determined that for each year of the first five years the rules are in effect the anticipated public benefits will be increased clarity in the agency's rules pertaining to services the agency is authorized to purchase during a consumer's rehabilitation plan. There will be no economic cost to small businesses or individuals as a result of the rule.

Questions about the content of this proposal may be directed to Jean Crecelius at (512) 377-0611, and written comments on the proposal may be submitted to Policy and Rules Coordinator, P. O. Box 12866, Austin, Texas 78711, within 30 days from the date of this publication.

The amendment is proposed under the authority of Human Resources Code, Title 5, Chapter 91, Section 91.011(h), which allows the agency to adopt rules prescribing the policies and procedures followed by the Commission in the administration of its programs.

The proposal affects no other statutes.

*§163.35. Occupational Licenses, Tools, Equipment, and Initial Stocks and Supplies.*

(a) Occupational licenses are any licenses, permits, fees for examinations for licenses, or other written authorities required by state, city, or other government units to practice an occupation or enter a small business. State and municipal tax assessments on occupations are not included.

(b) Tools must be needed or required to participate in the consumer's training program or for entry into an employment situation and include only those tools normally provided to workers with visual impairments in the same or a similar trade or profession.

(c) Equipment includes fixtures, apparatuses, machinery, or appliances normally found in a place of business that are necessary to carry out the requirements of the business in an efficient manner. Examples of items not considered as equipment are firearms, permanent structure buildings, land, aircraft, operating capital, operating cost, vehicles, trailers, boats, or other items requiring a Certificate of Title to be used on public roads, highways, or waterways. [~~Examples of items not considered as equipment are automobiles, building, land, operating capital, and operating cost.~~]

(d) Initial stocks and supplies are the initial goods necessary for direct resale or for further preparation for direct resale, either on a wholesale or retail basis, by a consumer entering into a self-employment enterprise. Such merchandise is limited to the amount necessary to start the business.

(e) The consumer may not sell, give away, or otherwise voluntarily relinquish possession of any tools, equipment, or nonconsumable supplies issued to the consumer during the rehabilitation process. [~~The commission retains residual title to all tools, equipment, and unused supplies issued to a consumer during the rehabilitation process.~~]

(f) The consumer must take reasonable care of tools, equipment, and supplies provided by the commission and shall be liable for its loss and damage resulting from wrongful act or neglect.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005610
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 377-0611

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# CHAPTER 164. INDEPENDENT LIVING PROGRAM

## SUBCHAPTER A. GENERAL INFORMATION

**40 TAC §§164.1-164.3**

The Texas Commission for the Blind is proposing several changes to rules in Chapter 164 pertaining to administration of the Independent Living Program. These changes are being proposed as a result of the agency's review of all chapter rules under its rule review plan adopted in accordance with the Appropriations Act, Article IX, §167, passed by the 75th Texas Legislature (1997), and now found in Article IX, §9-10.13, passed by the 76th Texas Legislature (1999).

Section 164.1, pertaining to a statement of the program's purpose, is being amended to clarify language that may be interpreted erroneously as limiting. Section 164.2, pertaining to a statement of legal authority for the program, is amended into proper rule form. Section 164.3, pertaining to definitions, has been amended by adding needed definitions, deleting terms no longer used in the rules or that do not have chapter-wide application, and amending terms not consistent with federal definitions. Section 164.10 is being amended to simplify application procedures. Section 164.11 is being repealed and simultaneously being replaced with a new §164.11 that has been rewritten consistent with federal eligibility regulations. Section 164.13 is being amended to add the federal requirement that consumers be notified about the state's Client Assistance Program when determined to be ineligible for services and to delete a provision requiring a periodic review of ineligibility which is not required in federal regulations. Section 164.25 is being amended by eliminating references to an order of selection because the order of selection is being simultaneously proposed for repeal. This section is also being amended by eliminating references to other subchapters and substituting the applicable section numbers for clarity. Section 164.26 is being amended by removing subsection (a) because the provision is covered within the definitions. Sections 164.30-164.32, pertaining to an order of section, are being repealed. The agency has not had occasion to implement this order of selection and it no longer serves a useful purpose as it is written. Section 164.41 is being amended by adding training in management of secondary disabilities or related health conditions to the services excepted from financial participation. Adding this exception will allow consistent application of financial participation across agency programs. Section 164.43 is being amended to clarify that the income of only those members of the family who have a legal obligation of support for the consumer will be taken into consideration in determining monthly income. Section 164.45 is being amended by adding disability-related expenses, rent or home mortgage payments, and family obligations imposed by court order to the costs subtracted from monthly income to arrive at net monthly income for consistent application across programs.

Alvin Miller, Chief Financial Officer, has determined that there will be no foreseeable implications relating to cost or revenues of the state or local governments as a result of enforcing or administering the rules.

Mr. Miller has also determined that for each year of the first five years the rules are in effect the anticipated public benefits will be increased clarity in the agency's rules pertaining to independent living services the agency is authorized to provide to consumers under the federal program. There will be no economic cost to small businesses or individuals as a result of the rule.

Questions about the content of the proposals may be directed to Jean Crecelius at (512) 377-0611, and written comments on the proposals may be submitted to Policy and Rules Coordinator, P.O. Box 12866, Austin, Texas 78711, within 30 days from the date of this publication.

The rules are proposed under the authority of Human Resources Code, Title 5, Chapter 91, §91.011(h), which allows the agency to adopt rules prescribing the policies and procedures followed by the Commission in the administration of its programs.

The proposal affects no other statutes.

*§164.1. Program Purpose.*

The Independent Living Program is a joint state-federal funded program administered by the Commission to assess, plan, develop, and provide independent living services to persons eligible under federal and state guidelines [~~for eligible persons with visual impairments so that these persons may reach a level of independence within their families and communities in accordance with their capacities, interests, and abilities~~].

*§164.2. Conformity to Federal Requirements.*

The rules in this chapter are intended to comply with [~~provisions of the following:~~]

[~~(1)~~] the Rehabilitation Act of 1973 as amended (29 United States Code, §§701 et seq.);

[~~(2)~~] implementing federal regulations (34 Code of Federal Regulations, Parts 364, 365, 366 and 367); and

[~~(3)~~] the state plan for independent living submitted to and approved by the federal government[~~, which is effective in all political subdivisions of the state~~]. In case of any conflict, federal regulations shall prevail.

*§164.3. Definitions.*

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

(1) Act--The Rehabilitation Act of 1973, as amended.

(2) [~~Applicant--A person, or a person's representative, as appropriate, who has filled out and signed the commission's application form or who has signed a written request for independent living services and is available for an assessment to determine eligibility and priority for services.~~]

[~~(3)~~] Blind (person who is)--A person whose visual acuity with best correction is 20/200 or less in the better eye, or a person with a limitation in the field of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees, which means a visual field of no greater than 20 degrees in the better eye.

(3) [~~(4)~~] Comparable services and benefits--Services and benefits that are provided or paid for, in whole or in part, by other federal, state, or local public agencies, by health insurance, or by employee benefits; available to the consumer; and commensurate in quality and nature to the services that the consumer would otherwise receive from the commission.

(4) [~~(5)~~] Consumer--A person who has been determined eligible by the commission for independent living services.

(5) Disability--A physical or mental impairment that substantially limits one or more major life activities.

(6) Family--The consumer, parent(s), and/or legal guardian(s) and all individuals residing in the household for whom the consumer, parent(s) and/or legal guardian(s) have legal and[~~/or~~] financial responsibility.

(7) Independent Living Plan (IL Plan)--A written record that documents all phases of the consumer's rehabilitation process as developed by the independent living worker and the consumer.

(8) Individual with a significant [~~severe~~] disability--An individual with a visual impairment whose ability to function independently in the family or community or whose ability to obtain, maintain, or advance in employment is substantially limited and for whom the delivery of independent living services will improve the ability to function, continue functioning, or move toward functioning independently in the family or community or to continue in employment, respectively.

[~~(9) Progressive eye condition--A visual condition that if left untreated may lead to a bilateral condition of blindness.~~]

(9) [~~(10)~~] Representative--A parent, legal guardian, or other representative appointed by the court to represent the individual or an advocate or other family member designated in writing by the individual to represent the individual.

[~~(11) Severe visual disability--A significant visual loss, or a potentially significant visual loss due to a progressive eye condition as documented by medical evidence, that limits the functional ability of an individual.~~]

(10) [~~(12)~~] Transportation--Travel and related expenses that are necessary to enable a consumer to benefit from another independent living service and travel and related expenses for an attendant or aide if the services of that attendant or aide are necessary to enable an individual with a significant disability to benefit from that independent living service.

(11) [~~(13)~~] Visual impairment--A visual acuity, with best correction, of 20/70 or less in the better eye, or a visual field of 30 degrees or less in the better eye, or a combination of both.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005604
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 377-0611

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## SUBCHAPTER B. BASIC PROGRAM REQUIREMENTS

**40 TAC §§164.10, 164.11, 164.13**

The amendments and new section are proposed under the authority of Human Resources Code, Title 5, Chapter 91, §91.011(h), which allows the agency to adopt rules prescribing the policies and procedures followed by the Commission in the administration of its programs.

The proposal affects no other statutes.

*§164.10. Application.*

(a) To apply for independent living services, a person or the person's representative may contact the commission office closest to them and provide the name of the person seeking services, an address

where the person resides, and a telephone number, if the person has a telephone. [~~A person is considered an applicant for services on the day the Commission receives either a signed application form or a written request for independent living services, and the person is available for an assessment to determine eligibility and priority for services.~~]

(b) Persons residing in institutions, such as state schools, state hospitals, or prisons, may apply for services when their release is expected within 60 days.

*§164.11. Eligibility.*

(a) Independent living services are available to individuals with a significant disability as the term is defined in §164.3 of this title, relating to definitions.

(b) The Commission shall apply eligibility requirements without regard to the individual's age, color, creed, gender, national origin, race, religion, or length of time present in Texas.

*§164.13. Ineligibility Determination.*

(a) Prior to making a determination of ineligibility, the commission shall consult with or provide a clear opportunity for consultation with the applicant or, in appropriate cases, the applicant's representative.

(b) The commission shall inform the applicant or the applicant's representative, in appropriate cases, in writing, or by special mode of communication if designated by the applicant, of an ineligibility determination, including the reasons for the determination, the requirements under this chapter, and the means by which the applicant may appeal the decision. The notice shall also include information on how to contact the Client Assistance Program in Texas. If appropriate, the Commission shall refer the applicant to other agencies and facilities.

(c) The commission shall review an ineligibility determination within 12 months unless the person has refused the review, the person is no longer present in Texas, the person's whereabouts are unknown, or the person's medical condition is rapidly progressive or terminal.

[~~(d) In the case of an ineligibility determination subsequent to the provision of services under an independent living plan based on a determination that the person is incapable of achieving an independent living outcome, the commission shall review the ineligibility determination annually thereafter only if requested by the person or the person's representative.~~]

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005606
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 377-0611

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**40 TAC §164.11**

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

The repeal is proposed under the authority of Human Resources Code, Title 5, Chapter 91, §91.011(h), which allows the agency to adopt rules prescribing the policies and procedures followed by the Commission in the administration of its programs.

The proposal affects no other statutes.

*§164.11. Eligibility.*

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005605
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 377-0611

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## SUBCHAPTER C. INDEPENDENT LIVING SERVICES

**40 TAC §164.25, §164.26**

The amendments are proposed under the authority of Human Resources Code, Title 5, Chapter 91, §91.011(h), which allows the agency to adopt rules prescribing the policies and procedures followed by the Commission in the administration of its programs.

The proposal affects no other statutes.

*§164.25. Goods and Services.*

(a) Goods and services provided under this chapter must be necessary to assist the consumer to achieve a greater level of independence.

(b) Goods and services provided under this chapter shall be subject to application of §§164.40-164.46 of this title pertaining to consumer participation in the cost of services [~~Subchapter D of this title (relating to Order of Selection for Independent Living Services), and Subchapter E of this title (relating to Consumer Participation in the Cost of Services)~~].

(c) Goods and services shall be provided only when planned in advance.

(d) The agency shall use, to the maximum extent possible and allowed, comparable services and benefits from other sources for all goods and services to be provided under this chapter.

*§164.26. Transportation.*

[~~(a) Transportation may include travel and related expenses for an attendant or aide if the services of that person are necessary to enable the consumer to travel.~~]

(a) [~~(b)~~] Transportation that is available to the consumer without cost to the commission shall be used first.

(b) [~~(c)~~] Transportation provided by the consumer shall be reimbursed at a rate no more than the rate for state employees traveling on state business.

(c) [~~(d)~~] To seek reimbursement for transportation, the consumer must submit a statement to the commission noting, at a minimum, the starting point, destination, the number of miles traveled, and any other information as may be required by the commission to satisfy state 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 August 11, 2000.

TRD-200005607
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 377-0611

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## SUBCHAPTER D. ORDER OF SELECTION FOR INDEPENDENT LIVING SERVICES

### 40 TAC §§164.30-164.32

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

The repeal of this subchapter and all rules therein are proposed under the authority of Human Resources Code, Title 5, Chapter 91, §91.011(h), which allows the agency to adopt rules prescribing the policies and procedures followed by the Commission in the administration of its programs.

The proposal affects no other statutes.

*§164.30. Purpose.*

*§164.31. Application.*

*§164.32. Order of Selection.*

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005608
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 377-0611

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## SUBCHAPTER E. CONSUMER PARTICIPATION IN THE COST OF SERVICES

### 40 TAC §§164.41, 164.43, 164.45

The amendments are proposed under the authority of Human Resources Code, Title 5, Chapter 91, §91.011(h), which allows the agency to adopt rules prescribing the policies and procedures followed by the Commission in the administration of its programs.

The proposal affects no other statutes.

*§164.41. Scope.*

All goods and services provided under this chapter are subject to this subchapter except the following:

(1) diagnostics and evaluation services (includes maintenance and transportation);

(2) counseling, guidance, and referral services provided by commission staff;

(3) independent living worker services;

(4) orientation and mobility training;

(5) low vision evaluations;

(6) adaptive aids, appliances, and supplies under $50;

(7) interpreter services;

(8) Criss Cole Rehabilitation Center training (includes transportation to and from the center); and

(9) services paid for or reimbursed by a source other than the commission.

(10) training in management of secondary disabilities or related health conditions.

*§164.43. General Procedures.*

(a) The commission shall inform applicants of the rules on consumer participation in the cost of services upon application.

(b) All applicants and consumers, regardless of their economic resources, may be asked if they can pay for any part of their rehabilitation program.

(c) Participation in the cost of services shall be determined after eligibility requirements contained in §164.11 of this title (relating to eligibility) and order of selection criteria contained in Subchapter D of this title (relating to order of selection for independent living services) have been applied and approved.

(d) Participation in the cost of services shall be determined by the economic resources of all persons meeting the definition of family who have a legal obligation of support for the consumer.

(e) Economic resources shall be evaluated at least annually or at any time the commission is purchasing a service and/or the commission has reason to believe the family's economic status has changed.

*§164.45. Allowed Adjustments to Calculate Net Monthly Income.*

It is not the intent of the commission to impose a financial hardship upon a family; therefore, monthly income may be adjusted to net monthly income by subtracting the following:

(1) disability-related expenses paid by the family, including, but not limited to, medical payments as a result of disability and/or illness of family member, [~~and~~]

(2) prescribed family medications and diets,[~~.~~]

(3) rent or home mortgage payments, and

(4) family obligations imposed by court 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 August 11, 2000.

TRD-200005609
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 377-0611

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## CHAPTER 169. BLIND AND VISUALLY IMPAIRED CHILDREN'S PROGRAM
## SUBCHAPTER A. GENERAL INFORMATION

**40 TAC §169.3**

The Texas Commission for the Blind proposes the amendment of §169.3, pertaining to remedy of dissatisfaction in the Blind and Visually Impaired Children's program. The amendment is needed to update the reference to a section of the agency's rules that has subsequently been repealed and adopted under a new section number.

Alvin Miller, Chief Financial Officer, has determined that for the first five-year period the rule is in effect there will be no implications relating to cost or revenues of the state or local governments as a result of enforcing or administering the rule.

Mr. Miller has also determined that for each year of the first five years the rules are in effect the anticipated public benefits will be current references for rule clarity. There will be no economic cost to small businesses or individuals as a result of the rule.

Questions about the content of this proposal may be directed to Jean Crecelius at (512) 377-0611, and written comments on the proposal may be submitted to Policy and Rules Coordinator, P. O. Box 12866, Austin, Texas 78711, within 30 days from the date of this publication.

The amendment is proposed under the authority of Human Resources Code, Title 5, Chapter 91, Section 91.018, which authorizes the Commission to promulgate rules establishing methods for directing complaints to the agency.

The proposal affects no other statutes.

*§169.3. Remedy of Dissatisfaction.*

The agency's appeal process in Subchapter B of Chapter 161 [~~§159.21~~] of this title (relating to Blind and Visually Impaired Children's Program Appeals and Hearing Procedures [~~Appeals, Process, Reviews and Hearings~~]) shall be available to parents who wish to contest a determination made concerning eligibility for services, the denial and furnishing of services, and the termination of services.

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005618
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 377-0611

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## CHAPTER 172. ADVISORY COMMITTEES AND COUNCILS

**40 TAC §172.3**

The Texas Commission for the Blind proposes the amendment of §172.3, pertaining to Committees and Councils Established by the Board. In compliance with Government Code, § 2110.008, pertaining to Duration of Advisory Committees, the Commission has determined that regional advisory committees continue to provide the agency with valuable information and feedback about local consumer services. Their chairpersons also serve as members of the agency's statewide consumer advisory committee. The committees are being extended in the amendment until 2004.

Alvin Miller, Chief Financial Officer, has determined that for the first five-year period the rule is in effect there will be no foreseeable implications relating to cost or revenues of the state or local governments as a result of enforcing or administering the rules.

Mr. Miller has also determined that for each year of the first five years the rules are in effect the anticipated public benefits will be an effective method for obtaining feedback from people who are blind and receiving services from the agency. There will be no economic cost to small businesses or individuals as a result of the rule as amended.

Questions about the content of this proposal may be directed to Jean Crecelius at (512) 377-0611, and written comments on the proposal may be submitted to Policy and Rules Coordinator, P. O. Box 12866, Austin, Texas 78711, within 30 days from the date of this publication.

The amendment is proposed under the authority of Human Resources Code, Title 5, Chapter 91, § 91.011, which authorizes the Commission to adopt rules prescribing the policies and procedures followed by the commission in the administration of its programs.

The proposal affects no other statute.

*§172.3. Committees and Councils Established by the Board.*

Regional Advisory Committees.

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

(5) Membership. Each RAC shall be comprised of seven members appointed by the regional director. The terms of three members will expire on December 31 of odd-numbered years and the term of remaining members will expire on December 31 of even-numbered years. [~~The first three members whose terms expire on an odd-numbered year will conclude their terms on December 31, 1997.~~] The majority of members shall be persons who are blind or parents/guardians of persons who are blind and who are receiving or have received services from the Commission within three years prior to appointment.

(6) (No change.)

(7) Duration. The RAC shall be continue in existence until December 31, 2004 [~~2000~~].

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

Filed with the Office of the Secretary of State, on August 11, 2000.

TRD-200005617

Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: September 24, 2000
For further information, please call: (512) 377-0611

# WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

## TITLE 16. ECONOMIC REGULATION

# PART 8. TEXAS RACING COMMISSION

## CHAPTER 303. GENERAL PROVISIONS
## SUBCHAPTER B. POWERS AND DUTIES OF THE COMMISSION

**16 TAC §303.41**

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed amended section, submitted by the Texas Racing Commission has been automatically withdrawn. The amended section as proposed appeared in the February 11, 2000 issue of the *Texas Register* (25 TexReg 1017).

Filed with the Office of the Secretary of State on August 16, 2000.

TRD-200005772

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**16 TAC §303.44**

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed new section, submitted by the Texas Racing Commission has been automatically withdrawn. The new section as proposed appeared in the February 11, 2000, issue of the *Texas Register* (25 TexReg 1017).

Filed with the Office of the Secretary of State on August 16, 2000.

TRD-200005773

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## CHAPTER 321. PARI-MUTUEL WAGERING
## SUBCHAPTER C. SIMULCAST WAGERING
## DIVISION 2. SIMULCASTING AT HORSE RACETRACKS

**16 TAC §321.233**

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed amended section, submitted by the Texas Racing Commission has been automatically withdrawn. The amended section as proposed appeared in the February 11, 2000, issue of the *Texas Register* (25 TexReg 1019).

Filed with the Office of the Secretary of State on August 16, 2000.

TRD-200005774

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# ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

# TITLE 4. AGRICULTURE

## PART 1. TEXAS DEPARTMENT OF AGRICULTURE

### CHAPTER 1. GENERAL PROCEDURES

### SUBCHAPTER A. GENERAL RULES OF PRACTICE

**4 TAC §1.3, §1.5**

The Texas Department of Agriculture (the department) adopts amendments to §1.3 and §1.5, concerning general rules of practice, without changes to the proposal published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3879). The amendment to §1.3 is adopted to clarify that procedural rules of the State Office of Administrative Hearings (SOAH) control in hearings conducted by that office. The amendment provides that in the event of a conflict between the rules in Chapter 1, Subchapter A, and SOAH's procedural rules,SOAH rules control. The amendment to §1.5 is adopted to allow the department to presume receipt within a reasonable time of documents mailed to the last known address of parties to administrative proceedings before the department. The timeline provided is consistent with similar service rules adopted by SOAH. The amendment provides that if a document is sent to parties by the department by regular, certified, or registered mail, the document is deemed received no later than five days after mailing.

No comments were received on the proposal.

The amendments are 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 August 10, 2000.

TRD-200005575
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: August 30, 2000
Proposal publication date: May 5, 2000
For further information, please call: (512) 463-4075

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### SUBCHAPTER D. MISCELLANEOUS PROVISIONS

**4 TAC §1.91**

The Texas Department of Agriculture (the Department) adopts the repeal of §1.91, concerning an expiration date for Chapter 1, relating to general procedures, without changes to the proposal published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3880). The repeal of §1.91 is adopted because the establishment of an expiration date for Chapter 1 is no longer necessary due to the enactment of legislation establishing a timeframe for review of agency rules. The repeal of §1.91 eliminates the expiration date for Chapter 1.

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 August 10, 2000.

TRD-200005574
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: August 30, 2000
Proposal publication date: May 5, 2000
For further information, please call: (512) 463-4075

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### SUBCHAPTER E. ADVISORY COMMITTEES

**4 TAC §§1.200, 1.201, 1.206**

The Texas Department of Agriculture (the Department) adopts amendments to §1.200 and new §1.201 and §1.206,concerning advisory committees of the department, including the Citrus Budwood Advisory Council and the Oyster Advisory Committee, without changes to the proposal published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3880). The amendment

to §1.200 is adopted to correct a statutory citation, clarify language in regards to what committees are covered by the subchapter, and to clarify reporting by committees. Because department staff works very closely with committees, serving as support staff, and staffing and attending all committee meetings, the adopted reporting requirement allows reporting to be done through preparation of board minutes, as is the current practice. The amendment does allow the commissioner to request that a committee submit a formal report on its activities as the commissioner deems necessary. The new sections are adopted to add two committees to the department's listing of advisory committees found at Chapter 1, Subchapter E., in accordance with the requirements of the Texas Government Code, Chapter 2110. The amendments to §1.200 change the reference from the Texas Civil Statutes to the correct citation in the Texas Government Code, provide that committees established by or under statute are covered, and provide that committees will report to the agency by holding open meetings in which agency staff participate and record the proceeding and/or by submitting a report of committee activities, at the request of the Commissioner. New §1.201 adds the Citrus Budwood Advisory Committee to the listing and provides information regarding the committee's purpose, duties, and duration. New §1.206 adds the Oyster Advisory Committee to the listing and provides information regarding the committee's purpose, duties and duration.

No comments were received on the proposal.

The amendments and new sections are adopted under the Texas Agriculture Code, §12.016 which provides the Department with the authority to adopt rules to administer the Texas Agriculture Code; and the Texas Government Code, Chapter 2110, which requires that a state agency that is advised by an advisory committee adopt rules stating the purpose and task of the committee and the manner in which the committee will report to the agency.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2000.

TRD-200005572
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: August 30, 2000
Proposal publication date: May 5, 2000
For further information, please call: (512) 463-4075

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**4 TAC §1.201**

The Texas Department of Agriculture (the Department) adopts the repeal of §1.201, concerning the Egg Marketing Advisory Board, without changes to the proposal published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3881). The repeal of §1.201 is adopted to eliminate an unnecessary rule because the statutory authority creating the Board has been repealed. The repeal of §1.201 eliminates the Egg Marketing Advisory Board from the agency's listing of advisory committees.

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 August 10, 2000.

TRD-200005573
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: August 30, 2000
Proposal publication date: May 5, 2000
For further information, please call: (512) 463-4075

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## SUBCHAPTER H. REQUESTS FOR PUBLIC INFORMATION

**4 TAC §1.404**

The Texas Department of Agriculture (the Department) adopts amendments to §1.404, concerning prepayments and waivers of public information charges, without changes to the proposal published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3881). The amendment of §1.404 is adopted to change the maximum amount that will be waived for processing a public information request. The amendment increases the maximum amount to more accurately reflect costs to the department of processing payments made by third parties for such requests, and more specifically, provides that the department will waive the charge for any request resulting in a total charge of $10 or less.

No comments were received on the proposal.

The amendment 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 August 10, 2000.

TRD-200005571
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: August 30, 2000
Proposal publication date: May 5, 2000
For further information, please call: (512) 463-4075

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## SUBCHAPTER K. EMPLOYEE TRAINING RULES

**4 TAC §1.700, §1.701**

The Texas Department of Agriculture (the Department) adopts amendments to §1.700 and §1.701, concerning employee training rules, without changes to the proposal published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3882). The amendment to §1.700 is adopted to clarify the section and make it consistent with current agency policy. The amendment

to §1.701 is adopted to broaden who may approve requests to attend training in order to make the approval process more efficient. The amendment to §1.700 adds language stating that no reimbursement will be made for refundable fees and textbooks. The amendment to §1.701 allows the employee's Regional Director to approve a request to attend an external training program, seminar or conference.

No comments were received on the proposal.

The amendments are adopted under the Texas Agriculture Code, §12.016 which provides the Department with the authority to adopt rules to administer the Texas Agriculture Code and the Texas Government Code, §656.048, which requires state agencies to adopt rules relating to employee training and education.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2000.

TRD-200005570
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: August 30, 2000
Proposal publication date: May 5, 2000
For further information, please call: (512) 463-4075

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# PART 7. TEXAS AGRICULTURE RESOURCES PROTECTION AUTHORITY

## CHAPTER 101. GENERAL RULES

## SUBCHAPTER A. ROUTINE PROCEDURES

**4 TAC §101.20**

The Board of Directors of the Agriculture Resources Protection Authority (ARPA Board) adopts an amendment to §101.20, concerning reporting requirements for agencies under its jurisdiction, without changes to the proposal published in the June 30, 2000, issue of the *Texas Register* (25 TexReg 6247). The amendment to §101.20 is adopted to exempt the Texas Agricultural Extension Service (TAEX) and the State Soil and Water Conservation Board (SSWCB) from the requirement to report pesticide regulatory enforcement activity to the ARPA Board. The current regulation requires reporting by all agencies under ARPA's jurisdiction. The TAEX and the SSWCB have no regulatory authority over the use or handling of pesticides, and conduct no pesticide regulatory enforcement activities. The amendment exempts the TAEX and the SSWCB from reporting requirements so long as those agencies conduct no pesticide regulatory enforcement activities.

No comments were received on the proposal.

The amendment to §101.20 is adopted in accordance with the Texas Agriculture Code (the Code), §76.009, which provides the ARPA Board with the authority to adopt rules for the reporting of pesticide regulatory enforcement activity by agencies under ARPA's jurisdiction, and to adopt rules relating to any duty of ARPA.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2000.

TRD-200005580
Dolores Alvarado Hibbs
Deputy General Counsel, Texas Department of Agriculture
Texas Agriculture Resources Protection Authority
Effective date: August 30, 2000
Proposal publication date: June 30, 2000
For further information, please call: (512) 463-4075

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## CHAPTER 105. CHLORDANE REGULATIONS

**4 TAC §105.12**

The Board of Directors of the Agriculture Resources Protection Authority (ARPA Board) adopts an amendment to §105.12, concerning prohibited pesticides, without changes to the proposal published in the June 30, 2000, issue of the *Texas Register* (25 TexReg 6247). The amendment to §105.12 is adopted to correct the name of an agency referenced in the section. The current regulation references the Texas Water Commission. The amendment changes that reference to refer to the Texas Natural Resource Conservation Commission.

No comments were received on the proposal.

The amendment to §105.12 is adopted in accordance with the Texas Agriculture Code (the Code), §76.009, which provides the ARPA Board with the authority to adopt rules relating to any duty of ARPA.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2000.

TRD-200005581
Dolores Alvarado Hibbs
Deputy General Counsel, Texas Department of Agriculture
Texas Agriculture Resources Protection Authority
Effective date: August 30, 2000
Proposal publication date: June 30, 2000
For further information, please call: (512) 463-4075

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# TITLE 16. ECONOMIC REGULATION

# PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

## CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts new §25.90 relating to Market Power Mitigation Plans, new §25.91 relating to Generating Capacity Reports, and new §25.401 relating to Share of Installed Generation Capacity with changes to the proposed text that was published in the April 28, 2000

*Texas Register* (25 TexReg 3665). Project Number 21081 was assigned to this proceeding. The new rules are necessary to implement provisions of the Public Utility Regulatory Act (PURA) §§39.154, 39.155, 39.156, and 39.157. Section 25.90 establishes requirements and procedures for utilities and power generation companies that own and control more than 20% of the installed generation capacity located in, or capable of delivering electricity to, a power region to file market power mitigation plans. Section 25.91 establishes reporting requirements and procedures for each person, power generation company, municipally owned utility, electric cooperative, and river authority that owns generation facilities and offers electricity for sale in the state to file annual generating capacity reports. Section 25.401 establishes initial filing requirements and components of the calculation method to be used in determining whether a power generation company owns and controls more than 20% of the installed generation capacity located in, or capable of delivering electricity to, a power region.

A public hearing on the proposed sections was held at the commission's offices at 9:30 a.m. on June 1, 2000. Representatives from Central and South West (CSW), Entergy Gulf States (EGSI or Entergy), FPL Energy (FPLE), Certain Power Generation Companies (PGCs), and Reliant Energy (Reliant), made comments at the hearing. To the extent that any party's comments at the hearing differed from their written comments, such comments are summarized herein.

The commission received written comments on proposed §25.90 from CSW, Reliant, EGSI, El Paso Electric (EPE), and TXU Electric Company (TXU). The commission also received reply comments on §25.90 from PG&E Corporation (PG&E) and Texas Industrial Energy Consumers (TIEC).

The commission received written comments on proposed §25.91 from Alcoa, Inc. (Alcoa), Austin Energy (AE), City Public Service of San Antonio (CPS), CSW, EGSI, EPE, FPLE, PGCs, PG&E, Occidental Chemical Corporation (OxyChem), Reliant, Southwestern Public Service (SPS), TIEC, and TXU. The commission also received reply comments on §25.91 from CSW, PGCs, PG&E, Reliant, and TIEC.

The commission received written comments on proposed §25.401 from PG&E, Reliant, SPS, EGSI, CSW, TIEC, TXU, and Office of Public Utility Counsel (OPC). The commission also received reply comments on §25.401 from CSW, EGSI, PG&E, Reliant, TIEC, and TXU.

The commission requested comments on the following preamble question concerning proposed §25.401:

*PURA §39.154(d) defines the term "installed generation capacity" in terms of generation capacity that is "potentially marketable." Subsection (e)(2) identifies several categories of generation that are not considered to be potentially marketable. The commission invites comments on whether these categories should be excluded from the denominator.*

CSW, Entergy, Reliant, SPS, and TXU commented that all of the categories listed in §25.401(e)(2)(A)-(G) are potentially marketable and should not be excluded from the denominator in calculating market share. They argued that the proposed exclusions in (e)(2) are not consistent with PURA or the Legislature's intent. Reliant averred that generation will be sold into the market if the price is right, even if the generation was built or will be built to primarily serve on-site generation. It added that the fact that a generator did not previously sell at wholesale is not an indication that the unit will not participate in the wholesale market in the future. TXU commented that the exclusionary nature of subsection (e)(2) is at odds with the broad, all-inclusive statutory definition of "installed generation capacity." It argued that the types of generating facilities listed in proposed subsection (e)(2) constitute installed generation capacity as defined by PURA §§39.154(d)(1), (2) and (3) and are potentially marketable. It added that these types of generation facilities are potentially marketable because power from such facilities can be sold in the competitive market; thus, they can be used to defeat an attempt to exercise market power. Their existence, therefore, thwarts the exercise of market power.

CSW recommended that if any of the categories are not considered to be potentially marketable, then a legally binding prohibition on sales of such capacity should be adopted, with no exceptions, even during the peak summer months. TIEC disagreed with CSW's recommendation. It argued that such a prohibition is beyond the commission's power to enforce in a deregulated market, and that a prohibition on sales from must-run units would seriously impair the reliability of the power grid.

Reliant interpreted the proposed rule as excluding certain generation capacity from the denominator of the installed generation calculation, but counting the same capacity in the numerator of individual market share calculations. It argued that this would not be conceptually correct and it would only serve to over-estimate market shares of power generation companies.

OPC commented that proper calculation of installed capacity in the state is critical to the development of workable competitive markets. It said that excessive concentration of capacity ownership will lead to the potential for market power which can drive prices up, exploit customers with inelastic demands, and pose barriers to entry of new competitors. OPC said that the protection offered by the 20% capacity market share criteria is diminished somewhat by legally required reductions to installed generation capacity, such as reductions for "grandfathered" facilities and capacity auction sales. It concluded that the concept of potentially marketable capacity should be defined in a conservative fashion.

TIEC and PG&E agreed with all of the exclusions in subsection (e)(2). TIEC stated that including generation that is not available for wholesale sales in the denominator of the market concentration analysis would impair the integrity of the analysis by artificially reducing the market shares of the owners. PG&E suggested that the words "potentially marketable" in this context are used by way of limitation. These words modify examples of categories of generation to be included in the determination of installed generation to be used to measure market power. In other words, only generation capacity that may be sold in the market may be considered in the assessment of market share, which, under the statute, is used as a proxy for measuring market power. PG&E said that the categories identified should be excluded consistent with the intent of the Legislature that only "potentially marketable" generation be considered in the determination of installed capacity.

PG&E proposed that two additional categories of capacity be excluded from installed generation capacity because the capacity is not available for sale at wholesale. PG&E would exclude the capacity necessary to meet the native summer peak demand of municipally owned utilities and cooperatives that have not opted for customer choice; and it would exclude any capacity that is under contract for delivery to another power region.

In reply comments, CSW, EGSI, Reliant, and TXU strongly disagreed with OPC, PG&E and TIEC that the phrase "all potentially marketable" was intended to be a limitation on the definition of "installed generation capacity." CSW said the phrase was used for emphasis and was intended to be inclusive rather than exclusive. EGSI and TXU argued that the words used in PURA §39.154(d) require that the statute be interpreted broadly. TXU said the Legislature intended the term "installed generation capacity" to include all capacity that could be marketed, not just capacity that is being marketed. TXU also said there was no basis in PURA §39.154 for PG&E's recommendations to exclude capacity that is exported to another power region or capacity that is reserved to serve native load of opt out municipal and cooperative utilities. It averred that the fact that this capacity is being sold indicates that it is marketable. Reliant suggested that initially all potentially marketable capacity should be included, and then excluded only if experience proves it not to be marketable.

Also in reply comments, PG&E and TIEC strongly disagreed with CSW, EGSI, Reliant, and TXU. PG&E said that in essence, the incumbent utilities would have the commission render the phrase "potentially marketable" meaningless. PG&E said the commission should identify the capacity that reasonably could be expected to be marketed, and thus, affect market power.

TXU in its comments presented the legislative history of §39.154(d) of Senate Bill 7 (SB7), 76th Legislative Session, and argued that the Legislature intended the term "installed capacity" to include all generation that *could* be marketed, not just generating capacity that *is being* marketed. However, incumbent utilities have not offered any examples of installed capacity that could not be marketed. If there is no capacity that is not potentially marketable, then it would seem that the phrase "potentially marketable" in PURA does not have any meaning.

The commission finds it unnecessary to adopt a prohibition on sales from capacity that has been excluded from installed generation capacity. The commission agrees with Reliant that when capacity is excluded from the denominator, it should also be excluded from the numerator for the power generator that owns and controls such excluded capacity. However, the commission disagrees with Reliant's suggestion that initially all generation facilities should be included in installed generation capacity and then excluded only if experience proves it not to be marketable. The commission makes no changes in response to these particular comments. The specific exclusions in §25.401(e)(2) are addressed below.

*§25.401(e)(2)(A):* Installed generation capacity will not include generating facilities that have a nameplate rating equal to or less than 1 megawatt (MW).

TXU and SPS pointed out that distributed generation facilities will likely play a significant role in the development of the market in Texas. Therefore, facilities rated at less than 1 MW should not be excluded from the potentially marketable capacity. On the other hand, TIEC commented that generation facilities rated at less than 1 MW are too small to have any meaningful impact on the market, so it is appropriate to exclude them from the denominator. PG&E agreed with the exclusion of these generators, mainly because it would be difficult to monitor every small generator around the state.

In reply comments, PG&E asserted that *de minimis* capacity, such as distributed generation, does not have a great effect on the current market. Reliant replied that Texas is likely to have many generation facilities with one megawatt or less capacity and, in the aggregate, those facilities will have a meaningful impact on market concentration. EGSI added that the phrase "potentially marketable" requires only that generation is capable of being sold, not that it must have a meaningful impact on the market.

In reply comments, TXU disagreed with PG&E that PURA §39.154 would impose a reporting burden on small generators or require the commission to monitor them. TXU expressed confidence that the commission could develop reasonable estimates of the total amount of generating facilities under 1 MW.

Although the commission encourages the development of distributed generation, generating facilities with a capacity of less than 1 MW do not constitute a significant percentage of the installed generation in the state at this time. Therefore, the commission believes it is appropriate to exclude these generating facilities from installed generation capacity in order to simplify the calculation. If it appears in the future that facilities with less than 1 MW capacity contribute significantly to the installed capacity in a power region, the commission may revise the rule appropriately.

*§25.401(e)(2)(B):* Installed generation capacity will not include generating facilities that are used for backup purposes and do not generate electricity that is sold at wholesale.

SPS disagreed with the exclusion of backup generation. It noted that in May 2000, the Federal Energy Regulatory Commission (FERC) issued interim orders valid until September 30, 2000, to make it easier for large manufacturers to sell their backup power to utilities when electricity supplies run short. PG&E responded that backup power sold to utilities, including power sold pursuant to FERC interim measures, would not be excluded from installed capacity under the proposed rule.

PG&E said it is reasonable to exclude backup generation because in the absence of an interconnection agreement and appropriate interconnection equipment such generation is not deliverable over the grid. It also said that backup generation should be excluded because its availability is limited by TNRCC regulations to 10% of the normal operating hours of the primary equipment being replaced, absent formal air quality permits being obtained. TXU responded that PURA §39.154 does not require capacity to be available 100% of the time. Reliant replied that backup power is potentially marketable since many such units are connected to the grid.

The commission concludes that the category of backup generation is not necessary, and it amends the rule to delete this category. Backup generation that is less than 1 MW will be treated in accordance with subsection (e)(2)(A). Backup generation that is greater than 1 MW is self- generation that may be able to participate in the wholesale market; therefore its treatment will be determined by subsection (e)(2)(C).

*§25.401(e)(2)(C):* Installed generation capacity will not include generating facilities that are used to generate electricity for consumption by the person owning or controlling the facility and do not generate electricity sold at wholesale.

*§25.401(e)(2)(D):* Installed generation capacity will not include cogeneration facilities that do not generate electricity that is sold at wholesale.

TXU, Entergy, and SPS opposed the exclusion of self-generation and cogeneration facilities that do not generate electricity that is sold at wholesale. TXU argued that whether or not the

generating facilities currently generate electricity that is sold at wholesale does not provide the basis for a determination that the capacity of these facilities is not potentially marketable. PURA §39.154(d) requires only that the capacity be potentially marketable, not that it is currently being marketed at wholesale. It added that excluding the capacity of such generating facilities is contrary to PURA §39.154(d)(2) which expressly includes "generating facilities used to generate electricity for consumption by the person owning or controlling the facility." SPS added that cogenerator status may change through the loss of a steam host; and PURA does not distinguish how potentially marketable capacity is used by the final consumer.

Entergy cited a trade publication article about an aluminum company that had recently decided to sell the output of its cogeneration facility to the grid rather than produce aluminum because the company perceived electricity prices to be more attractive than aluminum prices.

OPC agreed with the rule's recognition that some self-generation and cogeneration capacity is not potentially marketable, but it said one problem with the rule is that a very small sale into the wholesale market could qualify the full capacity of a self-generation or cogeneration facility as installed capacity, even though a large fraction of the facility's capacity is not potentially marketable. OPC proposed an alternative means for determining which self-generation and cogeneration is potentially marketable. It recommended that the portion of self-generation and cogeneration which serves on-site load and is defined as "eligible on-site generation" pursuant to §39.262(k) and Substantive Rule §25.345(i) of this title should be excluded from installed capacity. By this recommendation, capacity would be excluded because it is not economically feasible for a customer to change its self-supply arrangement if the on-site generation facility had qualified for a stranded cost exemption pursuant to §39.262(k).

PG&E commented that by definition self-generation and cogeneration that are not sold at wholesale are by definition not available for purchase in the market. Further, such capacity is not deliverable to the market absent an interconnection agreement and appropriate interconnection equipment. TXU replied that PG&E offered no proof that self-generation and cogeneration facilities do not have or could not get interconnection agreements.

TIEC agreed with OPC that only the portion of self-generation or cogeneration that serves the wholesale market should be included in the total installed capacity in the power region. However, TIEC and other parties disagreed with OPC's recommendation for an alternative definition of which self-generation and cogeneration is potentially marketable. PG&E found OPC's alternative to be too narrow in that it fails to recognize that other self-generation and cogeneration are not potentially marketable even if they do not qualify as eligible generation. TIEC opposed OPC's suggestion, saying that the treatment of on-site generation is more appropriately linked to actual participation in the market rather than a §39.262(k) determination. Reliant disagreed with OPC's argument that competition transition charge (CTC) would preclude self-generators from marketing power. Reliant said that self-generators in service areas without CTC would be able to market power without incurring this charge. TXU noted that OPC offered no proof that the loss of stranded cost exemption would be of sufficient magnitude to prevent the marketing of eligible on-site generation.

The commission amends the rule to delete the exclusions for self-generation and cogeneration. The commission agrees with TXU that whether the generating facilities currently generate electricity that is sold at wholesale does not provide a basis for a determination that the capacity of these facilities is not potentially marketable. The phrase "is available for sale to others" in the initially introduced version of SB7 was replaced by the concept of "potentially marketable" capacity. This is a more liberal standard, and the commission concludes that cogeneration and self-generation facilities meet this standard. Section 39.154, as finally enacted, casts a wide net on the generation facilities that are included in determining the size of the market.

*§25.401(e)(2)(E):* Installed generation capacity will not include generating facilities that will be retired within 12 months.

Reliant and SPS opposed the exclusion of generating facilities that are scheduled to be retired within 12 months. Reliant commented that there is no mandatory or regulatory requirement in a competitive market that any unit actually be retired. Further, changes in market conditions or unanticipated unit outages might require operation of a facility that had been previously scheduled for retirement. Moreover, information on planned retirements in a competitive environment is considered strategically sensitive information and forecasts of retirements could be subject to "gaming". TXU agreed that plans to retire a generating facility can be changed in response to market conditions.

PG&E supported the exclusion of capacity that will soon be retired because such capacity will no longer mitigate market power and because the exclusion provides consistency and symmetry in the determination of market shares. TXU responded that if the Legislature had wanted to provide symmetry it could have done so.

OPC also supported the exclusion of capacity that will soon be retired, but suggested that the word "permanently" be added before the word "retired" to alleviate the potential for manipulation of retirement plans by plant owners. PG&E agreed with OPC's recommendation but TIEC opposed it. TIEC proffered that if a unit is returned to service after being retired, it should be included in any market concentration analysis after its return to service.

The commission agrees with Reliant and TXU that in a competitive market, plans to retire a generating facility may be fluid and responsive to market conditions or changes in the status of other generating equipment. In addition, the commission is concerned about the potential for gaming retirement plans in order to manipulate market shares or mask competitively sensitive resource plans. Finally, in the last year, the commission has witnessed a regulated utility return several generating units to service in order to provide adequate resources for its system. These units were returned to service in a relatively short time, and it is fully plausible that they could provide marketable capacity in a future competitive market. Therefore, the commission amends the proposed rule to remove the exclusion for generating facilities that will be retired within 12 months.

*§25.401(e)(2)(F):* Installed generation capacity will not include generating facilities that have been designated as "grandfathered" pursuant to subsection (d)(3) of this section.

OPC, PG&E, and TIEC concurred that "grandfathered" facilities must be excluded from the denominator as well as the numerator. They said that while PURA §39.154(e) is silent with respect to the denominator, this does not preclude the commission from excluding such facilities from the denominator. They added that if numerator and denominator are defined inconsistently, the summation of Electric Reliability Council of Texas (ERCOT) market shares will not equal 100%. Thus, market shares and market

power would be understated. They argued that the Legislature did not intend an illogical mathematical operation, and that it did not intend to undermine its own stated policy to limit market share and to eliminate market power abuses.

Reliant and TXU disagreed that the total of all market shares must add to 100%. They said that the Legislature knew the shares would not add to 100%, but wanted to provide an incentive in §39.154(e) for a PGC to comply with §39.264. Rather than understating market shares, Reliant and EGSI said that excluding grandfathered facilities from the denominator would overstate the market shares of those generators who do not have grandfathered facilities.

TXU, EGSI, and Reliant said that excluding grandfathered facilities from the denominator is contrary to the statutorily-prescribed method of determining the percentage shares of installed generating capacity. They argued that by expressly stating that the commission shall reduce the numerator by the amount of such capacity, the Legislature clearly implied that the denominator is not to be reduced by the amount of such capacity. They observed that SB7 contemplated that the sum of all the percentage shares for a power region would not equal 100% because PURA §39.154(c) requires that the installed generation capacity subject to auction pursuant to §39.153 be subtracted from the numerator.

PG&E said that the exclusion of grandfathered facilities from the determination of installed capacity reasonably harmonizes the competing legislative policies related to market power and environmental issues. PG&E acknowledged that capacity auction requirements would result in market shares failing to sum to 100%, but it argued that excluding grandfathered capacity is more likely to achieve the Legislature's market power policy objectives than the alternative which would understate market shares and market power without providing any benefit to the competing environmental objective.

The commission deletes the provision that excludes grandfathered facilities from the denominator. The commission believes that these plants legitimately contribute to total market generation and should be counted in the denominator. However, the record is this rulemaking includes an August 9, 2000 letter from TXU Electric Company in which TXU proposes a compromise concerning the exclusion of grandfathered facilities. TXU proposed that if the commission deletes the proposed section related to the exclusion of grandfathered facilities, then TXU would refrain from acquiring ownership and control of additional generating facilities to the extent that such acquisition would cause TXU to exceed SB7 20% limitation of ownership and control, calculated with the capacity of all grandfathered facilities excluded from both the numerator and denominator of the equation. The commission accepts TXU's proposal.

*§25.401(e)(2)(G):* Installed generation capacity will not include generating capacity that has been designated "must-run" by the independent organization in the power region.

SPS opposed the exclusion of must-run capacity, arguing that even must-run units are potentially marketable since the output is sold to and for the benefit of the power region.

Noting that the treatment of must-run generation is still under discussion in ERCOT, TIEC commented that such generators will likely be required to sell their power at regulated prices. Thus, the ability of must-run generation to influence market behavior or competitive market prices will be restricted. Therefore, it is appropriate to exclude must-run generation from the denominator of the market concentration calculations.

PG&E also supported the exclusion of must-run capacity. It said that must-run capacity provides system support to ensure the reliability of the system, but it is not available to provide energy for sale at wholesale. However, since must-run generation will vary over time as generation and transmission facilities are added to the system, PG&E suggested that must-run units should be designated annually to coincide with the determination of market shares.

In reply comments, Reliant argued that if the rule excludes must-run capacity from the denominator, it should also allow PGCs to exclude their "must run" capacity from the numerator as well.

The commission agrees with SPS that the output of a "must-run" unit is sold to and for the benefit of the power region. The fact that the independent system operator (ISO) can control the output of a must-run unit in market-crucial periods means that the availability of a must-run unit clearly and directly moderates other players' ability to limit generation to influence the market clearing price. Under current plans in ERCOT, the ISO will purchase must-run capacity under contract. Therefore the commission concludes it is appropriate to delete the exclusion of must- run capacity from the market share denominator, as it is to include a company's must-run capacity in calculating its market share numerator.

*§25.90 Market Power Mitigation Plans*

*§25.90(a), Application*

CSW proposed the addition of a sentence to the end of §25.90(a) permitting the commission, for good cause, to waive or modify the requirement to file a market power mitigation plan, in accordance with PURA §39.154(b).

The commission has made the change recommended by CSW.

EPE commented 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. It requested that proposed §25.90 be amended to reflect this fact.

The commission has made the change recommended by EPE.

Entergy, Reliant, and TXU argued that the actual date of relevance for the 20% test should be on or after January 1, 2002, not the December 1, 2000, date in the proposed rules. Reliant and TXU stated that PURA §39.154 clearly states that the date on which the 20% limitation on installed capacity begins is the "date of introduction of customer choice." TXU stated that the Legislature clearly intended the ownership and control determinations to be forward-looking since new generating facilities that will be operating within 12 months are to be included as part of installed generation capacity. TXU noted that the commission has projected that more than 14,000 megawatts of new generation capacity is expected to come on-line in ERCOT by the first year of customer choice, and that the new generating capacity will substantially alter percentage shares of installed generation capacity. TXU and Reliant said the percentage shares of installed generation capacity should be determined based on projections or estimates of the total amount of installed generation capacity expected to exist in each power region on the date of introduction of customer choice.

PG&E and TIEC disagreed with the incumbent utilities, urging the commission to keep the December 1, 2000 date. PG&E argued that changing the operative date for measuring market share would be contrary to PURA §39.156(b). TIEC stated that using projected generation data would introduce a great deal of uncertainty and controversy in the market concentration analysis, because it is likely that parties will produce widely divergent forecasts of the amount of generation that will be added by various generation owners in the future.

The commission agrees with Entergy, TXU and Reliant that it is not appropriate to specify in the rule that a utility that has a capacity market share greater than 20% prior to December 1, 2000, will be required to file a market power mitigation plan by December 1, 2000. The focus of the rule should be on market shares when retail competition begins. Therefore, the commission deletes the phrase "prior to December 1, 2000" from §25.90(a). However, the commission does not believe it is appropriate to include language that specifies the use of projected data; therefore, it declines to make the other wording changes recommended by TXU.

The commission included the initial information filing in §25.90(b) of the proposed rule to provide enough information so that it can calculate market share percentages to determine which utilities, if any, will be required to file a market power mitigation plan by December 1, 2000. In calculating market share percentages, the commission will consider generating facilities that will be connected to a transmission and distribution system and operating within 12 months as required by PURA §39.154(d)(3). The commission recognizes that there may be differing expectations of the capacity that will be connected and operating within 12 months, but it will work with the appropriate ISOs to determine appropriate estimates for the amount of incremental generation capacity to be included.

*§25.90(b), Initial informational filing*

CSW commented that the rule does not set forth the basis for determining the capacity rating of a generating unit. It suggested that nameplate rating is the appropriate method.

The commission adds a reference in §§25.90(b) to §25.91(f) of this title (relating to Generating Capacity Reports) where the basis for determining the capacity rating of a generating unit is set forth.

Entergy and TXU commented that the proposed initial information filing in §25.90(b) is not expressly required by PURA and that it serves no useful purpose. TXU added that if the informational filing requirement is retained, it should be broadened to include all persons subject to PURA §39.155 since there is no basis in PURA for discrimination based on the amount of installed generation capacity owned and controlled. It pointed out that PURA §39.001(c) provides that the commission may not discriminate against any participant or type of participant during the transition to and in the competitive market.

PG&E and TIEC strongly dissented, stating that the reporting requirement is vital for enforcing the statutory limit on generation ownership. In addition, they believe that to require all generation owners to file market share calculations would impose an administrative burden on smaller generation owners with no useful purpose.

The commission believes that the initial filing requirement is necessary so that it can calculate market share percentages and determine which utilities or power generation companies, if any, should file market power mitigation plans on December 1, 2000. However, it would not serve any purpose to broaden the filing requirement to include all persons subject to PURA §39.155 since most of them would not come close to having a 20% capacity market share. The commission does not agree that it is discriminatory to require an informational filing from the small number of utilities that have the greatest amounts of installed generation so that it can determine who should file market power mitigation plans. The informational filing is necessary for the commission to meet its responsibilities to ensure that no one has a market share greater than 20%.

TXU recommended that the phrase "in the power region" in §25.90(b) should be modified to read "in the power region, or capable of delivering electricity to the power region" to be consistent with the language in PURA §39.154(a). It also commented that the phrase "owned in whole or in part" is inconsistent with PURA §39.154 and should be modified to read "owned and controlled."

The commission agrees with TXU and has made the recommended changes.

TXU recommended that transmission import capacity be excluded from both the numerator and denominator of the market concentration analysis because including it would be inconsistent with PURA §39.154(a). It pointed out that "installed generation capacity" is defined as all potentially marketable electric generation capacity, and therefore it is inappropriate to include transmission import capacity in the calculation. Reliant and Entergy suggested that the commission should retain transmission import capacity in the denominator of the analysis, while excluding such capacity from the numerator because open access transmission allows nondiscriminatory access to transmission capacity on a first-come, first-served basis.

TIEC opposed these suggestions, stating that it is entirely appropriate to include transmission import capacity in the numerator or denominator of the market concentration analysis, because the ability to import generation into a region has a direct impact on competitive market prices within the region. It said the existence of open-access transmission does not negate the fact that generation owners can control transmission import capacity by reserving such capacity under the tariffs. TIEC added that including transmission import capacity in the denominator but not in the numerator of the market concentration analysis would artificially reduce the market shares of the generation owners.

CSW recommended that transmission import capacity amounts that are to be included in the numerator and the denominator of the calculations should be reported by the ISOs rather than the utility or power generation company.

The commission believes that the inclusion of transmission import capacity in the market share calculation is entirely consistent with the language in PURA §39.154 which refers to capability of delivering electricity to a power region. It believes that inclusion of transmission import capacity in the denominator is necessary in order to accurately determine the value of the total installed generation capacity that is available in a region. Similarly, the commission believes that the transmission capacity that a utility or power generation company reserves in order to import generation capacity owned and controlled in another power region should be included in the numerator of the market share calculation. The commission adds wording to the section to clarify the

information that should be included in the initial informational filing, and to allow any interested party to respond to the initial informational filings.

Entergy stated that if the commission chooses to include import capacity, at a minimum, only the amount directly reserved by the power generation company should be included. Entergy said that continuing regulatory obligations may require that its regulated affiliates reserve transmission import capacity to support ongoing regulated retail load. It noted that utilities in regions that have not fully deregulated may need to reserve transmission capacity in order to meet retained regulated load obligations. Entergy continued by stating that certain types of transmission reservations may be properly assigned to a supplier, such as reservations associated with long-term power contracts. In this case, it said the supplier has "control" over the reserved amount of import capacity that can serve the power region. However, it added, other types of transmission reservations should not automatically be assigned to the current holder of the reservations.

As discussed in its comments concerning §25.401(d), the commission believes that a utility's numerator capacity share should include the transmission import capability that is reserved for the purpose of importing generation capacity during the summer peak season that is owned and controlled by the power generation company or its affiliate in another power region.

*§25.90(c), Market power mitigation plan*

SPS recommended that the ability to increase transmission capability into a power region be added as a recognized mitigation measure that may be included in a market power mitigation plan. PG&E disagreed, stating that the addition of transmission capacity does not represent a reasonable market power mitigation measure because it would impose costs on other market participants that otherwise could be avoided. It argued that the addition of transmission capacity can add costs to the nonbypassable charges. It added that in power regions other than ERCOT, transmission rates are subject to FERC jurisdiction and may not be determined based on the postage stamp approach. Thus, generation which is closer in proximity to load, *i.e.,* incumbent utility generation, would have a market advantage in that its transportation costs would be lower than the transportation costs to its competitors.

The commission declines to make the changes recommended by SPS. PURA §39.156(c)(5) states that a proposed market power mitigation plan may include any reasonable method of mitigation. SPS or other entity will be free to include a proposal to mitigate market power by increasing transmission capability in the plan it proposes. The merits of such a proposal can be taken up at that time.

*§25.90(f), Commission determinations*

*Subsection (f)(5)*

Reliant and TXU contended that whether a plan provides adequate mitigation of market power is not a relevant consideration in evaluating a proposed market power mitigation plan. They pointed out that PURA §39.156(a) defines a market power mitigation plan as a proposal for reducing ownership and control of installed generation capacity. Reliant averred that while other sections of PURA do give the commission the authority to monitor market power and address market power abuses, those issues cannot be the subject of a plan filed under PURA §39.156 and proposed §25.90, nor can the commission assume broader discretion in considering market power mitigation plans than is provided for in PURA §39.156(g).

In reply comments, PG&E and TIEC countered that the TXU and Reliant position should be rejected because §39.156(g)(5) of PURA provides that the commission may consider whether a plan is consistent with the public interest in evaluating a market power mitigation plan. TIEC stated that these responsibilities extend beyond the determination of whether generation capacity is excessively concentrated to include the detection and mitigation of a variety of market power abuses, including predatory pricing, collusion, withholding of capacity, and erecting barriers to market entry. It added that whether a proposed plan adequately mitigates market power is directly relevant to evaluating a market power mitigation plan and should be retained in the rule.

The commission does not agree that PURA §39.156 limits it in the manner suggested by Reliant and TXU. PURA §39.156(g) expands the commission's determinations beyond the sole issue of the proposed reduction in ownership and control of installed generation capacity to include such issues as minimization of stranded costs, the effect on federal income taxes, and consistency with the public interest. The commission agrees with PG&E and TIEC that in considering whether a plan is consistent with the public interest, it can make a determination of whether the plan provides adequate mitigation of market power. In determining whether there is adequate mitigation, the commission will look to whether the utility or power generation company has presented a feasible and timely plan to reduce generation to below the 20% threshold. The commission declines to make the changes recommended by TXU and Reliant.

*Proposed Subsection (f)(7)*

SPS suggested that language should be added to §25.90 as (f)(7) to indicate "whether the sale of capacity or disposition of assets is subject to federal Securities and Exchange Commission pooling of interests requirements."

The commission declines to add the language recommended by SPS. SEC pooling of interest requirements are not related to market power or the public interest determination in evaluating market power mitigation plans.

*§25.91 Generating Capacity Reports*

*§25.91(a), Application*

EGSI, Reliant, and SPS commented that the application in §25.91(a) should pertain to all generators connected to the transmission or distribution system, including self-generation and cogeneration. TIEC strongly opposed a requirement for self-generators and cogenerators to file generating capacity reports if they do not offer power for sale in the market. It argued that generation that is not for sale will not affect market prices; therefore, reports from such generators are not needed to assess market power.

The commission declines to make the change recommended by EGSI, Reliant, and SPS. The proposed rule is consistent with PURA §39.155(a), which requires entities that own generation facilities and offer electricity for sale in the state to file generating capacity reports.

EPE recommended that language be added to §25.91 stating that the section would not apply to an electric utility that is not subject to PURA Chapter 39, pursuant to PURA §39.102(c), until the expiration of its freeze period.

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. The commission modifies §25.91(a) to include this clarification; however, it notes that EPE will continue to be subject to other applicable commission reporting requirements during the freeze period that are not based on PURA Chapter 39.

*§25.91(b), Definitions*

CSW commented that the defined term "net dependable capability" (NDC) in §25.91(b) and the reference to "summer net dependable capability" §25.91(f) will be subject to a variety of interpretations which will lead to inconsistencies in the calculations made by various reporting entities. CSW recommended the use of nameplate ratings that it said would be more easily determined and verified. PG&E replied that NDC provides a more accurate measure of the capacity available during peak periods when the potential for market power abuses is at its highest. However, PG&E would not object to modifying the definition of "summer net dependable capability" to provide more uniformity in its determination.

The commission believes it is appropriate to measure capacity that is available during peak periods when the potential for market power abuse is at its highest. NDC rating is a well- established requirement in ERCOT, and the commission believes that other reliability councils have comparable requirements although they may use slightly different terms. Therefore, the commission modifies the definition of "summer net dependable capability" to mean the net capability of a generating unit for daily planning and operational purposes during the summer peak season, as determined in accordance with the requirement of the reliability council or independent organization in which the unit operates.

Reliant recommended the use of nameplate capacity ratings in §25.91(b)(1) for renewable generators instead of some historical operating measure. It noted that the output of renewable resources varies from year to year, which would yield an inconsistent measure of installed capacity.

Although the actual peak capacity provided by a renewable generator may vary from year to year, the year-to-year difference may be much less than the difference between the nameplate rating and the actual performance. Some renewable generation relies on intermittent resources, such as wind, and have significantly less real capability than their nameplate capacity. Therefore, the commission believes the historical measure is a more appropriate measure of the capacity of a renewable resource, and declines to make the change recommended by Reliant.

*§25.91(c), Filing requirements*

EGSI commented that filing such a broad list of operational measures on an annual basis is burdensome and inconsistent with the spirit of competition. SPS recommended that the reporting date be moved from the end of February to May 15th or later to allow companies to incorporate information from their FERC Form 1 reports.

The commission does not agree that annual filing of the information required by this rule is burdensome. Information filed on a less frequent basis would not be timely enough to be of value. In addition, to the extent that market power abuse issues arise, they are likely to occur during the summer peak period. An annual filing made on May 15th or later would be received too late for the commission to evaluate the information and take any needed actions prior to the summer peak season. Therefore, the commission declines to make the changes recommended by EGSI and SPS.

*§25.91(e), Confidentiality*

TXU commented that the use of a standard protective order as provided in §25.91(e) is not appropriate because the generating capacity reports will not be filed as part of a contested proceeding. It recommended that §25.91(e) should permit reporting parties to designate information as "competitively sensitive" since PURA §39.155(a) requires the commission to administer the reporting requirements in a manner that "ensures" the confidentiality of "competitively sensitive information." TXU also recommended the rule should expressly state that information designated as "competitively sensitive" shall be considered exempt from the disclosure requirements of Chapter 552, Government Code. TXU noted that Government Code §552.110 exempts from disclosure "commercial or financial information obtained from a person and privileged or confidential by statute…"

PURA §39.155(a) requires the commission to administer the reporting requirements "in a manner that ensures the confidentiality of competitively sensitive information." This requirement is not equivalent to saying that information filed automatically qualifies for an exemption from the Open Records act. Government Code §552.110 states that "a trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of §552.021." The commission does not agree that the information to be submitted in the generating capacity reports becomes "privileged or confidential by statute or judicial decision" by virtue of being submitted pursuant to PURA §39.155(a). Therefore, the commission declines to make the changes recommended by TXU.

*§25.91(g), Reporting requirements*

EGSI commented that much of the information requested in §25.91(g) is unnecessary and unduly burdensome. It recommended the information only be required when there is evidence of market power abuse or a complaint is filed alleging market power abuse. In reply comments, PG&E said that the reporting requirements should be retained, except for the highly sensitive competitive information in §25.91(g)(2)(H)-(L), to help the commission perform market monitoring and ensure compliance with the requirements of PURA, including the 20% limitation on the ownership of capacity.

Based on amendments made pursuant to comments, the commission does not believe that the revised information required in §25.91(g) is unnecessary and unduly burdensome. It notes that PURA §39.155(a) requires generating entities to report "any other information necessary for the commission to assess market power or the development of a competitive retail market in the state." The commission has reviewed the comments and reply comments on specific subparts of the proposed rule and will address them in the following paragraphs.

Alcoa and OxyChem commented that the proposed rule imposes a much greater burden on cogenerators than the prior requirements in P.U.C. Substantive Rule §25.105 of this title. They were very concerned about the amount of information, especially the highly confidential information, that would have to be reported on an annual basis. They argued that cogenerators should continue to report according to the §25.105 requirements, and that additional data should only be required when there is a complaint by a market participant that an abuse of market power has or is

likely to occur. FPLE and PGCs expressed the same concerns on behalf of EWGs as well as cogenerators and recommended that EWGs and cogenerators also should continue to report according to the §25.105 requirements.

When it revised Substantive Rule §25.105, the commission intended to simplify the registration requirements for power generation companies and to consolidate the reporting requirements in a separate rule. The commission believes that annual reporting is necessary because the commission is charged with monitoring capacity market shares and market power. It is likely that some of the information to be reported annually may not change significantly from year to year. Therefore, the reporting requirements may be less burdensome than they appear.

FPLE also argued that even if the requirements in the proposed rule are appropriate for incumbent utilities in Texas or their generation affiliates, they are not appropriate for independent power generation companies which are just entering the market in Texas and cannot wield market power. CSW and Reliant replied that a distinction in reporting requirements for small or non-affiliated owners of generation capacity would not be consistent with statutory provisions, and it would unfairly disadvantage those entities that are required to file extensive reports. CSW added that such a distinction would limit the commission's ability to monitor and evaluate market power. Reliant added that PURA §39.001(c) prohibits the commission from discriminating against any market participant or type of market participant during the transition to a competitive market or in the competitive market.

The commission does not agree that it would be appropriate to have separate reporting requirements for generating entities that are not affiliated with incumbent utilities in the state. Independent PGCs and new entrants can accumulate generation market share quickly, whether through construction or acquisition. All power generation companies should file the same generating capacity reports. Market power abuse may occur in a localized area and may not be a function of the total amount of generation in a power region. Therefore, the commission declines to make any changes in response to FPLE's comments.

*Subsection (g)(1)*

PG&E recommended two additional categories of information be required in §25.91(g)(1). First, it recommended that parties report total capacity under contract to affiliates from unaffiliated entities so the commission can better monitor the total capacity controlled by a single affiliate group. Second, it recommended that parties report affiliate capacity that will be connected to a transmission or distribution system within 12 months so the commission would have better information on the capacity owned by a single group. In reply comments, Reliant argued that both categories are unnecessary since the commission will already have the information. It pointed out that PGCs must identify wholesale and retail electric affiliates in Texas when they register with the commission pursuant to Substantive Rule §25.109 of this title, and that all entities that generate electricity for sale in the state will file the capacity reports to be approved in §25.91.

The commission agrees with Reliant that the information requested by PG&E could be determined from the information filed under Substantive Rule §25.109 of this title and proposed §25.91. The commission declines to make the changes recommended by PG&E

TXU Electric proposed adding a new subpart under §25.91(g)(1) that would require reporting parties to provide the capacity of generating facilities used to generate electricity for consumption by the person owning or controlling the facility. It argued that this is necessary to be consistent with the definition of "installed generation capacity" in PURA §39.154(d).

The commission agrees and makes the change proposed by TXU.

CSW requested clarification of whether the phrase "capacity dedicated to its own use" in §25.91(g)(1)(F) referred to data on power plant consumption.

Subsection (f) of this section provides that generating unit capacity will be reported at the summer net dependable capability. This value would be net of power plant consumption. The commission intends that self generators report the amount of capacity that they have reserved for their own use in response to subsection (g)(1)(F).

SPS and Reliant argued that subsection (g)(1)(H) should be deleted because there is no reason to risk inadvertent exposure of confidential, unit-specific information that is not needed for market monitoring purposes. They also argued that subsection (g)(1)(I) and (L) should be deleted because annual energy and capacity sales to affiliated REPs are not relevant to the determination of total market share. In reply comments, PG&E argued that the information in (g)(1) can be required pursuant to PURA §39.155(a); it said the reporting requirement should be retained since it is designed to facilitate the commission's market monitoring function.

Consistent with the commission's conclusion that anticipated plant retirements will not be excluded from the market share denominator, the rule is amended to delete this reporting requirement from the generating capacity reports. However, the commission believes that information on capacity and energy sales to affiliated REPs is necessary for market oversight purposes. Therefore, the commission declines to make the change recommended by Reliant.

SPS commented that the word "energy" in §25.91(g)(1)(J) and (K) should be changed to "power" to conform to PURA §39.155(a).

Although PURA uses the term "power," the commission believes that the term "energy" is more commonly used in this context. Therefore, the commission declines to make the change recommended by SPS.

*Subsection (g)(2)*

Alcoa, CSW, FPLE, OxyChem, PGCs, Reliant, SPS, TIEC, and TXU strenuously objected to subparagraphs (H) through (L) because they would require routine reporting of information that the parties view as highly confidential and competitively sensitive. In addition, the parties argued that the information in subparagraphs (H) through (L) is not needed by the commission to assess market power or the development of a competitive retail market in the state. Reliant and SPS also objected to subparagraph (M) for the same reasons. AE objected to all of paragraph (g)(2) for the same reasons.

OxyChem, PGCs, and TIEC argued that the information specified in subparagraphs (H) through (L) is particularly sensitive for industrial cogenerators and self-generators. TIEC said that information such as heat rate provides critical cost information that would allow a competitor to ascertain not only the cost of electricity for an industrial customer with self- generation, but also the production cost for the products made by that company. It

said that for some industries that use self-generation or cogeneration, electricity comprises up to 70% of their production costs. FPLE and PGCs stressed that there would be no assurance that competing generators or prospective buyers could not obtain the information through the Open Records Act. Reliant and TXU commented that even though the reports could be filed under a protective order, there was a risk that the information could be disclosed inadvertently.

CSW, EGSI, OxyChem, PGCs, and PG&E argued that the information in subparagraphs (H)-(L) should only be required if the commission had a specific need for it, such as investigating a complaint of market power abuse. PGCs and PG&E said the commission has sufficient authority under PURA to require this kind of data from any generator against whom a complaint has been lodged of potential market power abuse.

SPS recommended that if the commission deems the information in subparagraphs (H) through (M) to be necessary, then it should adopt a standard reporting format such as that provided to the North American Electric Reliability Council.

CPS, CSW, OxyChem, PGCs, PG&E, and TIEC acknowledged the commission's responsibility to monitor market power and its authority under PURA §39.155(a) to require reporting of "any other information necessary for the commission to assess market power or the development of a competitive retail market in the state." CPS suggested that such assessments might be better achieved through the establishment of an effective market monitoring program in conjunction with the ERCOT ISO (or the independent organizations in non-ERCOT regions). FPLE recommended that the commission obtain generating data through the Package 3 data collection processes being developed by the ERCOT ISO. PGCs supported FPLE's recommendation, provided that any information obtained from the ISO could be submitted pursuant to a protective order.

PG&E said the commission should not defer to the ERCOT data collection process for determining whether market power abuses have occurred. It said the commission's reporting requirements are designed to facilitate monitoring the market and mitigating any market power abuses and, therefore, the requirements should be retained.

The commission does not agree that all of the information in subsection (g)(2) is highly confidential, competitively sensitive information, but it acknowledges the concern expressed by all the parties about the sensitivity of the information specified in subparagraphs (H) through (M). The commission agrees that it would be more appropriate to require this information only if it is needed for an investigation of possible market power abuse. Therefore, the commission deletes proposed subparagraphs (H) through (M) and adds a new subsection (h) that would require reporting parties upon request to provide additional information to the commission within 15 days.

At this time, the commission declines to adopt the recommendations by CPS and FPLE to rely upon the market monitoring process or the ERCOT Package 3 database for all information beyond the minimum generation capacity share data. The ERCOT database is still in development, and the scope of the commission's market surveillance function has not yet been fully determined. Once those processes are in place, the commission will revisit this provision.

*Subsection (g)(3)*

SPS commented that it was not clear if subsection (g)(3) was meant to apply to generation that is used on-site or sold at retail only.

Based on the commission's decision concerning §25.401(e)(2) to include, rather than exclude grid-connected self-generation and cogeneration greater than 1 MW in the market share denominator, it is not necessary for parties to file this information as part of their generating capacity reports. The commission amends the proposed rule to delete the requirement.

*Subsection (g)(5)*

Section 25.91(g)(5) requires a reporting party to provide an explanation of generation that it owns but does not control. PGCs expressed concern that a detailed description of contractual rights and responsibilities would constitute highly confidential and competitively-sensitive information that should not be required.

For purposes of this reporting requirement, a brief explanation of the other party's control of the generating unit will be adequate. The commission is not seeking a detailed description of contractual rights and responsibilities. The commission amends the provision to clarify this point.

*Subsection (g)(8)*

SPS and Reliant recommended that subsection (g)(8) be deleted because must-run unit status is not relevant to the determination of market shares.

The commission deletes this information requirement because it has determined that must- run capacity will be included in installed generation capacity for the power region. Therefore, it is not necessary to have must-run capacity reported.

*Subsection (g)(9)*

CSW commented that information on the amount of transmission import capacity in §25.91(g)(9) is "more appropriately" obtained from the entity that supervises the applicable power region.

The commission declines to make the change recommended by CSW. Although the independent organization for the power region would likely be a good source of information on transmission import capacity, the commission's authority to require this information from independent organizations for power regions that include other states is not clear.

SPS and Reliant recommended that subsection (g)(9) be deleted because transmission import capacity is not relevant to the determination of capacity market shares, unless a PGC purchases electricity from itself or an affiliate outside the power region.

The commission declines to make the change recommended by SPS and Reliant. Subsection (g)(9) will provide information that the commission will need in order to calculate generation market shares in accordance with proposed §25.401.

*§25.401 Share of Installed Capacity*

All comments concerning §25.401(e)(2)(A) - (G) are summarized in the prior section of this document that discusses the published preamble question.

*§25.401(a), Application*

TXU commented that §25.401 must apply to persons, municipally owned utilities, electric cooperatives, and river authorities that own generating facilities and offer electricity for sale in the

state because §25.401 provides the definition of "installed generation capacity" that is used in proposed §25.90 and §25.91.

The commission does not believe it is necessary to include the other generators in the application section in order for this rule to incorporate by reference the definition of "installed generation capacity" in another rule. The commission declines to make the change recommended by TXU.

*§25.401(c), Capacity ratings*

Reliant suggested changing the last line of proposed §25.401(c) to say, "The commission may revise reported capacity estimates if they are found to be substantially incorrect and contrary to known published estimates." It said that estimates of net dependable capability for cogenerators, for example, are proprietary in nature, and therefore existing utilities and their affiliate PGCs should not be held accountable for small differences or even transitory changes in capacity estimates.

The commission declines to make the change recommended by Reliant because it is not necessary. The purpose of the last sentence in §25.401(c) is to clarify that the commission will not be obligated to use the submitted capacity ratings if it determines that they are incorrect. The sentence does not automatically attach blame or consequences to the party who submits capacity ratings that are subsequently changed by the commission.

*§25.401(d), Installed generation capacity of a power generation company*

TXU recommended that the proposed language should be clarified by adding the phrase "that is produced by installed generation capacity owned and controlled by such power generation company" to the end of proposed §25.401(d)(2). It said this is necessary for consistency with PURA §39.154(a).

Reliant and SPS argued that transmission import capacity reserved by a power generation company should not be considered a part of its generating capacity as currently stated in §25.401(d)(2). They noted that transmission is reserved through open access rules, and that transmission may be reserved for many reasons including ancillary services. SPS averred that transmission reservation during the summer peak period will have little to do with market power. SPS argued that transmission reservation is only important if the power generation company has to purchase electricity from itself or an affiliate outside the power region; in which case, such purchase would be considered in the power generation company's market share calculation, and the transmission reservation would be considered in the total power region calculation under the category "capable of delivering electricity to, the power region."

The commission generally agrees with SPS. The numerator of the capacity share calculation should include the transmission capacity that is reserved for the purpose of importing generation capacity that is owned by the power generation company or an affiliate in another power region. The commission amends §25.401(d)(2) accordingly.

TXU proposed that an electric utility or power generation company be allowed to provide evidence other than a Texas Natural Resource Conservation Commission (TNRCC) permit application to demonstrate that it has committed to complying with PURA §39.264. TIEC commented that the mere filing of an application with the TNRCC should not be considered a binding commitment to comply with PURA §39.264 since an applicant can withdraw its application prior to approval. TIEC recommended therefore that grandfathered facilities only be excluded from the determination of market share if the PGC's TNRCC application has been approved. In addition, TIEC recommended that the derated capacity of grandfathered units after pollution control equipment has been added should be used for the market concentration analysis.

In reply comments, TIEC urged the commission to reject TXU's proposal to allow the submission of evidence other than the TNRCC permit application. TIEC noted that it was not clear what evidence TXU had in mind, but it reiterated its initial comments that only an approved TNRCC application would constitute a binding commitment and justify the exclusion of the grandfathered capacity from the market share calculation. PG&E agreed with TIEC. As an alternative, it said the rule could provide that the filing of a TNRCC application would only be considered a binding commitment if the PGC agreed not to withdraw the application without the express consent of the commission.

The commission understands that a grandfathered facility must receive a permit for the emission of air contaminants from TNRCC or it will not be allowed to operate after May 1, 2003. Therefore, submission of a permit application will be considered adequate evidence of a binding commitment to comply with PURA §39.264. However, the commission will review the progress on achieving an approved TNRCC application when it determines market share percentages. If adequate progress has not been made, the commission may chose not to exclude the grandfathered facility from the numerator of the market share calculation. The commission amends proposed §25.401(d)(3) to require that adequate progress must be shown. It also amends proposed §25.91 to require that a utility report on its progress as part of its annual Generating Capacity Report. The commission declines the recommendations made by TXU, PG&E, and TIEC.

*§25.401(e), Total installed generation*

EGSI and TXU commented that the capacity of generating facilities located on the boundary between two power regions should not be allocated between the regions as currently stated in subsection (e)(1)(D). EGSI said that capacity would be sold into either power region based on prices. TXU said the entire capacity of a boundary facility should be included in the installed generation capacity for each power region because it is potentially marketable in either region. Reliant argued that allocating the capacity of a dual-sited generation facility based on historical sales is flawed logic because the previous year has no bearing on future sales.

TIEC argued that the allocation of capacity from generation facilities on the boundary between two power regions should reflect any firm commitments of power from such facilities. To the extent the facility has a firm contract to supply specific amounts of power to customers within a given power region during the study period, the amount of power committed under the contract should be assigned to that power region for the market concentration analysis.

In reply comments, PG&E agreed with TIEC. It disagreed with EGSI, Reliant, and TXU, pointing out that if both power regions are constrained, which is not unlikely during the peak period, the total capacity is not available to both regions to mitigate market power. CSW agreed with EGSI, arguing that allocation based upon historical data would be of little value because such data would be of little value with respect to capacity under different market conditions. It said such capacity should be included in

the denominator for both power regions. Also in reply comments, TIEC said that including the entire capacity in both regions results in obvious double- counting of the same capacity.

The commission believes it is appropriate to allocate the capacity as stated in the proposed rule. Historical information is an imperfect predictor of the future, but it is preferable to double-counting the capacity.

TIEC recommended that the commission establish an appropriate method of determining total transmission import capacity. For example, total import capacity could be defined either be a transmission connection's thermal rating or by the connection's total transmission capability as reported on the regional Open Access Same Time Information System. TIEC said this issue merits further study to determine the appropriate approach.

The commission agrees that this issue needs further study, and it makes no change to the proposed rule.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting these sections, the commission makes other minor modifications for the purpose of clarifying its intent.

## SUBCHAPTER D. RECORDS, REPORTS, AND OTHER REQUIRED INFORMATION

### 16 TAC §25.90, §25.91

These new 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 §39.154, which requires the commission to determine the percentage shares of installed generation capacity that are owned and controlled by a utility or a power generation company; §39.155, which grants the commission the authority to assess market power and to require the filing of generation capacity reports; §39.156, which grants the commission the authority to require the filing of market power mitigation plans; and §39.157, which grants the commission the authority to address market power and to monitor the market shares of installed generation capacity to ensure that the limitations in PURA §39.154 (relating to Limitation of Ownership of Installed Capacity) are not exceeded.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.003, 31.002, 39.154, 39.155, 39.156, 39.157, and 39.264.

*§25.90. Market Power Mitigation Plans.*

(a) Application. An electric utility or power generation company that the commission determines owns and controls more than 20% of the installed generation capacity located in, or capable of delivering electricity to, a power region shall file a market power mitigation plan with the commission not later than December 1, 2000. An electric utility or power generation company that the commission determines owns and controls more than 20% of the installed generation capacity located in, or capable of delivering electricity to, a power region after January 1, 2002, shall file a market power mitigation plan as directed by the commission. The commission may, for good cause, waive or modify the requirement to file a market power mitigation plan, in accordance with Public Utility Regulatory Act (PURA) §39.154(b). This section does not apply to an electric utility subject to PURA §39.102(c) until the end of the utility's rate freeze.

(b) Initial information filing. Each utility or power generation company that owns and controls, either separately or in combination with its affiliates, more than 10,000 megawatts (MW) of electric generation capacity located in a power region that is partly or entirely within the state shall file a calculation by September 5, 2000, detailing the installed generation for its power region expected as of January 1, 2002, and showing its percentage share of the installed generation capacity located in, or capable of delivering electricity to, the power region, plus the capacity expected to be interconnected to the transmission system by January 1, 2002, less the capacity to be auctioned off pursuant to PURA §39.153, and any grandfathered facilities capacity pursuant to PURA §39.154(e). The calculation shall be made pursuant to the requirements of §25.401 of this title (relating to Share of Installed Generation Capacity). The filing shall include detailed information that will allow the commission to replicate the calculation. At a minimum, the filing must include an itemized list of all generating units that are located in, or capable of delivering electricity to, the power region and are owned and controlled by the utility or power generation company and its affiliates in the power region or capable of delivering electricity to the power region. Generating units should be identified by name, capacity rating, ownership, location, and reliability council. Capacity shall be rated according to the method established in §25.91(f) of this title (relating to Generating Capacity Reports). The filing shall also include the transmission import capacity amounts that are to be included in the numerator and the denominator of the calculation prescribed by §25.401 of this title and an explanation of how the transmission capacity amounts were determined. Any interested parties may respond to the utility filings by filing comments with the commission by September 29, 2000. By October 20, 2000, the commission will indicate which utilities, if any, exceed the 20% threshold and are required to file a market power mitigation plan on or before December 1, 2000.

(c) Market power mitigation plan. A market power mitigation plan is a written proposal by an electric utility or a power generation company for reducing its ownership and control of installed generation capacity as required by PURA §39.154. A market power mitigation plan may provide for:

(1) the sale of generation assets to a nonaffiliated person;

(2) the exchange of generation assets with a nonaffiliated person located in a different power region;

(3) the auctioning of generation capacity entitlements as part of a capacity auction required by PURA §39.153;

(4) the sale of the right to capacity to a nonaffiliated person for at least four years; or

(5) any reasonable method of mitigation.

(d) Filing requirements. The plan shall include all supporting information necessary for the commission to fully understand and evaluate the plan. On a case-by-case basis, the commission may require the electric utility or power generation company to provide any additional information the commission finds necessary to evaluate the plan. The plan submitted should incorporate information addressing the determinations listed in subsection (f) of this section.

(e) Procedure. The commission shall approve, modify, or reject a plan within 180 days after the date of filing. The commission may not modify the plan to require divestiture by the electric utility or power generation company.

(f) Commission determinations. In reaching its determination under subsection (e) of this section, the commission shall consider:

(1) the degree to which the electric utility's or power generation company's stranded costs, if any, are minimized;

(2) whether on disposition of the generation assets the reasonable value is likely to be received;

(3) the effect of the plan on the electric utility's or power generation company's federal income taxes;

(4) the effect of the plan on current and potential competitors in the generation market;

(5) whether the plan provides adequate mitigation of market power; and

(6) whether the plan is consistent with the public interest.

(g) Request to amend or repeal mitigation plan. An electric utility or power generation company with an approved mitigation plan may request to amend or repeal its plan. On a showing of good cause, the commission may modify or repeal the mitigation plan.

(h) Approval date. If an electric utility's or power generation company's market power mitigation plan is not approved before January 1 of the year it is to take effect, the commission may order the electric utility or power generation company to auction generation capacity entitlements according to PURA §39.153, subject to commission approval, of any capacity exceeding the maximum allowable capacity prescribed by PURA §39.154 until the mitigation plan is approved. An auction held under this subsection shall be held not later than 60 days after the date the order is entered.

*§25.91. Generating Capacity Reports.*

(a) Application. This section applies to each person, power generation company, municipally owned utility, electric cooperative, and river authority that owns generation facilities and offers electricity for sale in this state. This section does not apply to an electric utility subject to Public Utility Regulatory Act (PURA) §39.102(c) until the end of the utility's rate freeze.

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

(1) Nameplate rating - The full-load continuous rating of a generator under specified conditions as designated by the manufacturer.

(2) Summer net dependable capability - The net capability of a generating unit in megawatts (MW) for daily planning and operational purposes during the summer peak season, as determined in accordance with requirements of the reliability council or independent organization in which the unit operates.

(c) Filing requirements. Reporting parties shall file reports of generation capacity with the commission by the last working day of February each year, based on the immediately preceding calendar year. Filings shall be made using a form prescribed by the commission.

(d) Report attestation. A report submitted pursuant to this section shall be attested to by an owner, partner, or officer of the reporting party under whose direction the report was prepared.

(e) Confidentiality. The reporting party may designate information that it considers to be confidential. Information designated as confidential will be treated in accordance with the standard protective order issued by the commission applicable to generating capacity reports.

(f) Capacity ratings. Generating unit capacity will be reported at the summer net dependable capability rating, except as follows:

(1) Renewable resource generating units that are not dispatchable will be reported at the actual capacity value during the most recent peak season, and the report will include data supporting the determination of the actual capacity value;

(2) Generating units that will be connected to a transmission or distribution system and operating within 12 months will be rated at the nameplate rating.

(g) Reporting requirements.

(1) Each reporting party shall provide the following information concerning its generation capacity (in MW) and sales (in megawatt-hours (MWh)) on a power region-wide basis and for that portion of a power region in the state:

(A) total capacity of generating facilities that are connected with a transmission or distribution system;

(B) total capacity of generating facilities used to generate electricity for consumption by the person owning or controlling the facility;

(C) total capacity of generating facilities that will be connected with a transmission or distribution system and operating within 12 months;

(D) total affiliate installed generation capacity;

(E) total amount of capacity available for sale to others;

(F) total amount of capacity under contract to others;

(G) total amount of capacity dedicated to its own use;

(H) total amount of capacity that has been subject to auction as approved by the commission;

(I) total amount of capacity that will be retired within 12 months;

(J) annual capacity sales to affiliated retail electric providers (REPs);

(K) annual wholesale energy sales;

(L) annual retail energy sales; and

(M) annual energy sales to affiliate REPs;

(2) Each reporting party shall provide the following information for each generating unit it owns in whole or in part:

(A) Name;

(B) Location by county, utility service area, power region, reliability council, and, if applicable, transmission zone;

(C) Capacity rating (MW) as specified in subsection (f) of this section;

(D) Annual generation (MWh);

(E) Type of fuel or nonfuel energy resource;

(F) Technology of natural gas generator; and

(G) Date of commercial operation.

(3) Each reporting party shall identify the name and capacity rating of each generating unit that it owns that is partly owned by other parties. For each such unit, it shall identify the other owners and their respective ownership percentages.

(4) Each reporting party shall identify the name and capacity rating of each generating unit that it owns but does not control. For each such unit, it shall identify the controlling party and briefly explain the nature of the other party's control of the unit.

(5) Each reporting party shall identify the name and capacity rating of each generating unit that it owns that is located on the

boundary between two power regions and able to deliver electricity directly into either power region, and shall report the total sales from each such unit for the preceding year by power region.

(6) Each reporting party that is subject to the PURA §39.154(e) shall identify the name and capacity rating of each "grandfathered" generating unit that it owns in an ozone non-attainment area. Each reporting party shall also provide copies of any applications to the Texas Natural Resources Conservation Commission (TNRCC) for a permit for the emission of air contaminants related to the grandfathered units, and it shall also provide a description of the progress it has made since its last Generating Capacity Report on achieving approval of each such TNRCC permit.

(7) Each reporting party shall identify the amount of transmission import capability that it has reserved and is available to import electricity during the summer peak into the power region from generating facilities that are owned by the reporting party or its affiliate in another power region.

(h) Upon written request by the person responsible for the commission's market oversight program, a reporting party shall provide within 15 days any information deemed necessary by that person to investigate a potential market power abuse as defined in PURA §39.157(a). In addition, the commission may request reporting parties to provide any information deemed necessary by the commission to assess market power or the development of a competitive retail market in the state, pursuant to §39.155(a). A reporting party may designate information provided to the commission as confidential in accordance with subsection (e) 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 August 11, 2000.

TRD-200005649
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: August 31, 2000
Proposal publication date: April 28, 2000
For further information, please call: (512) 936-7308

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## SUBCHAPTER O. UNBUNDLING AND MARKET POWER

## DIVISION 4. OTHER MARKET POWER ISSUES

### 16 TAC §25.401

These new 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 §39.154, which requires the commission to determine the percentage shares of installed generation capacity that are owned and controlled by a utility or a power generation company; §39.155, which grants the commission the authority to assess market power and to require the filing of generation capacity reports; §39.156, which grants the commission the authority to require the filing of market power mitigation plans; and §39.157, which grants the commission the authority to address market power and to monitor the market shares of installed generation capacity to ensure that the limitations in PURA §39.154 (relating to Limitation of Ownership of Installed Capacity) are not exceeded.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.003, 31.002, 39.154, 39.155, 39.156, 39.157, and 39.264.

*§25.401. Share of Installed Generation Capacity.*

(a) Application. The provisions of this section apply to power generation companies.

(b) Share of installed generation capacity. The percentage share of installed generation capacity for a power generation company will be determined by dividing the installed generation capacity owned and controlled by the power generation company in, or capable of delivering electricity to, a power region by the total installed generation capacity located in, or capable of delivering electricity to, the power region.

(c) Capacity ratings. For purposes of this section, generating unit capacity ratings shall be consistent with §25.91(f) of this title (relating to Generating Capacity Reports). The commission may revise reported capacity ratings if they are found to be incorrect.

(d) Installed generation capacity of a power generation company.

(1) In determining the percentage shares of installed generation capacity under the PURA §39.154, the commission shall combine capacity owned and controlled by a power generation company and any entity that is affiliated with that power generation company within the power region, reduced by the installed generation capacity of those facilities that are made subject to capacity auctions under PURA §39.153(a) and (d).

(2) In determining the percentage shares of installed generation capacity, the commission shall increase the installed generation capacity owned and controlled by a power generation company by the transmission import capability that is available for importing electricity during the summer peak season into the power region from generating facilities that are owned by the power generation company or an affiliate in another power region.

(3) In determining the percentage shares of installed generation capacity owned and controlled by a power generation company under PURA §39.154 and §39.156, the commission shall, for purposes of calculating the numerator, reduce the installed generation capacity owned and controlled by that power generation company by the installed generation capacity of any "grandfathered facility" within an ozone nonattainment area as of September 1, 1999, for which that power generation company has commenced complying or made a binding commitment to comply with PURA §39.264. This paragraph applies only to a power generation company that is affiliated with an electric utility that owned and controlled more than 27% of the installed generation capacity in the power region on January 1, 1999. The commission will consider a permit application to the Texas Natural Resource Conservation Commission (TNRCC) to be adequate evidence that the power generation company has commenced complying or made a binding commitment to comply with PURA §39.264. However, the commission will review the progress that has been made on achieving an approved an TNRCC permit, when it reviews and updates market share percentages, and if adequate progress has not been made, the commission may choose to include the grandfathered capacity in the numerator.

(e) Total installed generation. The total installed generation will consist of the installed generation capacity that is located in, or capable of delivering electricity to, a power region.

(1) Installed generation capacity will include all potentially marketable electric generation capacity. Except as provided in paragraph (2) of this subsection, installed generation capacity will include:

(A) generating facilities that are connected with a transmission or distribution system;

(B) generating facilities used to generate electricity for consumption by the person owning or controlling the facility;

(C) generating facilities that will be connected with a transmission or distribution system and operating within 12 months; and

(D) generating facilities that are located on the boundary between two power regions and are able to deliver electricity directly into either power region, except that the capacity of such facility shall be allocated between the power regions based on the share of its total electric energy that the facility sold in each power region during the preceding year.

(2) Installed generation capacity will not include generating facilities that have a nameplate rating equal to or less than 1 megawatt (MW).

(3) The amount of installed generation capacity that is capable of delivering electricity to a power region will be determined by:

(A) the import transmission capacity during the summer peak period of the alternating current transmission interconnections between the power region at issue and other power regions; and

(B) the import capacity during the summer peak period of the reliable direct current interconnections between the power region at issue and other power regions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005648
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: August 31, 2000
Proposal publication date: April 28, 2000
For further information, please call: (512) 936-7308

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## SUBCHAPTER P. PILOT PROJECTS

### 16 TAC §25.431

The Public Utility Commission of Texas (commission) adopts new §25.431, relating to Retail Competition Pilot Projects, with changes to the proposed text as published in the June 16, 2000, *Texas Register* (25 TexReg 5772). This new section is adopted under Project Number 21407. The new rule is necessary to implement Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §39.104 and §39.405. PURA §39.104, *Customer Choice Pilot Projects*, directs the commission to require utilities to conduct pilot projects beginning June 1, 2001, and PURA §39.405, *Pilot Project*, sets forth additional requirements for pilot projects conducted by utilities that are subject to the provisions of PURA Chapter 39, Subchapter I. Section 25.431 establishes the requirements and procedures for these pilot programs.

The commission used the negotiated rulemaking procedures set forth in Texas Government Code, Chapter 2008, for this project. The commission formally appointed a committee of interested stakeholders to serve on the negotiating committee and develop a proposed rule. Meetings of the negotiating committee were held in Austin, Texas, every Monday from March 6 through May 1, 2000, with additional meetings held on Tuesday, April 4 and Thursday May 11. Additional caucus meetings were held as necessary, and the committee members relied heavily on electronic communication to work through issues between meetings.

As a result of its negotiations, the committee was able to reach consensus on most aspects of the proposed rule. There were two issues, however, on which the committee was unable to reach consensus: 1) whether to use a lottery to select participants in the residential customer class, and 2) how to set delivery rates for the pilot if the commission has not set interim rates in the utilities' unbundled cost of service (UCOS) cases by May 2001. The committee agreed that these two issues should be identified in the preamble of the published rule for the purpose of soliciting public comment, and that all members of the committee were free to offer comments on these two issues.

The commission received comments on the proposed new section from the following interested parties: American Association of Retired Persons, Consumers Union Southwest Regional Office, Texas Legal Services Center, and Texas Ratepayers' Organization to Save Energy (collectively Residential Consumers); Central Power and Light Company, Southwestern Electric Power Company, and West Texas Utilities Company (collectively AEP); Cities served by TXU Electric Company and Central Power and Light (collectively Cities); Enron and the New Power Company (collectively Enron); Greenmountain.com and NewEnergy (collectively non- affiliated retail electric providers, or REPs); Entergy Gulf States, Inc. (EGS); Reliant Energy, Incorporated (Reliant); Southwestern Public Service Company (SPS); Texas Industrial Energy Consumers (TIEC); Texas-New Mexico Power Company-Retail Electric Provider (TNMP-REP); Texas-New Mexico Power Company-Distribution Utility (TNMP-DU); TXU Electric Company- Retail (TXU-REP); TXU Electric Company-Distribution Utility (TXU-DU); and the United States Department of the Army (Army).

No public hearing on the proposed new section was held under Government Code §2001.029 because it was not requested by at least 25 persons, a governmental subdivision or agency, or an association having at least 25 members.

Preamble Issue 1: Should a lottery be used to select participants in the residential customer class? Paragraph (g)(1) sets forth a procedure for residential customer participation that is first come, first served; as customers authorize switches to retail electric providers, they are counted toward the 5.0% load limit until such limit is reached. One option that was suggested during the negotiating committee meetings was to allow customers to first indicate interest in participating in the pilot project, and if that interest exceeded the 5.0% limit, then a lottery would be held to determine which residential customers could have the opportunity to switch providers.

Residential Consumers, non-affiliated REPs, Enron, TNMP-DU, TXU-REP, SPS, and Cities supported the first come, first served methodology for selecting participants in the residential

customer class. Parties generally supported this methodology because it would minimize confusion, simplify the process, keep administrative costs low, and test whether the market will broadly include demographic groups and all geographic areas. Reliant and EGS supported utility choice of whether to use a first come, first served methodology or a lottery. Reliant commented that a lottery would maximize the chance for any customer to participate. EGS opposed requiring a lottery because utilities may not be able to recover the costs of conducting a lottery.

The commission concludes that no changes to the proposed paragraph (g)(1) are necessary. The commission agrees with the parties that the first come, first served methodology for selecting participants in the residential customer class will minimize confusion, simplify the process, keep administrative costs low, and test whether the market will broadly include demographic groups and all geographic areas.

Preamble Issue 2: How should the commission set rates for the pilot if the commission has not set interim rates in the utilities' unbundled cost of service (UCOS) cases by May 2001? Proposed subsection (h) is silent regarding how the commission will set rates in the event that interim rates are not set in the UCOS cases in time for use in the pilot programs. Although it is the commission's intent to have interim rates set by May of 2001, and the committee members agreed that the UCOS interim rates are the most appropriate rates to be used during the pilot, the committee believed that the commission needs a contingency plan in the event that procedural delays in those cases result in interim rates not being set in time. The committee discussed several options. First, the rule could be silent on the issue. Second, the commission could rely on the proposed rates filed by the utilities in their UCOS cases, or, similarly, on testimony filed by rate design witnesses for the commission's Office of Regulatory Affairs in those cases. Third, the commission could rely on the methodology employed in §25.227 of this title (relating to Electric Utility Service for Public Retail Customers) (GLO Rule). Section 25.227 uses the functional cost percentages for each rate class developed for each utility in the final staff report in Project Number 20749, *Functional Cost Separation of Electric Utilities in Texas*, (May 1999) to determine transmission and distribution (T&D) rate components. Section 25.227 also includes a methodology for determining competition transition charges (CTC). Regardless of which contingency method should be used to set pilot rates, though, the committee members agreed that such rates should not be subject to true-up once final T&D rates are set.

All parties agreed that the most appropriate rate to use for the pilot project is a commission approved interim rate based on the UCOS filings. In the event the UCOS interim rates are not set, Residential Consumers and TIEC supported the rule remaining silent on the issue. In the alternative, Residential Consumers argued that if the interim rates are not set, the commission should reconsider the start date of the pilot project because it is critical that pilot project rates, like other aspects of the pilot project, mirror competition. Other parties objected to the rule remaining silent, arguing that market participants need more certainty in order to adequately plan for the pilot project and subsequent retail market.

AEP, SPS, and Entergy commented that the commission should rely on the proposed rates filed by the utilities in their UCOS cases, not subject to true-up. TIEC, Cities, non-affiliated REPs, and Enron generally opposed the utilities' proposed UCOS rates, arguing that the UCOS rates filed by the utilities are too high, and some adjustments have already been ordered by the commission in Docket Number 22344, *Generic Issues Associated With Applications for Approval of Unbundled Cost of Service Rate Pursuant to PURA §39.201 and Public Utility Commission Substantive Rule §25.344.* In addition, parties opposing the utilities' proposed UCOS rates argued that if the filed rates are used without true-up, the utilities will likely receive a financial gain.

Reliant, TXU-REP, Cities, and TXU-DU offered alternatives other than the utilities' proposed UCOS filings. Reliant supported a temporary rate based on either the companies' or the commission staff's proposed rates in the UCOS filing, subject to true-up. Reliant argued that PURA §36.155 establishes procedures for interim rates and requires refunds or surcharges if the temporary rates are different from the rates approved. TXU-REP supported a fair method stressing that rates should be utilized that reflect, as closely as possible, the rates that will be in effect at market opening for a seamless transition to retail competition. Cities recommended that the commission should convene a limited proceeding to consider evidence regarding the appropriate proxy and set the rates. TXU-DU commented that the utility should have the option to bond rates at levels that it determines reasonable in accordance with PURA §36.110, and such rates should be subject to true-up. TXU-DU argued that the bonding procedures in PURA §36.110 have been utilized by utilities and this commission in past proceedings and that procedures for accommodating this method are in place and tested. Reliant supported this alternative in its reply comments.

Non-affiliated REPs and Enron commented that, in the event interim rates are not approved in the UCOS cases, the commission should use the methodology established in Project Number 20749, which is employed in §25.227 (GLO rule). The parties argued that the rates developed in the GLO rule were presented to the 76th Legislature, and are a more reasonably proxy for final rates. Non-affiliated REPs and Enron opposed true-ups, arguing that such a process is a barrier to participation because it would unreasonably expose a REP to the entire risk of inaccurate collection or strip a REP of its ability to offer its customers price certainty. CSW, TXU-REP, TXU-DU, SPS, EGS, and Reliant opposed the methodology contained in the GLO rule. In reply comments, parties argued that the GLO rule methodology does not reflect the commission's unbundling and UCOS requirements because it was developed prior to the commission's unbundling rules. As a result, the methodology does not accurately reflect the cost items associated with unbundling, the cost levels, or rate design that utilities are proposing in the UCOS cases. Opposing parties argued that because the rate design and rate classes proposed for the unbundled T&D rates are very different from the existing rate structure and rate classes, the purpose of the pilot project to test systems and acquaint customers and market participants with the restructured retail market would be frustrated if the GLO rates were used.

The commission strongly agrees with all the parties that the most appropriate rates to use for the pilot projects are commission approved interim rates based on the UCOS filings. Such rates will provide the most seamless transition to full retail competition. The commission agrees with Residential Consumers that several aspects of the pilot project rule will be impacted by other rulemaking projects and contested cases before the commission, and that the proposed rule is silent where a decision is pending elsewhere. In addition, designating a "backup" alternative methodology for setting the pilot rates offers no certainty to market participants because such methodology would remain open

until May 31, 2001, the date by which the commission must approve the pilot tariffs pursuant to paragraph (h)(3). Accordingly, the commission concludes that the rule should remain silent on the rates to be used in the event interim rates are not approved in each individual UCOS case. The commission further adopts the original consensus position of the committee that rates for the pilot project are not subject to true-up.

*Other Issues:* Several parties raised additional issues in their comments.

TIEC commented that the term "registration agent" is not defined in the rule, although TIEC assumed that it refers to the Electric Reliability Council of Texas Independent System Operator (ERCOT ISO).

The commission finds that it is clear from the wording of the rule that the term "registration agent" refers to the ERCOT ISO, and therefore declines to adopt TIEC's proposed clarification.

Non-affiliated REPs noted concern with several informal discussions that have taken place at ERCOT that would require non-affiliated REPs to participate in a "mock market" before being eligible to participate in the pilot project.

The commission has noted the concerns of the non-affiliated REPs. However, the commission finds that the appropriate forum in which to address such concerns is in the mock market planning taking place at ERCOT. The commission affirms that REPs are not required by this rule to participate in the mock market as a prerequisite to participation in the pilot project, but declines to modify the proposed rule language.

TNMP-REP commented that the rule does not address the eligibility of customers who are delinquent in payment of their account with the integrated utility. TNMP-REP also commented that the rule does not address disconnects for non-payment during the pilot programs.

The commission declines to modify the proposed consensus rule to address the treatment of customers with delinquent accounts because these issues are most appropriately addressed in Project Number 22255, *Rulemaking Proceeding for Customer Protection Rules for Electric Restructuring Implementing SB7 and SB 86* (Customer Protection Rulemaking). Consistent with the intent of the pilot projects expressed in subsection (c) of the proposed rule, the pilot programs should parallel full customer choice, therefore pilot customers with delinquent accounts should be treated just as any such customer will be treated once full retail competition begins, as determined in the Customer Protection Rulemaking.

TIEC commented that the rule should require that any commission-approved fuel surcharge be included in the interim rate charged in the pilot project. In reply, Cities supported TIEC's comments and Reliant suggested that alternatively, an exit fee could be charged at the end of the pilot to collect any additional fuel surcharges.

The commission finds that this issue has been addressed in Docket Number 22650, *Petition of Reliant Energy HL&P to Revise Fuel Factors and Implement Surcharge for Pilot Undercollected Fuel Costs.* Should this issue arise with respect to a fuel surcharge for any other utility, the commission will give appropriate consideration at that time to the precedential value of its ruling in Docket Number 22650. Accordingly, the commission declines to modify the proposed rule language.

TNMP-DU commented on §25.431(b)(1), the application section, which states that a pilot project commencing before the adoption of this section may fulfill portions of the requirements of this section, as determined by the commission. TNMP-DU commented that it currently has municipal aggregation pilot programs underway in two municipalities and that these pilot projects represent approximately 3.0% of its total Texas load. TNMP-DU requested that the commission consider counting at least some of this load in fulfilling the 5.0% mandate.

The commission finds that the application section does exactly what TNMP requests, and that no changes to the proposed rule language are necessary. TNMP shall make such request in its compliance filing pursuant to §25.431(l), and the commission will then consider whether some of the load in its existing municipal pilot projects will count toward the 5.0% load participation for this pilot project.

AEP commented on §25.431(c)(4)(B) regarding the effect of pre-existing contracts. AEP interpreted this provision as prohibiting a utility from challenging a customer's right to participate in the pilot because the customer did not provide notice of cancellation in compliance with the contract, but that the utility may challenge a customer's right to participate in the pilot project based on other factors associated with the existing contract. AEP argued that in most instances, costs would be related to the construction of customer-specific facilities and that "the utility should be able to insist on economic performance of the customer's commitment, and participation in the pilot should not be an opportunity for customers to game the system and fail to fulfill such commitments". AEP noted that it understood that the affected utility can challenge a customer's participation in the pilot project if the utility has not fully recovered its costs as contemplated by an existing contract, unless alternative arrangements are made (e.g., the customer agrees to discharge the outstanding obligation for remaining costs).

The commission finds that AEP has a correct understanding regarding the language in §25.431(c)(4)(B), and that such proposed language includes the procedure for a utility to challenge a customer's participation in the pilot. The commission concludes that the proposed rule language adequately addresses AEP's concerns and that no clarification is necessary.

The Army commented that the definitions of customer classes in §25.431(d)(2) should be expanded to include a specific class for government, due to the distinct characteristics of governmental entities and their unique procurement requirements.

The commission finds that although the federal government was not represented on the negotiating committee, state agencies and public aggregators have similar interests and were represented on the negotiating committee that agreed to the definitions of customer classes. The Army has not shown that the federal and state governments have different characteristics and interests with respect to the activities contemplated by this rule, and therefore declines to modify the proposed rule language.

TNMP-DU commented that §25.431(f) related to customer education should be modified to suggest that for REPs who intend to serve only certain areas of the state, that this information be placed next to the name of the REP on the commission mailing.

The commission finds that this issue is most appropriately addressed in Project Number 21251, *Implementation of Senate Bill 7 Provisions Regarding Customer Education About Electric Choice.* Accordingly, the commission declines to modify the proposed rule.

TIEC commented on §25.431(g)(3)(A)(ii) that sets individual load caps of 20% of the 5.0% allocated to the demand-metered non-residential customer classes. TIEC argued that large industrial customers should be able to designate only a portion of their load served by one meter to participate in the pilot, because otherwise this cap would effectively eliminate participation by larger industrial customers. TIEC argued that this is similar to a customer designating a portion of its load to be served by one REP and a portion to be served by another REP.

The commission finds that this issue was discussed and agreed to by the negotiating committee, and that considerations were given to limitations at ERCOT for splitting meter load during the pilot. Although TIEC did not participate in the negotiations, large industrial customers were represented during the negotiations. The cap is to assure that one large customer does not constitute all or nearly all of the load eligible to participate from that customer class. Accordingly, the commission declines to modify the proposed rule language.

In reply comments, AEP commented on §25.431(k) regarding the recovery of costs associated with administering the pilot projects by the utilities. AEP noted that this section provides three options by which utilities may seek cost recovery, and reserves the rights of parties to challenge the utilities' ability to seek cost recovery. AEP argued that because the commission ruled in its open meeting on June 29, 2000, in Docket Number 22344, *Generic Issues Associated with Applications for Approval of Unbundled Cost of Service Rates Pursuant to PURA Section 39.201 and Public Utility Commission Subst. R. 25.344*, that utilities could not seek recovery of pilot program administrative costs as part of their transmission and distribution rates, AEP should no longer be bound by the results of the negotiated rulemaking process. AEP argued that the commission's decision in Docket Number 22344 undercuts the consensual nature of the consensus rule language.

The commission finds AEP's argument without merit. The consensus language states that the utilities "may request recovery from the commission…." This language does not guarantee cost recovery through any of the three options, nor does it specify when a decision should be rendered by the commission regarding a utility's request for cost recovery. The commission found in Docket Number 22344 that costs associated with administration of the pilot project were not appropriate for inclusion in transmission and distribution rates in the UCOS cases pending before the commission because such costs are not ongoing and will not be incurred in the test year. The commission finds that §25.431(k)(2)(C) should be deleted from the rule as proposed because it is no longer an option for cost recovery.

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 new section is 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 §39.104, which states that the commission shall require utilities to conduct pilot projects beginning June 1, 2001, and PURA §39.405, which sets forth additional requirements for pilot projects conducted by utilities that are subject to the provisions of PURA Chapter 39, Subchapter I.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.104, and 39.405.

*§25.431. Retail Competition Pilot Projects.*

(a) Purpose. This section establishes the parameters under which an electric utility shall offer customer choice for 5.0% of the load in its Texas service area beginning on June 1, 2001, through the implementation of retail competition pilot projects. The commission may use these pilot projects to evaluate the ability of each power region to implement full customer choice on January 1, 2002, including the operational readiness of support systems. The pilot projects conducted under this section also will serve to encourage participation in a competitive retail market and to inform customers about customer choice.

(b) Application.

(1) This section applies to an electric utility as defined in the Public Utility Regulatory Act (PURA) §31.002(6). An electric utility exempt from PURA Chapter 39 in accordance with PURA §39.102(c) may conduct a customer choice pilot project consistent with the requirements of this section upon expiration of its exemption. A pilot project commencing before the adoption of this section may fulfill portions of the requirements of this section, as determined by the commission.

(2) Other entities, including retail electric providers (REPs) certified by the commission, and aggregators, power generation companies, and power marketers registered with the commission may participate in the pilot projects under the terms and conditions established by this section.

(c) Intent of pilot projects. Pilot projects conducted under this section are intended to implement customer choice for all applicable customers in the same manner in which full customer choice will be offered starting January 1, 2002, to the extent practicable. Unless determined otherwise through a subsequent commission proceeding, or unless stated otherwise in this section, all pilot project participants who are not retail customers shall abide by all applicable commission rules, including but not limited to, rules relating to customer protection and transmission and distribution terms and conditions, and all rules of an independent organization as defined in PURA §39.151.

(1) Utility's obligation to serve. A utility shall continue to provide electric service in accordance with PURA and the commission's substantive rules to requesting customers in its certificated service area who do not wish to take service from a REP.

(2) Indemnification. Market participants, including utilities, shall be held harmless for any damages resulting from any non-willful system or process failures during the pilot project.

(3) Performance standards.

(A) Call center performance may be compromised by potential large increases of customer inquiries generated because of the customer education program and pilot project activities. For the period February 1, 2001 through December 31, 2001, as applicable to each utility,

*(i)* a reduction of five percentage points will be applied to the percentage of calls to be answered in the allowable time; or

*(ii)* 5.0% of the calls with the longest wait time will be subtracted from the calculation of average answer time.

(B) An affected utility shall track and report such performance during the pilot project in accordance with applicable commission rules and orders. An affected utility does not waive any rights

to request an adjustment or waiver of performance standards directly affected by the customer education program or pilot project.

(4) Effect of pre-existing service agreements or contracts.

(A) To the extent a customer is otherwise eligible to participate in a pilot project in accordance with this section, a utility shall not challenge a customer's right to participate:

*(i)* based upon a claimed failure to provide notice of cancellation in accordance with the requirements of an existing service agreement, contract, or tariff; or

*(ii)* in the event that the customer's service agreement or contract is beyond its primary term.

(B) To the extent a customer is otherwise eligible to participate in a pilot project in accordance with this section, customers in the primary term of a service agreement or contract shall have the right to participate in the pilot project subject to a challenge by the utility based upon a service agreement or contractual issue other than failure to provide notice of cancellation in compliance with an existing service agreement, contract, or tariff. The procedure for any such challenge shall be as follows:

*(i)* A utility contending that a customer that has been otherwise selected to participate in the pilot project is not eligible to participate, because of an existing service agreement or contract in its primary term, shall inform the customer not later than seven days after the date scheduled for the lottery for the applicable class in the event the class is oversubscribed or the date the customer requests participation in the event the class is undersubscribed.

*(ii)* If the customer wishes to dispute the utility's contention, the customer must, within seven days of receipt of the utility's notification, so inform the utility. Pending resolution of the dispute, the utility shall reserve a place for that customer on the participant list.

*(iii)* The customer shall be entitled to participate in the pilot project unless the utility informs the commission of the pilot project eligibility dispute within seven days of receipt of the customer's notification to the utility disputing the claim of ineligibility. Upon receipt by the commission of timely notice of the dispute, the commission will resolve the dispute within 30 days after filing, and may do so administratively.

*(iv)* If the commission determines that the customer is eligible to participate, the customer will be included within the pilot project as soon as practicable after the decision.

(5) Right to withdraw from pilot project. For any reason, and at a customer's request, the REP and the incumbent utility shall restore a residential customer's account to pre-pilot project services and rates. In the event a customer's REP ceases to do business in Texas during the pilot project, the incumbent utility shall restore any customer's account to pre-pilot project services and rates at the customer's request.

(6) Application of renewable energy rule. To encourage access to energy generated from renewable resources by customers participating in the pilot projects, the renewable energy mandate provisions of §25.173 of this title (relating to Goal for Renewable Energy) will be extended on a voluntary basis during the pilot projects to the competitive portion of the market, with the following changes:

(A) Each REP may acquire and retire renewable energy credits (RECs) consistent with its share of retail kilowatt-hour sales during the pilot period (June 1, 2001 through December 31, 2001), at a rate consistent with REC obligations for the year 2002, and in the manner specified in §25.173(h) of this title;

(B) Each REC retired for the pilot period will reduce the REC obligations of the REP for the year 2002 compliance period;

(C) The voluntary settlement period for the pilot project renewable energy program will commence January 1, 2002 and end March 31, 2002; and

(D) Penalty provisions of §25.173(o) of this title are not applicable.

(7) End of pilot projects. The pilot projects will end on December 31, 2001, unless determined otherwise by the commission in accordance with subsection (j) of this section. For an electric utility exempt from PURA Chapter 39 in accordance with PURA §39.102(c), the pilot project, if undertaken, will begin and end on dates deemed reasonable by the commission. A customer will remain with the REP by which he or she was served on the last day of the pilot project until the customer or the REP elects otherwise. By participating in the pilot project, a customer does not waive any right to take service under the price to beat in accordance with PURA §39.202.

(d) Definitions. The following terms when used in this section shall have the following meanings unless the context clearly indicates otherwise:

(1) Aggregation - includes the purchase of electricity from a retail electric provider, a municipally owned utility, or an electric cooperative by an electricity customer for its own use in multiple locations or as part of a voluntary association of electricity customers. An electricity customer may not avoid any nonbypassable charges or fees as a result of aggregating its load.

(2) Customer class - a grouping of customers, specific to the pilot projects, for the purpose of allocating loads available for customer choice during the pilot projects. The five customer classes used in the pilot projects are:

(A) Residential - all customers identified by an electric service identifier (ESI) who purchase electricity under a utility's residential rate schedule.

(B) Non-residential, non-demand metered - all customers identified by an ESI who:

*(i)* do not purchase electricity under a utility's residential rate schedule; and

*(ii)* do not purchase electricity under a utility's municipal or school rate schedule; and

*(iii)* do not purchase electricity under a utility's rate schedule that is based on metered or estimated demand during the twelve month period ending December 31, 2000.

(C) Industrial demand-metered - all customers identified by an ESI who:

*(i)* do not purchase electricity under a utility's residential rate schedule; and

*(ii)* purchase electricity under a utility's rate schedule that is based on a metered demand; and

*(iii)* purchase electricity under a utility's industrial rate schedules (or are identified as industrial by the utility's rate code if the utility does not have industrial rate schedules) or have filed a manufacturing or processing tax exemption certificate with the utility.

(D) Commercial and all other demand-metered - all customers identified by an ESI who:

*(i)* do not purchase electricity under a utility's residential rate schedule; and

*(ii)* do not come within the definition of the industrial demand metered customer class; and

*(iii)* purchase electricity under a utility's rate schedule that is based on a metered demand.

(E) Other - The other customer class is composed of all customers identified by an ESI who:

*(i)* purchase electricity under a utility's rate schedule that is based on known usage patterns, not actual metered data (i.e., unmetered loads); or

*(ii)* purchase electricity under a utility's municipal or school rate schedules; or

*(iii)* purchase electricity under utility rate schedules applicable to seasonal agricultural use, such as cotton gins, irrigation, or grain elevators.

(3) Electric service identifier (ESI) - premise-based identifier assigned to each electric service delivery point between a transmission and distribution utility and an end- use load, which is used in the Texas customer registration system and the Electric Reliability Council of Texas (ERCOT) settlement system.

(4) Lottery - fair process in which ESIs or aggregator packets of ESIs are selected for participation in a pilot project by using standard statistical methods for simple random sampling; each ESI or aggregator packet of ESIs should have an equal chance of actually being selected.

(5) Participation - occurs when the customer takes service from a retail electric provider that is not the incumbent, integrated utility.

(e) Requirements for participants that are not retail customers.

(1) A REP must be certified by the commission pursuant to §25.107 of this title (relating to Certification of Retail Electric Providers) prior to participating in pilot projects established pursuant to this section. An affiliated REP shall not participate in the certificated service area of the electric utility with which it is affiliated.

(2) An aggregator, other than a self-aggregator, must be registered with the commission pursuant to §25.111 of this title (relating to Registration of Aggregators) prior to participating in pilot projects established pursuant to this section.

(3) A power generation company must be registered with the commission pursuant to §25.109 of this title (relating to Registration of Power Generation Companies) prior to participating in pilot projects established pursuant to this section. A utility need not be registered as a power generation company in order to generate power for sale during the pilot projects.

(4) A power marketer must be registered with the commission pursuant to §25.105 of this title (relating to Registration and Reporting by Power Marketers) prior to participating in pilot projects established pursuant to this section.

(5) An independent transmission organization outside of ERCOT may require a market participant to register with that organization in order to become a wholesale buyer and seller of energy across the transmission system.

(f) Customer education. Customer education for the pilot projects shall be conducted as part of the statewide customer education campaign for introducing customer choice. Included in this campaign will be announcements regarding the opportunity to participate in the pilot project and instructions on obtaining further information about the pilot project. The commission shall mail information written in English and in Spanish explaining the pilot project to eligible non-residential customers no later than March 1, 2001, and to eligible residential customers no later than April 15, 2001. The utility shall provide the commission or its designee with customer information necessary to implement this subsection. For purposes of this subsection, §25.272(g)(1) of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates) does not apply with regard to proprietary customer information released to the commission or its designee. The mailing may contain information including, but not limited to:

(1) a description of the pilot project;

(2) the commission's central call center phone number and Internet website operating to respond to customer questions and requests for information;

(3) a list of REPs certified as of a date certain, including the telephone number and, if available, Internet website address for each REP, and a statement disclosing that the REP list is continually updated and how the customer can obtain an updated list; and

(4) a clear, plain language description of customer choice and the price to beat.

(g) Customer choice during pilot projects. The following procedures shall be used for customers to participate in the pilot projects within the designated time periods for each applicable customer class.

(1) Administration. For all customer classes, a REP shall submit requests to switch customers participating in the pilot projects to the registration agent beginning on May 31, 2001, and power delivery in conjunction with the pilot projects may begin on June 1, 2001. For purposes of this section, any electronic submission to the utility shall be executed using a standard electronic data interface (EDI) protocol (814) to be included in the utility's compliance filing.

(A) Except where explicitly stated otherwise in this section, a REP shall electronically submit switch requests to the utility for counting and validation purposes prior to submitting such requests to the registration agent. The utility shall maintain a weekly updated list of non-matching, rejected ESIs on its pilot project Internet website.

(B) Except for the industrial demand-metered class, there shall be no out-of-cycle meter reading requests submitted for purposes of the pilot project before July 1, 2001.

(C) Members of the non-residential customer classes may elect to waive the verification and recision process of the registration agent.

(D) A participating customer shall have the right to change from one REP to another REP in accordance with the switching procedures adopted by the commission.

(E) Beginning April 16, 2001, a REP shall electronically report to the utility any switch request for a customer or an aggregation packet with a listing of the ESIs to be switched to the REP as set forth in this paragraph. After the utility confirms that a non-residential ESI or aggregation packet is on the associated participant list, the utility shall submit the ESI to the registration agent. The registration agent shall keep a record of all the ESIs identified by the utility for participation in the pilot. The REP shall be responsible for submitting to the registration agent the ESIs associated with the switch request to serve. If the ESI identified by the REP matches an ESI identified by the utility, then the registration agent shall allow the registration process to continue.

(F) Because the utility is assigned the responsibility to administer the pilot project, except for complaints arising under §25.272 of this title, which may be made in accordance with procedures established under that section, a claim by any party of unreasonableness associated with the administration of the pilot project will first be addressed by the pilot implementation working group established by subsection (j)(4) of this section. If the complaint is not resolved within ten working days of initial notification to the pilot implementation working group, the complaint may be filed with the commission.

(2) Residential customer class.

(A) Determination of the 5.0% load available for customer choice. For residential customers, the load available for customer choice shall be determined by calculating 5.0% of the number of ESIs in this customer class as of December 31, 2000. No later than January 31, 2001, the utility shall determine the amount of load available for this customer class and shall make that information publicly available through its pilot project Internet website. For this customer class, 20% of the 5.0% load available for customer choice shall be initially set aside for each customer class (hereafter referred to as the 1.0% set-aside) for aggregated loads.

(B) Initiating switching. Beginning February 15, 2001, a REP may accept authorizations to switch providers from residential customers. A REP shall notify the utility of such authorizations for residential customers.

(C) Reaching the 5.0% load limit. For purposes of this subparagraph the total number of ESIs eligible to switch determined in subparagraph (A) of this paragraph, less the number of ESIs that have already authorized a switch, shall be referred to as the amount of available load.

*(i)* As each customer in this class authorizes a switch to another provider, the amount of available load shall be decremented by one.

*(ii)* When the amount of available load reaches zero, no more switch authorizations shall be accepted.

(3) Non-residential customer classes.

(A) Determination of the 5.0% load available for customer choice. No later than January 31, 2001, the utility shall make the results of the following calculations for each non-residential customer class publicly available through its pilot project Internet website. For each non-residential customer class, 20% of the 5.0% load available for customer choice shall be initially set aside for each customer class (hereafter referred to as the 1.0% set-aside) for aggregated loads.

*(i)* Non-residential, non-demand metered customers. For non- residential, non-demand metered customers, the load available for customer choice shall be determined by calculating 5.0% of the number of ESIs in that customer class as of December 31, 2000.

*(ii)* Industrial demand-metered customers; commercial and all other demand-metered customers. For each of the demand metered customer classes, the load available for customer choice shall be determined by calculating 5.0% of the sum of the kilowatts invoiced by the utility to all ESIs in each customer class for meter reading dates during the utility's peak demand month in the year 2000. In addition, the utility shall determine the individual ESI load caps for each demand metered customer class by calculating 20% of the load available for the pilot project in each demand- metered customer class.

*(iii)* Other customers as defined in subsection (d)(2)(E) of this section. For all other customers, the load available for customer choice shall be determined by calculating 5.0% of the sum of the kilowatt- hours for which all ESIs in this customer class were invoiced by the utility during the twelve month period ending December 31, 2000. In addition, the utility shall determine the individual ESI load caps for this customer class by calculating 20% of the kilowatt-hours available for the pilot project in this customer class.

(B) Amount of available load. For purposes of this paragraph, the total load available for customer choice determined in subparagraph (A) of this paragraph, less the amount of the customer's ESI load used for calculation in subparagraph (A) of this paragraph, shall be referred to as the amount of available load for each non-residential customer class. For an ESI that was not included in the calculation in subparagraph (A) of this paragraph, hereinafter called a new ESI, the customer's ESI load shall be determined as follows:

*(i)* For the non-residential, non-demand metered class, a new ESI shall count as one ESI against the total number of ESIs.

*(ii)* For the demand-metered classes, the demand allocated to a new ESI shall be 95% of the utility-estimated demand for the new ESI.

*(iii)* For the other class as defined in subsection (d)(2)(E) of this section, the energy allocated to a new ESI shall be 95% of the utility- estimated annual kilowatt-hours for the new ESI.

(C) Open interest period. Beginning February 15, 2001, and continuing through March 15, 2001, interested customers may request the opportunity to participate in a utility's pilot project by submitting to the utility through its pilot project Internet website the account number and zip code information necessary to determine the customer's ESI. An eligible ESI is one that does not exceed the individual ESI load cap established in subparagraph (A) of this paragraph. By March 21, 2001, the utility shall determine if the non-residential customer classes are either oversubscribed or undersubscribed, including the amount of load oversubscribed or undersubscribed, and shall make such information publicly available through its pilot project Internet website.

*(i)* Participant list. The utility shall create a list of customers eligible to participate in the pilot project, referred to as the participant list. The participant list shall include each ESI and related service address, the name in which the customer is billed, and customer class as defined in this section. No later than March 21, 2001, the utility shall make available its integrated voice response (IVR) system or its pilot project Internet website to allow a customer having an ESI in the lottery to determine whether its ESI has been selected for the participant list. The participant list for each customer class shall be provided to the commission no later than March 21, 2001.

*(ii)* Oversubscription. On March 21, 2001, if a non-residential customer class is oversubscribed, the utility shall use a lottery to develop the participant list. As each ESI is selected through the lottery, the ESI's load used for the calculation in subparagraph (A) of this paragraph shall be subtracted from the total amount of load available for customer choice as determined in subparagraph (A) of this paragraph. The ESI that causes the 4.0% load limit (i.e., the 5.0% load limit less the 1.0% set-aside) to be reached shall be the final ESI selected through the lottery; the 4.0% limit may be exceeded only for the purpose of accommodating the entire load associated with the final ESI selected, except that such excess shall not cause the amount of load available for customer choice to be greater than 4.1%. Once the 4.0% load limit is reached, the selected ESIs shall be included on the participant list.

*(iii)* Undersubscription. If a non-residential customer class is undersubscribed, all eligible ESIs submitted shall be

included on the participant list. Beginning March 21, 2001, any unsubscribed load will be available for subscription by customers in that customer class on a first come, first served basis.

(D) Negotiation period. Between March 21, 2001 and May 10, 2001, customers on the participant list may negotiate and contract with REPs. A REP shall notify the utility of execution of a contract. If a customer has not entered into a confirmed REP contract for a specific ESI by May 10, 2001, that ESI shall be removed from the participant list, and the load associated with that ESI shall be added to the amount of available load. On May 11, 2001, the utility shall post, on its pilot project Internet website, a list of submitted ESIs that do not match a customer on the participant list. REPs shall have until May 14, 2001 to correct any ESI listed by the utility on May 11, 2001. On May 17, 2001, the utility shall determine the amount of available load for each non-residential customer class and shall make such determination publicly available through its pilot project Internet website.

(E) Monitoring and adjusting the amount of available load. Following the negotiation period, participation shall be allowed on a first come, first served basis.

*(i)* As each non-residential customer in a class executes a contract, the amount of available load for that class shall be decremented by the amount of the customer's ESI load used for the calculation in subparagraph (A) of this paragraph.

*(ii)* The ESI that causes the amount of available load to reach zero shall be the final ESI selected; the amount of available load may drop below zero only for the purpose of accommodating the entire load associated with the final ESI selected, subject to the limitations described in subparagraph (C)(ii) of this paragraph.

(4) Aggregated load set-aside. Customers participating in customer choice may use aggregation to the extent they choose, and may participate by self aggregation or multiple customer aggregation. For purposes of pilot project administration, aggregators must submit to the utility their groupings of utility account numbers and associated zip codes, or ESIs if available, for participation in the pilot project subject to the 1.0% set-aside. Such groupings (hereafter referred to as aggregation packets) shall be submitted by customer class as defined in subsection (d) of this section with a listing of utility account numbers and associated zip codes.

(A) Set-aside cap. No single aggregation packet may contain an ESI or ESIs that represent more than 20% of the 1.0% set-aside for that customer class, with the exception of the residential class.

(B) Registration dates. Aggregators may register non-residential customer class aggregation packets, subject to the limitation in subparagraph (A) of this paragraph, with the utility beginning February 15, 2001. Aggregators may register residential aggregation packets beginning March 1, 2001.

(C) Undersubscription for all non-residential customer classes. If an aggregation packet contains non-residential ESIs from a class that is undersubscribed as of April 2, 2001, then that aggregation packet shall have a reserved allotment of the 1.0% set-aside until May 21, 2001. If by May 31, 2001, the 1.0% set-aside for aggregation in any non-residential class is undersubscribed, then the utility shall determine the unused class capacity and add it to the amount of available load for that class. No later than June 10, 2001, the utility shall make the updated amount of available load publicly available through the utility's pilot project Internet website.

(D) Aggregation selection process for customer classes. The eligibility for the 1.0% set-aside for each customer class shall be determined as follows:

*(i)* Residential customer class. Beginning on March 1, 2001, an aggregator may accept authorizations from residential customers to switch providers as a part of an aggregation packet. Aggregators shall submit aggregated utility account numbers and associated service address zip codes to the utility for tracking the 1.0% set- aside on a first come, first served basis. Aggregation packets shall be accepted until either the 1.0% set-aside is reached or June 15, 2001, whichever comes first. If the 1.0% set-aside is not fully subscribed by June 15, 2001, the utility shall determine the unused class capacity and add that unused capacity to the total amount of available load for the residential class.

*(ii)* Non-residential customer classes. The initial set-aside for each of the non-residential customer classes shall be 1.0% of the eligible load by customer class. To be eligible for the aggregation participant list, an aggregator must provide utility account number and service address zip code information, or ESIs if available, to the utility by April 2, 2001.

*(I)* Oversubscription for the non-residential, non-demand metered customer class. If the total number of ESIs in aggregation packets submitted for the pilot for a non- residential, non-demand class as of April 2, 2001 exceeds the 1.0% set-aside, then the utility shall use a lottery to determine the aggregation participant list for this class. Aggregation packets eligible for the aggregation participant list shall be selected by the utility by April 5, 2001. As each aggregation packet is selected through the lottery, the ESI count shall be subtracted from the total number of ESI available for the 1.0% set-aside. Aggregation packets shall be selected until none of the 1.0% set-aside is left. If the last aggregation packet selected causes the 1.0% set-aside to be exceeded, the selection of the final aggregation packet for this class shall be done in accordance with subparagraph (E)of this paragraph. By April 6, 2001, the utility shall determine whether an aggregation packet has been selected, and shall make such information publicly available through its pilot project Internet website.

*(II)* Oversubscription for the industrial demand-metered and commercial and all other demand-metered classes. If the total combined load of all aggregation packets submitted for each of the industrial demand-metered and commercial and all other demand-metered classes exceeds the 1.0% set-aside as of April 2, 2001, then the utility shall use a lottery to determine the aggregation participant list for each customer class. Aggregation packets eligible for the aggregation participant list shall be selected by the utility by April 5, 2001. As an aggregation packet is selected through the lottery, the demand for that ESI used to determine the available capacity for that customer class shall be subtracted from the total demand amount available for the 1.0% set-aside. Aggregation packets shall be selected until none of the 1.0% set-aside is left. If the last aggregation packet selected causes the 1.0% set-aside to be exceeded, the selection of the final aggregation packet for the class shall be done in accordance with subparagraph (E) of this paragraph. No later than April 6, 2001, the utility shall make the list of ESIs eligible for the pilot project publicly available through its pilot project Internet website.

*(III)* Oversubscription for the other customer class as defined in subsection (d)(2)(e) of this section. If the total combined load of all aggregation packets submitted for the other class exceeds the 1.0% set-aside as of April 2, 2001, then the utility shall use a lottery to determine the aggregation participant list for this class. Aggregation packets eligible for the aggregation participant list shall be selected by the utility by April 5, 2001. As each aggregation packet is selected through the lottery, the energy in kilowatt-hours for that ESI used to determine the size of the customer class shall be subtracted from the total amount of energy available for the 1.0% set-aside. Aggregation packets shall be selected until none of the 1.0%

set-aside is left. If the last aggregation packet selected causes the 1.0% set-aside to be exceeded, the selection of the final aggregation packet for the class shall be done in accordance with subparagraph (E) of this paragraph. No later than April 6, 2001, the utility shall make the list of ESIs eligible for the pilot project for the class publicly available through its pilot project Internet website.

(E) Non-residential customer classes oversubscription lottery selection of last aggregation packet. If the final aggregation packet chosen in a customer class lottery causes the 1.0% set-aside for that customer class to be exceeded by more than 10%, that is, if that aggregation packet increases the size of the customer class to greater than 1.1%, that aggregation packet shall be rejected and another aggregation packet shall be chosen if available. If no other aggregation packet is available to fill each non- residential customer class without exceeding the 10% overage limit, that remaining increment of capacity set-aside will not be subscribed, but will be added to the amount of available capacity for aggregation for that non- residential customer class and will be available on a first come, first served basis. An aggregation packet that does not exceed the 10% overage limit will be allowed. When the results of the oversubscription lottery are posted by the utility, the utility shall also make publicly available the information concerning this available capacity through its pilot project Internet website.

(F) Contract notification due date for non-residential customer classes. By May 21, 2001, a REP must submit verification of executed supply contracts with ESIs and associated zip code to the utility. Any ESI that has not been validated by a REP by this date will relinquish its reserved allotment on the aggregation participant list. The relinquished allotment will then be available for aggregation in that customer class on a first come, first served basis.

(G) Notification of executed contract for non-residential customer classes. The REP shall document the existence of an executed contract for service by electronically submitting a list of ESIs representing executed contracts to the utility. The utility may rely on receipt of this list as proof of the existence of an executed contract. The REP shall file a signed affidavit with the commission attesting to the accuracy of the ESIs on the list.

(H) Electronic submissions by aggregators. All submittals required by this section by aggregators to a utility shall be made in electronic format using a Microsoft Excel spreadsheet using a spreadsheet template posted on the utility's pilot project Internet website. A utility will post its templates by January 31, 2001.

(I) New ESIs. For an ESI that was not included in the calculation in paragraph (3)(A) of this subsection, hereinafter called a new ESI, the customer's ESI load shall be determined as follows:

*(i)* For the non-residential non-demand metered classes, a new ESI shall count as one ESI against the total number of ESIs.

*(ii)* For the demand-metered classes, the demand allocated to a new ESI shall be 95% of the utility-estimated demand for the new ESI.

*(iii)* For the other class as defined in subsection (d)(2)(E) of this section, the energy allocated to a new ESI shall be 95% of the utility- estimated annual kilowatt-hours for the new ESI.

(h) Transmission and distribution rates and tariffs.

(1) Utilities within ERCOT. In connection with a utility's pilot project, the utility shall provide transmission service and distribution service in accordance with the rates for non-bypassable delivery charges approved by the commission, on an interim basis for application during the utility's pilot project, in the utility's unbundled cost of service case filed pursuant to PURA §39.201. Notwithstanding the provisions of §22.125 of this title (relating to Interim Relief), such interim rates shall not be subject to surcharge or refund if the rates ultimately established differ from the interim rates.

(2) Utilities outside of ERCOT.

(A) Jurisdiction of other regulatory bodies. Processes utilized by non-ERCOT participants shall support the settlement of traditional wholesale markets and shall conform to all Federal Energy Regulatory Commission (FERC) rules and regulations.

(B) Transmission service. In connection with a utility's pilot project, the utility shall provide transmission service in accordance with the rates and delivery charges approved by the FERC. A utility in transition to an independent transmission company (ITC) model shall maintain on file with the commission a copy of its current FERC-approved open access transmission tariff (OATT), as well as any proposed amendments to the OATT submitted to FERC.

(C) Distribution service. In connection with a utility's pilot project, the utility shall provide distribution service in accordance with the rates for non- bypassable delivery charges approved by the commission, on an interim basis for application during the utility's pilot project, in the utility's unbundled cost of service case filed pursuant to PURA §39.201. Notwithstanding the provisions of §22.125 of this title, such interim rates shall not be subject to surcharge or refund if the rates ultimately established differ from the interim rates.

(3) Approval of tariffs. Tariffs implementing pilot project rates must be filed within ten days following the commission's determination of those rates. The commission shall approve such tariffs by May 31, 2001, and may do so administratively.

(i) Billing requirements.

(1) A utility shall bill a customer's REP for non-bypassable delivery charges in accordance with the tariffs established pursuant to subsection (h) of this section. The REP must pay these charges.

(2) A REP shall be responsible for ensuring that its retail customers are billed for electric service provided. A utility may bill retail customers at the request of a REP, provided that any such billing service shall be offered by the utility on comparable terms and conditions for any requesting REP.

(j) Evaluation of the pilot projects by the commission; reporting. The commission shall evaluate the pilot projects and the operational readiness of each power region, including its support systems, for customer choice.

(1) Evaluation criteria.

(A) Criteria for determining the readiness of a power region for customer choice may include the following:

*(i)* whether a power region's operational support systems were tested, and any problems that surfaced during the pilot project were adequately rectified;

*(ii)* whether electric system reliability was significantly affected in an adverse way; and

*(iii)* any other criteria the commission determines appropriate.

(B) Criteria for determining whether commission rules may need modifications or whether certain aspects of retail competition may require more detailed monitoring by the commission may include the following:

*(i)* whether participants in the pilot projects represented a broad base of customers of diverse demographic characteristics;

*(ii)* whether customers were aware of their rights and responsibilities with respect to customer choice, and whether such awareness increased for customers as a whole over the duration of the pilot projects;

*(iii)* whether a broad range of electric services and products were offered;

*(iv)* whether the quality of customer service with respect to retail customers was affected; and

*(v)* any other criteria the commission determines appropriate.

(2) Information used for evaluation of pilot projects. Evaluation of the pilot projects shall be based on information including, but not limited to:

(A) reports filed in accordance with paragraph (3) of this subsection;

(B) surveys of retail customers conducted in connection with the commission's customer education program; and

(C) the quantity and nature of complaints or inquiries regarding the pilot project received by the commission's Office of Customer Protection.

(3) Reporting by market participants and independent organizations. Each market participant and independent organization shall file two status reports with the commission under a single project number as designated by the commission's central records division. The first status report shall be filed on November 15, 2001, and the second no later than 30 days following the conclusion of the pilot project. In addition, a utility subject to PURA Chapter 39, Subchapter I, shall file semi-annual reports with the commission for the duration of its pilot project to permit the commission to monitor whether proportional representation is achieved in accordance with subsection (l)(3)(B) of this section.

(A) Reporting by utilities. Each status report from a utility shall include:

*(i)* The percent of load switched by month and cumulatively, for each customer class as defined in this section, including supporting data;

*(ii)* The number of customers that have withdrawn from the pilot project, by customer class;

*(iii)* A summary of any technical problems encountered during the reporting period, including resolutions or proposed resolutions, as appropriate, and supporting data;

*(iv)* A summary of all complaints related to the pilot project received by the utility during the reporting period, including a description of the resolution of the complaints;

*(v)* For a utility in transition to an ITC model, a progress report on the transition to the ITC, including any updates to the initial compliance filing; and

*(vi)* Any other information the utility believes will assist the commission in evaluating the pilot projects and the readiness of a power region for implementation of full customer choice.

(B) Reporting by REPs. Each status report from a REP shall include:

*(i)* A summary of any technical problems encountered during the reporting period, including resolutions or proposed resolutions, as appropriate, and supporting data;

*(ii)* A summary of all complaints related to the pilot project received by the REP during the reporting period, including a description of the resolution of the complaints; and

*(iii)* Any other information the REP believes will assist the commission in evaluating the pilot projects and the readiness of a power region for implementation of full customer choice.

(C) Reporting by an independent organization. Each status report from an independent organization shall include:

*(i)* Data from the registration agent regarding the average time elapsed between a switch request and the time the switch became effective;

*(ii)* Data from the registration agent, categorized by residential and non- residential customers, listing the total number of switch requests for each month, as well as the average number of switch requests per day for each month, and the total number of switch requests by zip code;

*(iii)* Data from the registration agent regarding the number of rejected switch requests resulting from the anti-slamming verification process;

*(iv)* A summary of all complaints, categorized by REP and by utility, related to the pilot project captured in the registration agent's systems during the reporting period, including a description of the resolution of the complaints;

*(v)* A summary from the registration agent and the independent organization, as applicable, of any technical problems encountered during the reporting period, including resolutions or proposed resolutions, as appropriate, and supporting data; and

*(vi)* An analysis by the independent transmission organization of system reliability during the pilot projects.

(D) Other reporting.

*(i)* To the extent low-income rate discounts are offered in accordance with PURA and commission rules, the number of customers receiving a low-income rate discount shall be reported to the commission by the administrator of the system benefit fund.

*(ii)* At any time, a pilot project participant who is neither a utility nor a REP may provide the commission with any information the participant believes will assist the commission in evaluating the pilot projects and the readiness of a power region for implementation of full customer choice.

(4) Pilot implementation working group. The commission will establish a pilot implementation working group to oversee the pilot projects. The commission or its designee, based upon a recommendation of the pilot implementation working group, may revise the operational requirements of the pilot projects in order to resolve technical problems encountered by market participants.

(5) Extension of pilot projects. Should the commission determine that it is necessary to delay competition and extend the pilot projects, it must make such determination by December 31, 2001, except as otherwise authorized by PURA §39.405.

(k) Pilot project administration and recovery of associated costs.

(1) Each utility shall be responsible for administering the pilot project for its service area. Costs incurred by the utility to administer the pilot project may include expenses for required communications, third-party outsourcing for any or all administration tasks, enrollment process, or lottery administration.

(2) The utility may request recovery from the commission of pilot project administrative costs through:

(A) inclusion in the annual report filed pursuant to PURA §39.257; or

(B) deferral to future retail transmission or distribution rates.

(3) Parties do not waive the right to challenge the utility's ability to seek cost recovery for costs associated with the pilot projects at the time that such relief is sought. In addition, nothing in this section shall be construed as resolving the legal issue of whether utilities may recover costs associated with the pilot projects.

(l) Compliance filings.

(1) Timing and review. Each utility shall file a pilot project implementation plan with the commission under a project number designated by the commission's central records division. An implementation plan filed under this section shall be reviewed administratively to determine whether it is consistent with the principles, instructions and requirements set forth in this section.

(A) Each utility shall file its implementation plan within 45 days of the commission's adoption of this section. Such filings do not constitute contested case proceedings, but are designed to describe the particular application of this section to the filing utility for the purpose of providing information to the public and the commission.

(B) No later than 15 days after filing, interested parties may file comments on the implementation plan.

(C) No later than 25 days after filing, commission staff may file a recommendation concerning the implementation plan.

(D) Unless the commission or presiding officer determines otherwise, an implementation plan filed under this section shall be deemed approved on the thirtieth day after filing. If the implementation plan is not approved, the utility shall resubmit its plan following consultation with commission staff under a deadline established by the presiding officer.

(2) Content. The compliance filing shall address each provision of this section with a brief narrative explaining how the utility intends to implement that provision, including the utility's pilot project Internet website address and other contact information, as applicable. Numerical and formulaic data shall also be provided where applicable. Specifically, the compliance filing shall detail the calculation of the 5.0% load available for each customer class, including the 1.0% set-aside, and demonstrate the calculation with sample data. The final calculations containing actual data shall be filed with the commission by January 31, 2001.

(3) Additional requirements for non-ERCOT utilities.

(A) A utility subject to PURA Chapter 39, Subchapter I, shall include in its transition plan filed pursuant to PURA §39.402, a plan for extending its pilot project beyond January 1, 2002. The plan for extension of the pilot project shall contain:

*(i)* The utility's proposed increase(s) in pilot project participation beyond 5.0%, and proposed timing for such increase(s), including supporting data and workpapers; and

*(ii)* A report to the commission on market conditions in the utility's power region, including an analysis of the level of competition that the region can support and all relevant data and workpapers.

(B) A utility subject to PURA Chapter 39, Subchapter I, shall include in its compliance filing, a plan to ensure proportional representation in its pilot project between customers receiving service from the utility in an area that is certificated solely to the utility and those customers of the utility located in multiply certificated areas.

(C) A utility in transition to an ITC model shall include in its compliance filing:

*(i)* a narrative of how its plan for transition to an ITC is expected to affect the pilot project, including relevant supporting data and workpapers; and

*(ii)* an explanation of any requirements of market participants that are unique to its service area (e.g, registration with ITC, data aggregation 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.

Filed with the Office of the Secretary of State on August 14, 2000.

TRD-200005693
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: September 3, 2000
Proposal publication date: June 16, 2000
For further information, please call: (512) 936-7308

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# PART 8. TEXAS RACING COMMISSION

## CHAPTER 303. GENERAL PROVISIONS

## SUBCHAPTER D. TEXAS BRED INCENTIVE PROGRAMS

## DIVISION 2. PROGRAMS FOR HORSES

**16 TAC §303.92**

The Texas Racing Commission adopts an amendment to §303.92 concerning the rules of the Texas Thoroughbred Association regarding the Texas Bred Incentive Programs. The amendment is adopted without changes to the proposed text published in the June 23, 2000, issue of the *Texas Register* (25 TexReg 6020) and the text will not be republished. The amendment was presented to the Commission as a rulemaking petition under 16 Tex. Admin. Code §307.33 by the Texas Thoroughbred Association, the official breed registry for Thoroughbred horses in Texas.

The amendment is adopted to ensure the funds dedicated to the Texas Bred Incentive Programs may be used in a variety of ways to enhance the Texas breeding programs. According to the petition, the amendment permits the breed registry to use award money generated from multiple two and multiple three wagers under §6.08(f) of the Texas Racing Act to supplement purses for special events or days that are restricted to accredited Texas-

bred thoroughbreds. The amendment also corrects a misspelled word.

No comments were received regarding the proposal.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §6.08(g), which authorizes the Commission to adopt rules relating to the accounting, audit, and distribution of all amounts set aside for the Texas-bred program; and §9.01, which authorizes the state breed registries to adopt reasonable rules to establish the qualifications of accredited Texas-bred horses to promote, develop, and improve the breeding of horses in Texas, subject to the approval of the Commission.

The adopted amendment implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005593
Judith L Kennison
General Counsel
Texas Racing Commission
Effective date: September 1, 2000
Proposal publication date: June 23, 2000
For further information, please call: (512) 833-6699

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## CHAPTER 311. OTHER LICENSES
## SUBCHAPTER A. LICENSING PROVISIONS
## DIVISION 1. OCCUPATIONAL LICENSE

**16 TAC §311.3**

The Texas Racing Commission adopts an amendment to §311.3 concerning the fingerprint requirements and procedure for background investigations of applicants. The amendment is adopted without changes to the proposed text published in the May 26, 2000 issue of the *Texas Register* (25 TexReg 4685) and the text will not be republished.

The amendment is adopted to ensure the occupational licensing process will be more streamlined and efficient. The amendment eliminates the requirement that a license applicant submit a set of fingerprints on a separate card for the Federal Bureau of Investigation. Under a new system in place at the Department of Public Safety, fingerprints submitted by the Commission to the Department are sent electronically to the FBI. Therefore, a separate set of fingerprints for the FBI is no longer required.

No comments were received regarding the proposal.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §7.02, which authorizes the Commission to establish categories of occupational licenses and the qualifications and experience required for licensing in each category.

The adopted amendment implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005594
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: September 1, 2000
Proposal publication date: May 26, 2000
For further information, please call: (512) 833-6699

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## SUBCHAPTER B. SPECIFIC LICENSES

**16 TAC §311.101**

The Texas Racing Commission adopts an amendment to §311.101 concerning the licensing of horse owners. The amendment is adopted without changes to the proposed text published in the May 26, 2000, issue of the *Texas Register* (25 TexReg 4685) and the text will not be republished.

The amendment is adopted to simplify the licensing process for horse owners. The amendment eliminates the "entry time" deadline for licensing of horse owners. A horse owner must still be licensed before a horse may start in a race in Texas.

No comments were received regarding the proposal.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §7.02, which authorizes the Commission to establish categories of occupational licenses and the qualifications and experience required for licensing in each category.

The adopted amendment implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005595
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: September 1, 2000
Proposal publication date: May 26, 2000
For further information, please call: (512) 833-6699

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## CHAPTER 313. OFFICIALS AND RULES OF HORSE RACING
## SUBCHAPTER C. CLAIMING RACES

**16 TAC §313.308**

The Texas Racing Commission adopts an amendment to §313.308 concerning the restrictions on transferring and racing a horse that has been claimed in Texas. The amendment is

adopted without changes to the proposed text published in the May 26, 2000, issue of the *Texas Register* (25 TexReg 4686) and the text will not be republished.

The amendment is adopted to ensure the claiming process will be more consistent with other states and an owner who claims a horse will have more opportunities to race the horse in Texas during the initial ownership period. The amendment eliminates the requirement that a claimed horse run back at 125% of the claiming price and establishes a reciprocal relationship for other states' claiming rules.

No comments were received regarding the proposal.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3.02, which authorize the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of racetracks.

The adopted amendment implements Texas Civil Statutes, Article 179e.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005596
Judith L. Kennison
General Counsel
Texas Racing Commission
Effective date: September 8, 2000
Proposal publication date: May 26, 2000
For further information, please call: (512) 833-6699

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# TITLE 22. EXAMINING BOARDS

## PART 12. BOARD OF VOCATIONAL NURSE EXAMINERS

### CHAPTER 239. CONTESTED CASE PROCEDURE

### SUBCHAPTER B. ENFORCEMENT

**22 TAC §239.11**

The Board of Vocational Nurse Examiners adopts the amendment of §239.11 relating to unprofessional conduct without changes to the proposed text published in the June 30, 2000, issue of the *Texas Register* (25 TexReg 6277).

The amendment is adopted to allow the Board jurisdiction of vocational nurses or applicants for licensure who are currently participating and/or will be participating in the future in a health care setting.

No comments were received relative to the adoption of this amendment.

The amendment is adopted under Chapter 302, Texas Occupations Code, Subchapter D, §302.151(b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2000.

TRD-200005562
Mary M. Strange, RN, BSN, CNA
Executive Director
Board of Vocational Nurse Examiners
Effective date: August 30, 2000
Proposal publication date: June 30, 2000
For further information, please call: (512) 305-8100

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## PART 15. TEXAS STATE BOARD OF PHARMACY

### CHAPTER 291. PHARMACIES

### SUBCHAPTER A. ALL CLASSES OF PHARMACIES

**22 TAC §291.29**

The Texas State Board of Pharmacy adopts new §291.29, concerning Exemption from Pharmacy Technician Certification Requirements. The new section is adopted with changes to the proposed text as published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5783).

The new section implements the provisions of Section 4 of Senate Bill 730 as passed by the 76th Legislature. Specifically, the new section allows the continued use of non-certified, experienced pharmacy technicians and allows pharmacies in counties of less than 50,000 population to continue to use non-certified pharmacy technicians. Changes from the proposed text respond to public comments or otherwise reflect nonsubstantive variations from the proposed text.

The Board held a public hearing to receive oral comments on the proposed new §291.29 on August 1, 2000. In addition, written comments were received on the rule.

A change was made to clarify that only initial petitions for exemption must be received by January 1, 2002. This change allows a technician exempted based on 10 years of experience, to repetition for an exemption if they change employment. A written comment was received from the Academy of Pharmacy Technicians, an Academy of the Texas Pharmacy Association. The Academy restated their opposition to exemption from certification but understands that exemptions may need to be issued in emergency situations. The Board agrees and believes the rule adequately accommodates those needs. The Texas Society of Health System Pharmacists provided written comments in support of the rule as proposed.

The new section is adopted under §20A of the Texas Pharmacy Act (Article 4542a-1, Texas Civil Statutes), as added by the 76th Legislature, 1999, and §554.051 of the Occupations Code, Subtitle J. The Board interprets §20A of the Texas Pharmacy Act as authorizing the agency to grant exemptions to the pharmacy technician certification requirements. The Board interprets

§554.051 of the Occupations Code as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Texas Civil Statutes, Article 4542a-1, now codified as Occupations Code, Subtitle J.

*§291.29. Exemption from Pharmacy Technician Certification Requirements*

(a) Purpose. The board encourages all pharmacy technicians to become certified. However, the board will consider petitions for exemption on a case by case basis. This section outlines procedures for pharmacy technicians to petition the Board for an exemption to the certification requirements established by Section 20A of the Act.

(b) Long-term Employees. Pharmacy technicians who, on September 1, 2001, will have been continuously employed as a pharmacy technician in this state for at least 10 years.

(1) Eligibility.

(A) A pharmacy technician may petition the board for an exemption from the certification requirements established by Section 20A of the Act if the technician has been continuously employed at a pharmacy in this state since September 1, 1991.

(B) Initial petitions for the exemption must be received by January 1, 2002.

(2) Petition process.

(A) A pharmacy technician shall petition the board for the exemption. The petition shall contain the following:

*(i)* name of the pharmacy technician;

*(ii)* name, address, and license number (if known) of the Texas pharmacies where the pharmacy technician has been employed;

*(iii)* dates of employment in each pharmacy;

*(iv)* name of the pharmacy technician's supervisor in each pharmacy where the technician was employed;

*(v)* name, address and license number of the pharmacy at which the pharmacy technician is currently working;

*(vi)* a notarized statement signed by the pharmacy technician stating that:

*(I)* the pharmacy technician has been continuously employed as a pharmacy technician at a pharmacy in this state since September 1, 1991;

*(II)* the information provided in the petition is true and correct; and

*(vii)* a notarized statement signed by the pharmacist-in-charge of the pharmacy the pharmacy technician is currently working, stating that:

*(I)* the pharmacist-in-charge supports the pharmacy technician's petition for exemption from certification;

*(II)* the pharmacy technician has completed the pharmacy technician training program at the pharmacy; and

*(III)* the pharmacist-in-charge has personally worked with and observed that the pharmacy technician is competent to perform the duties of a pharmacy technician.

(B) Each petition shall be considered on an individual basis. In determining whether to grant the exemption, the board shall consider the information contained in the petition and additional information including the following:

*(i)* the accuracy and completeness of the petition;

*(ii)* the employment history of the pharmacy technician and whether it can be verified;

*(iii)* the following information concerning the pharmacy where the pharmacy technician is currently working:

*(I)* the degree of compliance on previous compliance inspections;

*(II)* history of disciplinary action by the board or other regulatory agencies against the license held by the pharmacy or pharmacists working at the pharmacy.

(C) After review of the petition, the pharmacy technician and the pharmacist- in-charge of the pharmacy where the pharmacy technician is currently working shall be notified in writing of approval or denial of the petition. If the petition is approved, the pharmacy technician will be sent an exemption certificate, which shall be displayed at the pharmacy where the pharmacy technician is currently working.

(3) Limitations.

(A) The exemption granted under this section may only be used at the pharmacy noted in the petition and may not be transferred to another pharmacy. If the pharmacy technician ceases employment at the pharmacy or changes employment, the exemption is canceled.

(B) After January 1, 2001, pharmacy technicians exempted from certification may not perform any of the duties restricted to a certified pharmacy technician.

(c) Rural counties. Pharmacy technicians working in counties with a population of 50,000 or less.

(1) Eligibility. A pharmacy technician may petition the board for an exemption from the certification requirements established by Section 20A of the Act if the technician works in a county with a population of 50,000 or less.

(2) Petition process.

(A) A pharmacy technician shall petition the board for the exemption. The petition shall contain the following:

*(i)* name of the pharmacy technician;

*(ii)* name, address, and license number of the pharmacy where the pharmacy technician is employed;

*(iii)* name of the county in which the pharmacy is located and the most recent official population estimate for the county from the Texas State Data Center;

*(iv)* a notarized statement signed by the pharmacy technician stating:

*(I)* the reason(s) the pharmacy technician is asking for the exemption, including reason(s) the pharmacy technician has not taken and passed the National Pharmacy Technician Certification Exam or other examination approved by the Board;

*(II)* the information provided in the petition is true and correct; and

*(v)* a notarized statement signed by the pharmacist-in-charge of the pharmacy the pharmacy technician is currently working, stating that the:

*(I)* pharmacist-in-charge supports the pharmacy technician's petition for exemption;

*(II)* pharmacy technician has completed the pharmacy technician training program at the pharmacy; and

*(III)* pharmacist-in-charge has personally worked with and observed that the pharmacy technician is competent to perform the duties of a pharmacy technician.

(B) Each petition shall be considered on an individual basis. In determining whether to grant the exemption, the board shall consider the information contained in the petition and additional information including the following:

*(i)* the accuracy and completeness of the petition;

*(ii)* reason(s) the pharmacy technician is asking for the exemption;

*(iii)* the population of the county;

*(iv)* the number of pharmacies located in the county and adjacent counties and the number of pharmacy technicians working in these pharmacies;

*(v)* unemployment rate in the county and adjacent counties;

*(vi)* the following information concerning the pharmacy where the pharmacy technician is currently working:

*(I)* the degree of compliance on previous compliance inspections;

*(II)* history of disciplinary action by the board or other regulatory agencies against the licenses held by the pharmacy or pharmacists working at the pharmacy.

(C) After review of the petition, the pharmacy technician and the pharmacist- in-charge of the pharmacy where the technician is working shall be notified in writing of approval or denial of the petition.

*(i)* If the petition is approved, the pharmacy technician shall be sent an exemption certificate, which shall be displayed at the pharmacy where the pharmacy technician is working.

*(ii)* In lieu of the exemption, the board may grant the pharmacy technician up to an additional 12 months to take and pass the National Pharmacy Technician Certification Exam or other examination approved by the Board. During this additional time, the pharmacy technician shall be designated a pharmacy technician trainee.

(3) Limitations.

(A) The exemption granted under this section may only be used at the pharmacy noted in the petition and may not be transferred to another pharmacy. If the pharmacy technician ceases employment at the pharmacy or changes employment, the exemption is canceled.

(B) After January 1, 2001, pharmacy technicians exempted from certification may not perform any of the duties restricted to a certified pharmacy technician.

(C) If the population of the county exceeds 50,000, the Board shall cancel the exemption. The pharmacy technician and the pharmacist-in-charge of the pharmacy shall be notified when an exemption is canceled.

(d) Requirements for pharmacy technicians granted exemptions.

(1) The pharmacist-in-charge shall notify the board, within 10 days, if the pharmacy technician terminates employment at the pharmacy.

(2) Each exempt pharmacy technician shall be required to complete the same number of continuing education hours as required for a certified pharmacy technician.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005662
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: August 31, 2000
Proposal publication date: June 16, 2000
For further information, please call: (512) 305-8028

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## SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

**22 TAC §§291.32-291.34, 291.36**

The Texas State Board of Pharmacy adopts amendments to §291.32, concerning Personnel, §291.33, concerning Operational Standards, §291.34, concerning Records, and §291.36, concerning Class A Pharmacies Compounding Sterile Pharmaceuticals. These amendments are adopted without changes to the proposed text as published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5785).

The amendments make changes needed to be consistent with the requirements of a Class C (Institutional) Pharmacy license and make changes to support health science technology programs offered by high schools. Specifically, the amendments: (1) delete the requirement for documentation of the quantity added to an automated compounding or counting device; (2) correct the time limitation for the dispensing of a prescription for a Schedule II controlled substance issued by a practitioner from out-of-state; and (3) allow an individual enrolled in a health science technology education program in a Texas high school to be designated as a pharmacy technician trainee under certain conditions.

No comments were received.

The amendments are adopted under sections 551.002, 554.051, 554.005, and 554.053 of the Texas Pharmacy Act (Chapters 551-566, Texas Occupations Code). The Board interprets section 551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets section 554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets section 554.005 as authorizing the agency to regulate the delivery or distribution of prescription drugs as they relate to the practice of pharmacy. The Board interprets 554.053 as authorizing the agency to adopt rules for the use and the duties of pharmacy technicians in a pharmacy.

The statutes affected by this rule: Chapters 551-566, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005661
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: August 31, 2000
Proposal publication date: June 16, 2000
For further information, please call: (512) 305-8082

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## SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

**22 TAC §§291.72-291.76**

The Texas State Board of Pharmacy adopts amendments to §291.72, concerning Definitions, §291.73, concerning Personnel, §291.74, concerning Operational Standards, §291.75, concerning Records, and §291.76, concerning Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center. These amendments are adopted without changes to the proposed text as published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5787).

The amendments update these sections as a result of a rule review adopted elsewhere in this issue of the *Texas Register* and makes changes to support health science technology programs offered by high schools. Specifically, the amendments: (1) delete the requirement for documentation of the quantity added to an automated compounding or counting device; (2) make changes required by changes in the statutes, citations, and definitions; (3) add flexibility to the choices for a pharmacy's reference library; (4) remove obsolete language; and (5) allow an individual enrolled in a health science technology education program in a Texas high school to be designated as a pharmacy technician trainee under certain conditions.

No comments were received.

The amendments are adopted under §§551.002, 554.051, 554.005, and 554.053 of the Texas Pharmacy Act (Chapters 551-566, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §554.005 as authorizing the agency to regulate the delivery or distribution of prescription drugs as they relate to the practice of pharmacy and to specify the minimum standards for the maintenance of prescription drug records. The Board interprets §554.053 as authorizing the agency to adopt rules for the use and the duties of pharmacy technicians in a pharmacy.

The statutes affected by this rule: Chapters 551-566, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

TRD-200005660
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: August 31, 2000
Proposal publication date: June 16, 2000
For further information, please call: (512) 305-8028

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# PART 28. EXECUTIVE COUNCIL OF PHYSICAL THERAPY AND OCCUPATIONAL THERAPY EXAMINERS

## CHAPTER 651. FEES

**22 TAC §651.2**

The Executive Council of Physical Therapy and Occupational Therapy Examiners adopts amendments to §651.2, Physical Therapy Board Fees, with changes to the proposed text as published in the May 19, 2000, issue of the *Texas Register* (25 TexReg 4455). The change to subsection (c), concerning the fee charged for putting a license on inactive status, will be adopted as proposed. The deletion of subsection (g), concerning the charge for CE program approval, will be adopted as proposed. Also, the word "license" has been inserted in §651.2(c)(2) for language consistency. No other changes will be adopted at this time.

These amendments are being adopted to bring PT and OT administrative procedures into alignment, to charge the inactive fee when the service is provided, and to delete outdated information.

The amendments establish that a licensee must pay the inactive fee to go inactive rather than to return to active status.

No comments were received on the amendment of this section.

The rule is adopted under Title 3, Subtitle H, Chapter 452 of the Occupations Code, which provides the Executive Council of Physical Therapy and Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

*§651.2. Physical Therapy Board Fees.*

(a) Application.

(1) Physical therapist--$150.

(2) Physical therapist assistant--$100.

(b) Application to Retake the Examination.

(1) Physical Therapist--$25.

(2) Physical Therapist Assistant--$25.

(c) License.

(1) Temporary license.

(A) Physical therapist--$60.

(B) Physical therapist assistant--$40.

(2) Provisional license.

(A) Physical therapist--$80.

(B) Physical therapist assistant--$75.

(3) Active to Inactive.

(A) Physical therapist--$50.

(B) Physical therapist assistant--$25.

(d) Renewal (Active and Inactive).

(1) Physical therapist--$200 (two-year).

(2) Physical therapist assistant--$150 (two-year).

(e) Registration of Facilities.

(1) First facility--$300.

(2) Additional site--$100.

(f) Renewal of Facility Registration.

(1) First facility--$300.

(2) Additional site--$100.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2000.

TRD-200005505
John P. Maline
Executive Director
Executive Council of Physical Therapy and Occupational Therapy Examiners
Effective date: August 27, 2000
Proposal publication date: May 19, 2000
For further information, please call: (512) 305-6900

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# TITLE 25. HEALTH SERVICES

## PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

### CHAPTER 407. INTERNAL FACILITIES MANAGEMENT

### SUBCHAPTER E. TDMHMR HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

**25 TAC §407.200**

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeal of Subchapter E, §407.200, concerning TDMHMR historically underutilized businesses (HUBs), of Chapter 407, governing internal facilities management, which was proposed in the June 16, 1999, issue of the *Texas Register*(25 TexReg 5795-5796). The repeal of the section is adopted without changes to the text as proposed. The repealed section is replaced by §417.201, relating to TDMHMR historically underutilized business program, of Chapter 417, agency and facility responsibilities, which is contemporaneously adopted in this issue of the *Texas Register*.

The adoption of new §417.201 and the contemporaneous adoption of the repeal of §407.200 are made to fulfill the requirements of Texas Government Code, §2161.003, which requires state agencies to adopt General Services Commission (GSC) rules governing historically underutilized businesses (HUBs) for construction purposes and the purchase of goods and services paid for with state-appropriated funds. The repeal and replacement of the section with the adoption by reference of the updated section also fulfills the requirements of the Texas Government Code, §2001.39, concerning the periodic review of agency rules.

No public comments were received concerning the repeal of the section as proposed.

The repeal of the section is adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; Texas Government Code, §2161.003, which requires state agencies to adopt the GSC rules governing HUBs; and Texas Government Code, §2001.39, concerning the periodic review of agency rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005599
Charles Cooper
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: August 31, 2000
Proposal publication date: June 16, 2000
For further information, please call: (512) 206-4670

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### CHAPTER 417. AGENCY AND FACILITY RESPONSIBILITIES

### SUBCHAPTER E. TDMHR HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

**25 TAC §417.201**

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new Subchapter E, §417.201, concerning TDMHMR historically underutilized businesses (HUBs), of Chapter 417, governing agency and facility responsibilities, which was proposed in the June 16, 1999, issue of the *Texas Register*(25 TexReg 5796). The new section is adopted without changes to the text as proposed. The new section replaces §407.200, relating to TDMHMR historically underutilized business program, of Chapter 407, concerning internal facilities management, which is contemporaneously repealed in this issue of the *Texas Register*.

The adoption of new §417.201 and the contemporaneous adoption of the repeal of §407.200 are made to fulfill the requirements of Texas Government Code, §2161.003, which requires state agencies to adopt General Services Commission (GSC) rules governing historically underutilized businesses (HUBs) for construction purposes and the purchase of goods and services paid for with state-appropriated funds The repeal and replacement of the section with the adoption by reference of the updated section also fulfills the requirements of the Texas Government Code, §2001.39, concerning the periodic review of agency rules.

No public comments were received concerning the new section as proposed.

The section is adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority; and Texas Government Code, §2161.003, which requires state agencies to adopt the GSC rules governing HUBs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005598
Charles Cooper
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: August 31, 2000
Proposal publication date: June 16, 2000
For further information, please call: (512) 206-4670

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# TITLE 31. NATURAL RESOURCES AND CONSERVATION

## PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

### CHAPTER 57. FISHERIES

### SUBCHAPTER K. SCIENTIFIC AREAS

**31 TAC §57.920, §57.921**

The Texas Parks and Wildlife Commission adopts new §57.920 and §57.921, concerning state scientific areas, without changes to the proposed text as published in the April 28, 2000, issue of the *Texas Register* (25 TexReg 3697). The rules implement measures to protect and preserve seagrass resources that have been threatened by increasing boat traffic and attendant propeller scarring. Further, creation of the Nine-Mile Hole State Scientific area provides a means of protecting fishery resources and providing a controlled scientific study area for determining the effects of boat traffic on fish species.

Submerged seagrass meadows are a dominant, unique subtropical habitat in many Texas bays and estuaries. These highly evolved marine flowering plants play critical roles in the coastal environment, including nursery habitat for estuarine fisheries, as a major source of organic biomass for coastal food webs, effective agents for stabilizing coastal erosion and sedimentation, and major biological agents in nutrient cycling and water quality processes. Recent studies show that seagrasses are sensitive to nutrient enrichment and water quality problems, as well as physical stress from human disturbances. As a result, many Texas scientists, resource managers and environmentally aware citizens have concerns about the ecosystem health of these seagrass resources.

In January 1999, Texas Parks and Wildlife (TPW), Texas General Land Office and the Texas Natural Resource Conservation Commission published The Seagrass Conservation Plan for Texas. That document and the sources it cites form part of the factual basis for this rule adoption. Copies of the Seagrass Conservation Plan for Texas my be obtained from TPW by contacting Dr. Bill Harvey, (412) 389-4642, or email bill.harvey@tpwd.state.tx.us.

An outgrowth of the "Symposium on Texas Seagrasses" which took place in November 1996 in Corpus Christi, Texas the Plan identified several man-induced threats to Texas' seagrasses:

"Anthropogenic disturbances include a variety of activities that impact seagrass habitats. The frequency of all anthropogenic activities increases with increasing human populations and use of the ecosystem. The activities are a direct result of marine transportation, commercial fishing, recreational boating, and agricultural practices (p 34-35)."

Each of the three agencies targeted critical issues for immediate action. TPW focus is on these initiatives: Coastwide efforts to determine status and trends of seagrass beds and species distribution on a regular basis; Maintenance of a central seagrass library and database developed by the resource agencies and research institutions; Public education and outreach activities to help protect seagrasses from human disturbance.

In fulfilling this charge, TPW staff identified the first coastal areas that will require active boater education, seagrass restoration and protection. Redfish Bay (located in Aransas, San Patricio and Nueces Counties) is a true jewel of the Texas Coast. However, the excellent fishing, ease of access and attendant increases in boat traffic characteristic of this area have led to a significant fragmentation of seagrass resources and threaten the ecological integrity of this system. Further, user-conflicts between traditional and recently evolved fishing strategies have begun to rapidly escalate.

A second site, located south of Baffin Bay in an area called the "Nine-mile Hole," was selected as a pilot site to determine the effects of boat traffic on fishing experience. Although seagrass fragmentation and loss are not significant in this expansive, shallow, off-channel depression the Nine-Mile Hole provides an opportunity for assessing strategies for reducing user-conflicts and providing quality fishing experiences.

TPW staff and the Seagrass Conservation Task Force found that protection of seagrass resources would require redirection of boat traffic around extant seagrass meadows. Propeller scarring of seagrasses has been and will continue to be a significant direct cause of seagrass meadow fragmentation and loss if boaters continue to cross these shallow areas in propeller driven vessels. The agency believes that redirecting boat traffic around seagrass meadows and education of boaters as to the fragile nature of these resources will allow continued boating access in Redfish Bay and the Nine-Mile Hole while conserving and protecting existing marine ecosystems. Establishing State Scientific Areas allows the Parks and Wildlife Commission to establish rules redirecting boat traffic and prevents removal and destruction of signage placed by the Department for the purposes of boater education.

Further, establishment of a State Scientific Area in the Nine-Mile Hole sets the stage for research regarding the effects of boat traffic on fish distribution. Although anecdotal information concerning those effects are in evidence, there exists little scientific data describing the relationship between fish distribution, behavior and movement in the presence of significantly reduced boat traffic.

The adopted new sections establish, for a period not to exceed five years from the time of adoption, two state scientific areas for the purposes of education, scientific research, and preservation of flora and fauna of scientific or educational value. The rules concerning the Nine-Mile Hole establish a mandatory no-run

zone, and the rules prohibit removal of signs from both scientific areas.

Organizations speaking in favor of the proposals as published included: Coastal Conservation Association; Coastal Bend Guides Association; Coastal Bend Bays Foundation; Coastal Bend Bays and Estuaries Program; Environmental Defense; Lone Star Chapter of the Sierra Club and the Federation of Fly Fishers. Organizations in support of the Redfish Bay State Scientific Area were the Aransas County Commissioners Court and the Rockport Chamber of Commerce.

Organizations speaking in opposition to the proposals were the Recreational Fishing Alliance and the National Marine Manufacturers Association.

The department received 92 cards, letters, email communications and telephone calls regarding these proposals. The Department received one letter in support and three letters in opposition to the Redfish Bay State Scientific Area. The Department received 68 letters in favor of the Nine-Mile Hole State Scientific Area. The Department received three letters supporting seasonal (May 1 through September 30) rather than year-round closure of the Nine-Mile Hole to airboat, jet- boat and propeller-driven boat traffic. The Department received 21 letters in opposition to the Nine-Mile Hole proposal.

Those in opposition to the Redfish Bay State Scientific Area opposed the proposed voluntary "prop-up" areas as being unnecessary. The Department disagrees with these comments as current research results of long-term monitoring of seagrass meadows in Redfish Bay clearly demonstrate the ongoing and increasing damage to these resources caused by propeller traffic.

The Department disagrees with the proposal for a seasonal closure (May 1 - September 30) for the Nine-Mile Hole because there was no support from any organization and very little support from individuals. Further, a seasonal restriction could possible negate any meaningful scientific studies directed to assess fish distributions in the Nine-Mile Hole. TPW intends to study the effects of closure during all seasons.

Those in opposition to the Nine-Mile Hole State Scientific Area proposal stated that restriction of boat traffic in this area was not necessary and restricted access to these areas. The Department agrees that means of accessing the Nine-Mile Hole will be affected, however, all boaters can still access this area. Access lanes around the closed area are provided and boaters would still be allowed to access these areas by poling, wading, drifting, paddling or use of a trolling motor. The Department disagrees with the comments suggesting that restricting boat traffic in the Nine-Mile Hole is unnecessary. Future research activities to measure effects of boat traffic on fish distribution and seagrass growth would be rendered ineffective in the presence of boat traffic.

The new sections are adopted under Parks and Wildlife Code, Chapter 13, Subchapter B that authorizes the Commission to adopt rules governing activities in state scientific areas and Parks and Wildlife Code, §§81.501-81.502 that authorizes the Commission to create state scientific areas. The purposes of state scientific areas are education, scientific research, and preservation of flora and fauna of scientific or educational value. To the extent necessary to carry out the purposes of that subchapter, the Department may make and publish all rules and regulations necessary for the management and protection of scientific areas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005587
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Effective date: August 31, 2000
Proposal publication date: April 28, 2000
For further information, please call: (512) 389-4775

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## CHAPTER 61. DESIGN AND CONSTRUCTION SUBCHAPTER E. GUIDELINES FOR ADMINISTRATION OF TEXAS LOCAL PARKS, RECREATION, AND OPEN SPACE FUND PROGRAM

The Texas Parks and Wildlife Commission adopts the repeal of §§61.132 - 61.139 and new §§61.132 - 61.135, concerning Guidelines for Administration of the Local Parks, Recreation, and Open Space Fund Program, without changes to the proposed text as published in the March 3, 2000, issue of the *Texas Register* (25 TexReg 1834).

The repeals and new sections are necessary to implement the provisions of House Bill 2108, enacted by the 76th Texas Legislature, which increased the scope of the program and therefore requires changes to both the Texas Recreation and Parks Account Grant Manual (which is adopted by reference) and the scoring criteria used to evaluate candidate projects for possible funding.

The repeals and new sections will function by: adopting by reference the Texas Recreation and Parks Account Grant Manual, which provides communities with a comprehensive explanation of the program and instructions and requirements for participation; and by establishing the purpose, priorities, standards, and scoring systems for grant awards for outdoor, indoor, and outreach projects submitted by communities.

The department received no comments concerning adoption of the proposed rules.

**31 TAC §§61.132 - 61.139**

The repeals are adopted under Parks and Wildlife Code, Chapter 24, which requires the department to adopt regulations for grant assistance.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005650

Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Effective date: August 31, 2000
Proposal publication date: March 3, 2000
For further information, please call: (512) 389-4775

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**31 TAC §§61.132 - 61.135**

The new rules are adopted under Parks and Wildlife Code, Chapter 24, which requires the department to adopt regulations for grant assistance.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005651
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Effective date: August 31, 2000
Proposal publication date: March 3, 2000
For further information, please call: (512) 389-4775

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## CHAPTER 65. WILDLIFE
## SUBCHAPTER K. MIGRATORY GAME BIRD PROCLAMATION

**31 TAC §65.315, §65.319**

The Texas Parks and Wildlife Commission adopts amendments to §65.315 and §65.319, concerning early-season provisions of the Migratory Game Bird Proclamation. Section 65.315, concerning Open Seasons and Bag and Possession Limits For Early Season Species, is adopted with changes to the proposed text as published in the April 28, 2000, issue of the *Texas Register* (25 TexReg 3700). Section 65.319, concerning Extended Falconry Season - Early Season Species, is adopted without changes and will not be republished. The change to §65.315 shifts the season for sandhill cranes one week earlier to minimize the loss of opportunity caused by the light goose conservation season and eliminates proposed subsection (g)(4), which was rendered inapplicable because U.S. Fish and Wildlife Service did not authorize the creation of an additional crane zone.

The amendment to §65.315, concerning Open Seasons and Bag and Possession Limits - Early Season Species, is necessary to adjust the season dates for early-season species of migratory game birds (with the exception of teal) to account for calendar-shift. The amendment to §65.319, concerning Extended Falconry Season--Early Season Species, is necessary to adjust season dates for the take of early-season species of migratory game birds by means of falconry.

Section 65.315 will function by establishing the dates for the lawful hunting of early-season species of migratory game birds, and by establishing the bag and possession limits for those species. Section 65.319 will function by establishing the dates for the lawful hunting of early-season species of migratory game birds by means of falconry, and by establishing the bag and possession limits for those species when taken by means of falconry.

The department received 68 comments concerning adoption of the rules. Two persons opposed adoption of a September 15 opening date for teal, one because the season length would conflict with archery season, and the other because an earlier opener would provide three full weekends of hunting opportunity. The department disagrees with the comments and responds that migration chronology and harvest data indicate that more opportune situations for teal hinting exist later in the month rather than earlier. No changes were made as a result of the comments. One commenter opposed the opening of teal season on a Friday rather than a Saturday, because opening day is the best hunting day and most people have jobs and children, precluding participation. The department, while sympathetic, disagrees with the comment and responds that an ample supply of the resource is available after opening day. No charges were made as a result of the comment. One commenter opposed the early closure of snipe season engendered by the special light-goose conservation season. The department, while sympathetic, disagrees with the comment and responds that under the provisions of federal law, the department must close all open seasons for migratory birds before opening the conservation season. No changes were made as a result of the comment. One commenter opposed adoption of the rules because they contain no prohibition against pigeon shoots and do not require participants to eat the birds they kill. The department disagrees with the commenter and responds that the regulations affect only red-billed and band-tailed pigeons, neither of which may be hunted. Similarly, only game species are required to be maintained in edible condition. No changes were made as a result of the comments. The department received 60 comments in favor of adoption of the proposed rules. The Texas Wildlife Association commented in favor of adoption of the proposed rules.

The amendments are adopted under Parks and Wildlife Code, Chapter 64, which authorizes the Commission and the Executive Director to provide the open season and means, methods, and devices for the hunting and possessing of migratory game birds. The amendments affect Parks and Wildlife Code, Chapter 64.

*§65.315. Open Seasons and Bag and Possession Limits - Early Season.*

(a) Rails.

(1) Dates: September 15-30, 2000 and October 28 - December 20, 2000.

(2) Daily bag and possession limits:

(A) king and clapper rails: 15 in the aggregate per day; 30 in the aggregate in possession.

(B) sora and Virginia rails: 25 in the aggregate per day; 25 in the aggregate in possession.

(b) Dove seasons.

(1) North Zone.

(A) Dates: September 1 - October 30, 2000.

(B) Daily bag limit: 15 mourning doves, white-winged doves, and white-tipped (white-fronted) doves in the aggregate, including no more than two white-tipped doves per day;

(C) Possession limit: 30 mourning doves, white-winged doves, and white-tipped doves in the aggregate, including no more than four white-tipped doves in possession.

(2) Central Zone.

(A) Dates: September 1-October 17, 2000, and December 26, 2000- January 7, 2001.

(B) Daily bag limit: 15 mourning doves, white-winged doves, and white-tipped (white-fronted) doves in the aggregate, including no more than two white-tipped doves per day;

(C) Possession limit: 30 mourning doves, white-winged doves, and white-tipped doves in the aggregate, including no more than four white-tipped doves in possession.

(3) South Zone.

(A) Dates: Except in the special white-winged dove area as defined in §65.314 of this title (relating to Zones and Boundaries for Early Season Species), September 22 - November 5, 2000, and December 26, 2000- January 9, 2001. In the special white-winged dove area, the mourning dove season is September 22 - November 5, 2000, and December 26, 2000-January 5, 2001.

(B) Daily bag limit: 15 mourning doves, white-winged doves, and white-tipped (white-fronted) doves in the aggregate, including no more than two white-tipped doves per day;

(C) Possession limit: 30 mourning doves, white-winged doves, and white-tipped doves in the aggregate, including no more than four white-tipped doves in possession.

(4) Special white-winged dove area.

(A) Dates: September 2, 3, 9, and 10, 2000.

(B) Daily bag limit: 10 white-winged doves, mourning doves, and white-tipped (white-fronted) doves, in the aggregate to include no more than five mourning doves and two white-tipped doves per day;

(C) Possession limit: 20 white-winged doves, mourning doves, and white-tipped doves in the aggregate to include no more than 10 mourning doves and four white-tipped doves in possession.

(c) Gallinules.

(1) Dates: September 15-30, 2000, and October 28-December 20, 2000.

(2) Daily bag and possession limits: 15 in the aggregate per day; 30 in the aggregate in possession.

(d) September teal-only season.

(1) Dates: September 15-30, 2000.

(2) Daily bag and possession limits: four in the aggregate per day; eight in the aggregate in possession.

(e) Red-billed pigeons, and band-tailed pigeons. No open season.

(f) Shorebirds. No open season.

(g) Sandhill cranes. A free permit is required of any person to hunt sandhill cranes in areas where an open season is provided under this proclamation. Permits will be issued on an impartial basis with no limitation on the number of permits that may be issued. The daily bag limit is three. The possession limit is six.

(1) Zone A: November 11, 2000- February 11, 2001.

(2) Zone B: December 2, 2000- February 11, 2001.

(3) Zone C: December 30 -February 4, 2001.

(h) Woodcock: December 18, 2000- January 31, 2001. The daily bag limit is three. The possession limit is six.

(i) Common snipe (Wilson's snipe or jacksnipe): October 21, 2000-February 4, 2001. The daily bag limit is eight. The possession limit is 16.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005588
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Effective date: August 31, 2000
Proposal publication date: April 28, 2000
For further information, please call: (512) 389-4775

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# PART 17. TEXAS STATE SOIL AND WATER CONSERVATION BOARD

## CHAPTER 517. FINANCIAL ASSISTANCE

## SUBCHAPTER B. COST-SHARE ASSISTANCE FOR BRUSH CONTROL

**31 TAC §§517.23, 517.27 - 517.29**

The Texas State Soil and Water Conservation Board (TSSWCB) adopts amendments to 31 TAC §§517.23, 517.27, 517.28 and 517.29 concerning deficiencies discovered during implementation of the brush control cost share program, without changes to the proposed text as published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3923) and will not be republished.

The adopted amendments removes language from §§517.23, 517.27, 517.28 and 517.29 regarding maintenance agreements and maintenance of brush control practices. Language is added to §517.28 and §517.29 which replaces maintenance of brush control practices with management of the treated area. The adopted amendments also clarifies the definition of a performance agreement in §517.23.

These changes are needed to allow necessary flexibility in the brush control cost share program.

No comments were received regarding adoption of these amendments.

The amendments are adopted under Chapter 201.020 Agriculture Code which provides the Texas Soil and Water Conservation Board with the authority to adopt rules as necessary for the performance of its functions under the 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 August 10, 2000.

TRD-200005563

Robert G. Buckley
Executive Director
Texas State Soil and Water Conservation Board
Effective date: August 30, 2000
Proposal publication date: May 5, 2000
For further information, please call: (254) 773-2250

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# TITLE 34. PUBLIC FINANCE

## PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

### CHAPTER 41. INSURANCE PROGRAMS SUBCHAPTER B. LONG-TERM CARE, DISABILITY AND LIFE INSURANCE

**34 TAC §§41.17 - 41.20**

The Teacher Retirement System of Texas (TRS) adopts new §§41.17 - 41.20 concerning insurance coverage under the Texas Public School Employees and Retirees Group Long-Term Care Insurance Program. Section 41.19 is adopted with one non-substantive change to the proposed text as published in the June 23, 2000, issue of the *Texas Register* (25 TexReg 6084). Sections 41.17, 41.18, and 41.20 are adopted with no changes to the proposed text published in the June 23, 2000, issue of the *Texas Register* (25 TexReg 6084) and therefore the text will not be republished.

The reason for adopting the new rules is to set forth eligibility criteria, enrollment timelines, and coverage timelines for the long-term care insurance program. The non-substantive change in §41.19(b) amends the term "Eligible Family Members" to appear in all lower-case letters, consistent with the way it appears elsewhere in the new rules. The rules will provide guidelines and timelines for eligibility, enrollment, and coverage to participating members, eligible retirees, and their eligible family members.

No comments were received regarding the proposal.

The new rules are 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.

*§41.19. Enrollment Periods for Texas Public School Employees and Retirees Group Long-Term Care Insurance Program.*

(a) The initial enrollment period for eligible participating members and their eligible family members to participate in the long-term care insurance program shall begin on August 1, 2000 and end at 11:59 p.m. Central Time November 30, 2000.

(b) The initial enrollment period for eligible Texas public school retirees and their eligible family members to participate in the long-term care insurance program shall begin on July 3, 2000 and end at 11:59 p.m. Central Time September 30, 2000.

(c) In accordance with Insurance Code, Article3.50-4A, the trustee has authority to declare periodic open enrollment and the rules and conditions for such open enrollment periods.

(d) The standard enrollment period for newly hired eligible participating members and their eligible family members to participate in the long-term care insurance program shall begin on the effective date of employment and end at 11:59 p.m. Central Time on the 30th day after the effective date of employment.

(e) The standard enrollment period for eligible current Texas public school employees who are covered under their employer-sponsored group long-term care plan will begin on the date such plan is terminated by their employer and end at 11:59 p.m. Central Time on the 30th day after the termination date of such plan.

(f) The standard enrollment period for surviving spouses of eligible participating members and surviving spouses of eligible retirees to participate in the long-term care insurance program shall begin on the first day after the eligible employee or retiree dies and end at 11:59 p.m. central time on the 30th day after the end of the month in which the eligible participating member or retiree dies.

(g) The standard enrollment period for new spouses and parents of new spouses shall begin on the date of the eligible participating member's or retiree's marriage and end at 11:59 p.m. Central Time on the 30th day after marriage.

(h) If an eligible individual described in subsection (d), (e), (f) or (g) of this section is permitted to enroll under two or more of the provisions of this section, the individual may enroll during the timeframe of either enrollment period.

(i) An individual's status as an eligible retiree, eligible participating member or eligible family member shall be determined as of the date a complete enrollment application is received by the carrier.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2000.

TRD-200005498
Charles Dunlap
Executive Director
Teacher Retirement System of Texas
Effective date: August 27, 2000
Proposal publication date: June 23, 2000
For further information, please call: (512) 391-2115

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# TITLE 40. SOCIAL SERVICES AND ASSISTANCE

## PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

### CHAPTER 97. HOME AND COMMUNITY SUPPORT SERVICES AGENCIES SUBCHAPTER D. ENFORCEMENT

**40 TAC §97.52**

The Texas Department of Human Services (DHS) adopts an amendment to §97.52 without changes to the proposed text published in the July 7, 2000, issue of the *Texas Register* (25 TexReg 6479).

Justification for the adoption is to correct a technical error in transmitting the final adopted version of 40 TAC §97.52. The Severity Level 1 Violations chart was inadvertently omitted from §97.52(b)(3)(C)(iii) when it was transmitted to the *Texas Register* as the adopted rule and published in the June 16, 2000, issue (25 TexReg 5941). DHS filed a public notice in the "In Addition" section of the July 7, 2000, issue of the *Texas Register* (25 TexReg 6479).

The department received no comments regarding the adoption.

The amendment is adopted under the Health and Safety Code, Chapter 142, which provides the department with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The amendment implements the Health and Safety Code, Chapter 142.001-142.030.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2000.

TRD-200005579
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2000
Proposal publication date: July 7, 2000
For further information, please call: (512) 438-3108

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# PART 3. TEXAS COMMISSION ON ALCOHOL AND DRUG ABUSE

## CHAPTER 144. CONTRACT REQUIREMENTS
## SUBCHAPTER A. GENERAL PROVISIONS

**40 TAC §§144.1, 144.11, 144.21**

The Texas Commission on Alcohol and Drug Abuse adopts amendments to §§144.1, 144.11, and 144.21 concerning General Provisions without changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5558).

These sections contain information regarding applicability, waivers and definitions.

These amendments are adopted to more clearly state that statutes governing state agencies apply if there is a conflict between such statutes and these rules; to change the term variance to waiver; to establish a time limit for waivers; to clarify several definitions; to add new definitions for graduate, unethical conduct and unprofessional conduct; to add the term cost reimbursement and eliminate the term financial assistance to more precisely describe this type of payment mechanism; to replace the term unit cost with the term unit rate; and to make grammatical changes to improve readability and understanding.

Comments on the rules were received from the Association of Substance Abuse Programs and an individual.

The following comments were received regarding §144.21.

Comment: The definition of financial assistance is being eliminated. Is it being replaced with cost reimbursement? This is an important shift in basic terminology , and we recommend the Commission provide more information about how this term will be referenced and used. Response: The term "financial assistance" is being replaced with "cost reimbursement". Financial assistance contracts were defined as those based on a line-item budget rather than a unit cost rate. Those contracts have always been cost reimbursement contracts. More information about this and other changes will be published in the Provider Bulletin. Comment: You define which professionals are QCCs. Some period of work experience should be stated for many of these professionals. An LMSW or LPC may have no working knowledge of substance abuse. Response: The professionals defined as Qualified Credentialed Counselors (QCCs) are authorized by law to provide chemical dependency counseling. The commission agrees that specific knowledge and experience with substance abuse is important, but a competent counselor can acquire these assets on the job. In light of continued reports of counselor shortages, it is important to keep the pool of potential applicants as large as possible. Individual facilities may establish more stringent hiring criteria than those listed in the rules. Comment: The rules contain a definition for unit rate. We are pleased to see TCADA defining and utilizing this type of contract/payment system.

These amendments are adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the adopted rules is the Texas Health and Safety Code, Chapter 461.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005534
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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## SUBCHAPTER B. CONTRACT ADMINISTRATION

**40 TAC §144.101**

The Texas Commission on Alcohol and Drug Abuse adopts amendments to §144.101 concerning Contract Administration with changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5561).

This section contains information regarding general contract provisions.

The amendments are adopted to more fully outline the steps required before a contract is considered fully executed; to raise the cap on the required fidelity bond or insurance; to specify

that providers will be held to performance standards stated in the contract; and to make other changes to improve readability and understanding.

Comments on the rules were received from the Association of Substance Abuse Programs.

The following comments were received.

Comment: The proposed rule requires signed contracts to be returned to the commission within 14 calendar days of the postmark date. Documents postmarked by TCADA are sometimes not actually received at the provider's office until as much as 10 days after the postmark. We believe 21 days is more reasonable considering the mail service factor. Or, delivery by certified mail with a 14 day deadline from the date of receipt.

Response: It is extremely important for all contracts to be signed and returned to the commission before the contract period begins. Negotiations are conducted in advance, so the content of the contract has been reviewed and agreed upon before it is mailed to the provider. Providers are expected to make advance arrangements if necessary so the document can be signed in a timely manner. The rule has been revised to require contracts to be returned before the start of the contract period.

Comment: This rule references §144.413 and §144.552. Neither one of these sections are included in the published rules.

Response: No changes are proposed for these sections, so the text was not published in the *Texas Register*. The current language in these sections remain in effect.

These amendments are adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the adopted rule is the Texas Health and Safety Code, Chapter 461.

*§144.101. General Contract Provisions.*

(a) A contract is not fully executed until it has been signed by the commission and the provider. The commission's policy is to have all contracts executed before the start date of the contract.

(1) The commission shall send the provider two original contracts signed by the commission. Both copies of the contract must be signed by an official authorized to enter into such agreements on behalf of the governing body. One shall be submitted to the commission before the start of the contract period and the other shall be maintained by the organization.

(2) If the provider makes any modifications to the original contract, both signed copies must be mailed to the commission for review. The commission may approve the counter-offer by co-signing the revised contracts and returning one copy to the provider or continue negotiations.

(3) No payment or advance of funds will be made until the contract is fully executed.

(b) Changes in state or federal laws and regulations may affect contract provisions. Any modifications resulting from such changes are automatically made part of the contract and go into effect on the date set by the law or regulation.

(c) The provider shall have insurance or other provisions approved in writing by the commission to ensure that assets purchased with commission funds will be replaced if lost, destroyed, damaged, or stolen.

(d) The provider shall carry a fidelity bond or insurance coverage. The fidelity bond or insurance must provide for indemnification of losses due to fraudulent or dishonest acts committed by any of the provider's employees or volunteers who have access to funds, either individually or in concert with others.

(1) If the provider's contract with the commission is $100,000 or less, coverage shall be equal to the contract amount.

(2) If the provider's contract is over $100,000, coverage shall be equal to $100,000 or 10% of the contract amount, whichever is greater, but in no event shall coverage exceed $500,000.

(e) Providers shall follow this order of legal precedence:

(1) federal and state laws (including, but not limited to the federal block grant found at United States Code, Title 42, §300x);

(2) applicable federal regulations;

(3) rules adopted by the commission ; and

(4) the contract.

(f) All providers shall be held to performance standards stated in the contract.

(1) Performance standards for prevention and intervention programs include the performance and activity measures described in §144.413 of this title (relating to Performance and Activity Measures).

(2) Performance standards for treatment programs include the performance measures defined in §144.552 of this title (relating to Select Performance Measure Definitions).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005535
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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**40 TAC §144.102**

The Texas Commission on Alcohol and Drug Abuse adopts the repeal of §144.102 concerning Contract Administration without changes to the proposal as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5562).

This section contains the requirements for amendments.

The repeal is adopted because requirements for contract amendments will be included in individual contracts.

The following comments were received from the Association of Substance Abuse Programs and an individual regarding the adoption of the repeal: Why are you deleting this section? Does it imply no contract amendments will ever be permitted? This seems very unrealistic for both TCADA and providers because circumstances do come up where it is reasonable and warranted to make a contract amendment(s). We recommend keeping this

section or revising it to specify how amendments to the terms and conditions can be made in the current environment.

Response: Amendments will be permitted in FY 2001. Information about amending contracts will be found in the contract itself instead of in the rules.

The repeal is adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the repeal is the Texas Health and Safety Code, Chapter 461.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005537
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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**40 TAC §§144.103 - 144.109, 144.121, 144.124, 144.131-144.134, 144.141, 144.142, 144.145**

The Texas Commission on Alcohol and Drug Abuse adopts amendments to §§144.103-144.108, 144.121, 144.124, 144.131-144.133, 144.141, 144.142 and adopts new §§144.109, 144.134, and 144.145 concerning Contract Administration. Sections 144.104 - 144.106, 144.109, 144.121, 144.131, 144.132, 144.134, 144.141, 144.142 and 144.145 are adopted with changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5562). Sections 144.103, 144.107, 144.108, 144.24 and 144.133 are adopted without changes to the proposed text and will not be republished. These sections contain information regarding organizational and personnel changes, matching awards, financial eligibility and third party payment, payment requirements, reporting, cost reimbursement for treatment services, billing for treatment services, application of federal and state requirements, indirect costs, equipment and supplies, travel, minor remodeling, procurement of goods and services, subcontracting, and contract closeout.

These amendments and new sections are adopted to require all funded providers to contribute at least 5% match; to stipulate that rules regarding third party payments apply to all programs that are subject to financial eligibility requirements; to specify that providers cannot bill the commission for any services delivered to an individual who has access to another public or private funding source; to provide more direction on becoming a Medicaid provider; to require providers serving individuals under 18 years of age to become a Children's Health Insurance Program provider; to strictly prohibit double billing for any service; to require providers to collect client fees according to a sliding fee scale; to limit advance payments; to stipulate reporting requirements for various types of programs; to limit the use of cost reimbursement as a payment mechanism to 12 months unless the commission's executive director grants a waiver; to specify restrictions on billing including limitations on the types and hours of services that providers can charge to the commission; to clarify the application of federal and state regulations; to allow the commission to require that administrative expenses be charged as direct costs; to provide clearer guidance about the process by which a provider requests that administrative costs be charged as indirect costs; to limit the requirement for prior approval for certain expenditures only to providers on cost reimbursement; to require prior approval for transfers among program budget line items when cumulative transfers exceed 10% of the total program budget; to define and require a physical inventory of controlled items; to specify limits on costs for mileage and out-of-state travel; to fully describe the process required to expend Commission funds for minor remodeling; to provide more details regarding the procurement of goods and services by providers; to prohibit the use of subcontractors that are not in good standing with legal, regulatory, and funding agencies, including the commission; to specify what information a provider must submit to the commission regarding proposed subcontractors; to establish a time limit of 90 days after the end of a contract for claims for reimbursement for subcontractors to be submitted; to stipulate that subcontractors are subject to commission oversight; to establish a process for the closeout of contracts; and to make other changes to improve readability and understanding.

Comments on these sections were received from the Association of Substance Abuse Programs and individuals.

Comment received regarding §144.103. Organizational and Personnel Changes: Thank you for deleting (G) "any other individuals identified as key personnel in the application." With all of the personnel changes, that was difficult to keep up with.

The following are comments received regarding §144.104 Matching Awards.

Comment: This rule now requires all contracts, including treatment contracts where a waiver has historically been applied, to provide matching funds. For many treatment providers this equates to a 5% rate reduction. Many providers, including prevention programs have used or are using available "other" dollars to help offset the recent funding restrictions in order to maintain continuity and reduce disruption to services. If you are a large service provider, (i.e. $1 million) a 5% match equates to $50,000 which is a substantial sum of unrestricted funds to come up with for drug and alcohol non-profit agencies. Although in-kind contributions can be applied toward match, $50,000 of in-kind contributions can also be difficult to accrue. To assist providers in maintaining levels of service in light of budget reductions and to allow for stability and continuity, we recommend removing the proposed rules and utilizing TCADA's option to waive match for both prevention and treatment service providers. At a minimum, revise the wording in the proposed rule to clearly indicate individual requests for match waivers will be reviewed and granted by TCADA.

Response: Under state statute, the commission cannot waive the match requirement unless it determines that the requirement will jeopardize the provision of needed services. The commission does not agree that a blanket waiver meets the intent of the statute; such a determination can only be made on a case-by-case basis. Providers can request a waiver through existing provisions in the rules.

Comment: As the primary provider of substance abuse services to medically indigent clients, we have extremely limited opportunity to access additional funding eligible to be used for matching purposes. Few of our clients have private insurance, and most billings are denied. Client fees are minimal, and local city and county funds are already limited and spread thin to meet diverse needs. Other sources of income include federal and state criminal justice contracts. Clarification is needed as to the eligibility of these funds to be used as match. The 5% match requirement is unrealistic given our limited opportunities to generate additional income given the population we are charged to serve.

Response: In general, other federal and state funds may not be used to match federal block grant dollars. Organizations should refer to the grant or contract and laws and rules that govern the other state or federal funds to determine whether or not they can be used as match. The rule has been revised to clarify that in-kind contributions and program income may be used to meet the match requirement.

Comment: The initiation of a 5% match for treatment services, which includes significant match restrictions, imposes a large hurdle for an existing program and an even larger obstacle for a start-up program. Unlike prevention or intervention services that can typically be managed from a leased office, treatment services are cost-efficiently and program-effectively provided from program-owned facilities. Even in the best circumstances, a large cash investment is a huge risk for the short-term contracts offered by TCADA. To mitigate this risk and encourage programs that provide much-needed treatment capacity, the matching fund requirements should be greatly expanded. Specifically, we encourage TCADA to consider as match: a. Building and remodeling costs not funded by grants b. Food stamp payment to residents paid over to programs c. Federal program income sources such as breakfast/lunch programs d. Federal education entitlements such as Eisenhower, Title I, and SDFSC leveraged to strengthen our education services for clients

Response: The commission can accept match only to the extent permitted by applicable regulations. Cash and in-kind match must meet the same requirements as contract expenditures. In general, federal and state funds cannot be used as match. Providers should review their federal and state grants and related regulations to see if permission is given to use the dollars as match. The federal block grant prohibits building and remodeling costs except for minor remodeling. Food stamps cannot be used as match because the source is federal funds.

The following are comments received regarding §144.105 Financial Eligibility and Third Party Payment.

Comment: The rule requires any provider offering services eligible for Medicaid reimbursement to take all necessary steps to obtain a Medicaid provider number and become an approved Medicaid provider. The services funded by the Medicaid state plan should be listed and referenced.

Response: The commission does not agree that this information should be included as part of the commission's rules because it is governed by the state Medicaid plan. Detailed information regarding eligible services is provided through the Provider Bulletin and other publications.

Comment: Programs providing outpatient treatment services to children and adolescents are required to enroll in the Texas Medicaid Program. A question has arisen about programs providing counseling in adolescent intervention programs and substance abuse assessments. Do these programs need a Medicaid number or only licensed treatment programs?

Response: This rule does not apply to adolescent intervention programs. The services provided by such programs are not eligible for Medicaid reimbursement.

Comment: The rules states that any provider in a STAR or STAR+ service area must take all necessary steps to enroll with those program health plans to be reimbursed for services delivered to those clients. If the client is on Medicaid and the provider does not receive authorization from a STAR or STAR+ program can they discharge the client based on inability to pay?

Response: A commission-funded provider cannot deny services to a client based solely on inability to pay. If the provider has exhausted all appeals, the costs of treating the client can be charged to the commission.

Comment: Providers serving individuals under 18 years of age are required to take all necessary steps to become an approved Children's Health Insurance Program (CHIP) provider. The CHIP portion is confusing because assessment and intervention activities are included in the benefit package which are services often performed by councils under OSAR and prevention providers and not typically viewed as "insured services". It would be helpful here to list covered CHIP services under (d)(2) and providers that must apply.

Response: At this time, the rules do not require prevention and intervention providers (including OSARs) to enroll as CHIP providers. Detailed information about CHIP is provided through the Provider Bulletin and other publications. The commission will also provide a training session on CHIP.

Comment: Will TCADA be providing information or references as to where providers can find both Medicaid and CHIP eligibility standards?

Response: This information will be provided through the Provider Bulletin and other publications.

Comment: This entire section poses a documentation nightmare. In addition, it seems that substance abuse providers are being asked to perform the duties of Medicaid and CHIP program staff. These are activities which in many hospitals or similar settings require several staff members to perform. Perhaps they have the money to hire those people; we do not.

Response: The commission recognizes that billing multiple funding sources increases administrative procedures and documentation. However, the commission does not agree that the burden outweighs the benefit of leveraging all available funding sources to extend the limited dollars allocated to the commission for substance abuse programs. As of August,1999, less than 20% of the need for treatment was being met in Texas. Every unit of service billed to Medicaid or CHIP leverages federal dollars and increases the total quantity of substance abuse services available for poor Texans. Furthermore, ability to access multiple funding streams enhances the financial stability of providers in a rapidly changing environment.

Comments received regarding §144.106 Payment Requirements follow.

Comment: This section does not address prevention/intervention programs which receive cash advances. I suggest that some mention be added to make it more clear.

Response: Under the new rules, no commission-funded program will receive monthly cash advances.

Comment: We recommend that TCADA continue to give providers the option to choose method of payment rather than allow an advance on an exception basis only. We believe a failsafe system is already in place for advance payments through the FSR or quarterly financial reports. To improve accountability, TCADA can increase internal controls of the existing safeguards and only require reimbursements for providers who don't comply with procedures. At a minimum, allow providers to choose advance payments for personnel costs. Providers do not necessarily have adequate reserve or access to a line of credit to function on a reimbursement basis. Although we do appreciate that the rule allows working capital advances on an exception basis, we are unclear about what constitutes an exception.

Response: The amount of surplus cash that remains in the contracting system at closeout and the commission's previous inability to predict carryforward from year to year indicates that the current system does not have adequate operational safeguards. Furthermore, cost reimbursement is the standard method of payment in most comparable state and federal programs. Providers may request a working capital advance based on their organization's cash flow. The commission would expect to see supporting information such as: all sources of funding for the agency, timing of other funding, restricted versus unrestricted sources of revenue, timing of liquidation of liabilities, whether or not the agency has a relationship with a bank for a loan or line of credit, and sources of match and program income and flexibility associated with those resources.

The following are comments received regarding §144.107 Reporting.

Comment: Why has the commission changed the deadline for submitting reports from 30 to 20 days? Unless TCADA is then able to significantly reduce the time it takes to turn around reports back to providers as a result of this 10 day reduction, we believe providers should be given the 30 day period currently in effect.

Response: The timeframe has been shortened to enhance the commission's ability to manage cash flow. This is also consistent with the practices of other health and human service agencies which require reports to be submitted as early as three days after the close of a reporting period. It is unclear what turnaround the commenter is referring to in the last sentence.

Comment: The 20-day deadline is unrealistic, particularly for providers in a network setting. Because the last half of the month payroll and expenses are run on the 15th of the following month it would be very difficult to accurately report all expenses if the FSR is due 20 days after the end of the reporting period. We are in a network, and the network management organization (NMO) requires the FSR to be submitted in 20 days so they can meet the current 30-day deadline. We have had to continually request an extension to ensure accurate reporting. If the NMO deadline will be 20 days, participating providers will have an even shorter deadline.

Response: Deadlines within the network are an issue for negotiation between the subcontractor and the NMO.

Comment: Programs that treat individuals for intravenous substance abuse shall notify the commission through the facility capacity management system when the program's capacity for treating intravenous substance abusers reaches 90%. What does this mean? We report all available beds on a daily basis. Is this sufficient?

Response: There is a separate question on the reporting form for this item. It is in addition to reporting the number of beds.

The following comment was received regarding §144.121. Application of State and Federal Regulations: It would be helpful if TCADA would cite the appropriate UGMS sections we must comply with much as it does the other federal circulars.

Response: Providers are required to comply with all of UGMS, as is true of the federal circulars.

One comment was received regarding §144.124. Indirect Cost: A new rule states that the commission reserves the right to require administrative expenses to be charged as direct costs. Since the RFP process upon which an award is based clearly distinguishes between program, administrative, and indirect costs, an award should not be subject to a "reserves the right" clause. This implies an after-the-fact change to the RFP process. Since the chosen provider is obligated to perform under the terms and conditions of the RFP, TCADA should also be bound to abide by the characterization of costs as presented in the RFP.

Response: The budget instructions for the Comprehensive Services Request for Proposal for FY 2001 states (on page 173) that the commission reserves the right to mandate direct charging.

The following are comments received regarding §144.142 Subcontracting.

Comment: Requiring a provider to perform an annual documented subcontractor monitoring visit appears to be a significant new requirement and is a big area of TCADA audit vulnerability for providers. We recommend more specific instruction be provided in the rule about the scope of sub-contractor monitoring and what it needs to entail, how it should be documented and generally what TCADA expects from a provider in order to successfully comply with this provision.

Response: The proposed rule simply states that the provider shall monitor subcontractor compliance; it does not specifically mandate an annual on-site visit. The commission will provide additional guidance in the Provider Bulletin.

Comment: Providers are told to require all subcontractors to permit access to TCADA staff. Does this apply in situations such as NorthSTAR?

Response: The rules in this chapter do not apply to NorthSTAR. However, the NorthSTAR contract contains similar provisions.

These amendments and new sections are adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the adopted rules is the Texas Health and Safety Code, Chapter 461.

*§144.103. Organizational and Personnel Changes.*

The provider shall notify the commission in writing within ten business days of:

(1) changes in the provider's legal name, address, telephone number, or legal status; and

(2) changes in the following personnel:

(A) certifying representative;

(B) board chair;

(C) chief executive officer;

(D) chief financial officer;

(E) project director; or

(F) contact person.

*§144.104. Matching Awards.*

(a) Unless waived in writing by the commission, all providers shall contribute at least 5.0% of the total commission-funded program expenditures in cash or in-kind match from sources eligible to be used for matching purposes.

(b) Match shall comply with requirements found in the applicable Office of Management and Budget (OMB) circulars as stated in §144.121 of this title (relating to Application of State and Federal Regulations).

*§144.105. Financial Eligibility and Third Party Payment.*

(a) The rules in this section apply to all programs subject to financial eligibility requirements, including all treatment programs. If applicable to a prevention or intervention program, the requirement for financial eligibility determination shall be stipulated in the contract.

(b) The Commission is the payor of last resort for substance abuse services. A provider shall not bill the commission for services provided to a client if:

(1) the individual does not meet the commission's eligibility criteria as described in §144.521 of this title (relating to Client Eligibility); or

(2) the individual has access to another public or private funding source that pays for substance abuse services addressing the individual's diagnosis or condition.

(c) Any provider offering services eligible for Medicaid reimbursement shall take all necessary steps to obtain a Medicaid provider number and become an approved Medicaid provider. The process must be initiated no later than 30 days after the beginning date of a contract with the commission.

(1) All programs providing outpatient treatment services to children and adolescents must contact the National Heritage Insurance Company (NHIC) to initiate enrollment as a Chemical Dependency Treatment Facility (CDTF) in the Texas Medicaid Program.

(2) Any provider delivering services in the STAR, STAR+, and/or NorthStar service areas must take all necessary steps to enroll with those Program Health Plans to be reimbursed for services delivered to those clients.

(3) The provider must screen all clients for Medicaid eligibility. If a client appears eligible but has not yet applied, the provider shall direct the client to apply for Medicaid benefits and provide assistance as needed to facilitate the enrollment process.

(4) The provider must bill Medicaid for all covered services delivered to eligible clients.

(d) Providers serving individuals under 18 years of age shall take all necessary steps to become an approved Children's Health Insurance Program (CHIP) provider by contacting the contracted Health Maintenance Organization (HMO), Behavioral Health Organization (BHO), or Exclusive Provider Organization (EPO) in the region. The process must be initiated no later than 30 days after the beginning date of a contract with the commission.

(1) The provider must screen all clients under the age of 18 for CHIP eligibility. If a client appears eligible but has not yet applied, the provider shall direct the client's consentor to apply for CHIP benefits and provide assistance as needed to facilitate the enrollment process.

(2) The provider must bill CHIP for all covered services delivered to eligible clients.

(e) The provider shall not bill the commission for any part of any unit of service that has been billed to another entity or that is eligible for reimbursement by another entity. If the third party payor denies payment and all appeals have been exhausted, the provider may bill the commission for that unit of service.

(f) The provider shall make a reasonable effort to collect fees generated from clients paying according to a sliding fee scale, but the provider may waive collection if the administrative cost of collection will exceed the fee to be collected. The provider shall not bill the commission for any uncollected client fees.

*§144.106. Payment Requirements.*

(a) Payments shall be made only when the contract has been fully executed.

(b) To be eligible for payments, the provider must comply with provisions of the contract, rules, policies, and procedures of the commission, and other applicable state and federal laws and regulations.

(c) The commission may delay or deny payment if the provider is not in compliance with commission requirements, which include:

(1) rules adopted by the commission;

(2) the contract; and

(3) other applicable statutes and regulations.

(d) Providers paid through cost reimbursement may request a working capital advance.

(1) A working capital advance may be granted if the provider submits documentation justifying the need for working capital. Advances shall be granted on an exception basis only.

(2) A provider receiving a cash advance shall minimize the time between disbursement of funds by the commission and expenditure of funds by the program. The commission may reduce or reject payment if the program has excess cash on hand.

(e) All providers must submit requests for payment promptly and regularly.

(1) Payment requests must be submitted at least monthly.

(2) Failure to submit payment requests in a timely manner may result in nonpayment.

(f) Payment requests shall be complete, accurate, submitted in the format required by the commission, and certified by the provider's authorized representative (specified in the contract).

(g) Treatment programs funded through the unit rate payment mechanism shall use the client billing forms to request reimbursement. A billing form must be submitted for each client served in the program who is supported with commission funds. Treatment programs funded through cost reimbursement shall also submit client billing forms, but payments will be based on satisfactory submission of a request for reimbursement.

(h) The provider shall maintain documentation necessary to support all payment requests.

*§144.107. Reporting.*

(a) The provider shall submit all reports as required by commission rules, the contract, and applicable instruction manuals. Reports shall be submitted in the specified form, manner, and timeframe. Unless otherwise specified, reports are due 20 days after the end of the reporting period.

(b) The provider shall submit all performance reports, financial reports, and requests for payment through the designated web-based computer system. The provider's authorized official or designee specified in the Electronic Forms Signature Agreement is responsible for the completeness and accuracy of the data.

(c) Treatment programs shall report available capacity and waiting list information daily through the commission's facility capacity management system and comply with procedures specified by the commission.

(d) A provider that treats individuals for intravenous substance abuse shall notify the commission through the facility capacity management system when the program's capacity for treating intravenous substance abusers reaches 90%.

(e) All treatment programs shall submit Client Data System (CDS) forms to the commission through the commission's web-based computer system for all clients receiving commission-funded substance abuse treatment services.

(f) The provider shall acquire and maintain the equipment and software needed for the web-based computer system.

(g) The provider shall establish adequate internal controls, security, and oversight for the approval and transfer of complete and accurate information.

(h) When equipment problems prevent electronic submission of required reports, the provider shall fax or mail paper copies to the commission.

(i) Providers shall reconcile internal accounting records with documentation submitted to the commission and maintain supporting documentation on site.

(j) Adjustments to the final FSR will not be made more than 90 days after the end of the contract period unless the provider's independent audit report demonstrates that the FSR is incorrect.

*§144.108. Cost Reimbursement for Treatment Services.*

(a) The commission's standard payment mechanism for treatment services is the unit rate payment mechanism.

(b) The commission may place a treatment program on cost reimbursement if the provider does not have the resources to provide needed treatment services without start-up funding and meets at least one of the following criteria:

(1) has never before provided treatment or prevention services funded by the commission;

(2) will provide commission-funded services in a specific geographic area or to a specific population for the first time;

(3) will provide services at the commission's request to meet identified needs; or

(4) demonstrates other extenuating circumstances.

(c) Cost reimbursement is granted for a single 12-month period unless the commission's executive director grants a waiver based on extenuating circumstances.

*§144.109. Billing for Treatment Services.*

(a) Treatment programs shall not bill the commission for services provided:

(1) at an unlicensed site if the site is required to have a license; or

(2) by a staff person who does not meet the commission's minimum requirements.

(b) Programs may bill for only one level and service type (outpatient or residential) per client per day.

(c) An outpatient program shall not bill the commission for more than:

(1) nine hours of service per week for Level IV;

(2) 19 hours of service per week for Level III; and

(3) 29 hours of service per week for Level II.

(d) Outpatient programs shall only request payment for substance abuse education, life skills training, and counseling (individual, group, or family). The following activities are not reimbursable: peer support groups, case management, academic courses, and recreation.

(e) A residential program may hold an empty bed and bill for a client who is on a planned, approved absence for up to two consecutive days. The frequency of approved absences shall be reasonable and appropriate and shall not exceed four days in a 30-day period, except as provided below.

(1) Providers shall include planned absences for delivery in treatment plans for each pregnant female, and shall ensure that a bed is available for the female upon her return.

(2) Absences for medical treatment (including delivery), court appearances, or other emergencies may exceed 48 hours, but commission approval is required if the absence exceeds 96 hours.

(f) The provider shall maintain complete documentation for all services paid for by commission funds as described in §144.553 of this title (related to Treatment Documentation).

*§144.121. Application of Federal and State Regulations.*

(a) All providers shall comply with the provisions of the Uniform Grant Management Standards (UGMS). Expenditures of commission funds, including required cash match, shall be reasonable, necessary, and allowable, and must receive required prior approval as stated in UGMS. All providers shall also comply with federal cost principles and administrative requirements as appropriate for the organization. When there is a conflict between UGMS and the federal regulations, the most restrictive shall apply. The federal cost principles and administrative requirements are applicable as follows:

(1) state and local governments or Indian Tribal governments shall comply with cost principles found in the Office of Management and Budget (OMB) Circular A-87 and administrative requirements found in the OMB Circular A-102;

(2) not-for-profit providers shall comply with cost principles found in the OMB Circular A-122 and administrative requirements found in the OMB Circular A-110 (with changes incorporated as the Code of Federal Regulations, Title 45, Part 74);

(3) educational organizations shall comply with cost principles found in OMB Circular A-21 and administrative requirements found in OMB Circular A-110; (with changes incorporated as the Code of Federal Regulations, Title 45, Part 74);

(4) commercial organizations shall comply with cost principles found in Code of Federal Regulations, Title 48, Part 31, and administrative requirements found in OMB Circular A-110 (with changes incorporated as the Code of Federal Regulations, Title 45, Part 74); and

(5) hospitals shall comply with cost principles found in the Code of Federal Regulations, Title 45, Part 74, and administrative requirements found in OMB Circular A-110.

(b) All references in the circulars to "Federal" or "Federally' shall be expanded to read "Federal or State" or "Federally or State", as applicable. References to "recipient" shall be expanded to read "recipient, contractor, subcontractor, subrecipient, or provider".

(c) The provider shall also comply with requirements and restrictions found in the Substance Abuse Prevention and Treatment federal block grant, found at United States Code, Title 42, §300x.

*§144.124. Indirect Cost.*

(a) The commission reserves the right to require administrative expenses to be charged as direct costs.

(b) A provider may request approval to charge administrative expenses as indirect costs. Three mechanisms are available for charging shared administrative costs. The provider may:

(1) submit documentation of an indirect cost rate approved by the provider's cognizant agency;

(2) request a negotiated rate with the commission based on a cost allocation plan; or

(3) use an indirect cost rate not to exceed 10% as provided in the Uniform Grant Management Standards (UGMS). If requesting this option, the provider must provide supporting documentation to show the direct salary and wage costs of providing the service (excluding overtime, shift premiums, and fringe benefits).

(c) All providers receiving funds from other sources must maintain a cost allocation plan showing how administrative costs are distributed among funding sources.

*§144.131. Expenditures Requiring Prior Approval.*

For providers on a cost reimbursement payment mechanism, prior written approval is required for certain costs charged to the commission contract or reported as program income or match. Costs that are allowable only with prior written approval from the commission include:

(1) Equipment. Items used solely for the delivery of funded substance abuse services that have a unit cost of $1,000 or more and a useful life of more than one year.

(2) Minor remodeling. Work described in §144.134 of this title (relating to Minor Remodeling) costing $1,000 or more in the aggregate.

(3) Contractual services. Contracting out, subgranting, or otherwise obtaining the services of a third party to perform activities which:

(A) are central to the purposes of the contract; or

(B) cost $5,000 or more.

(4) Transfers. Any transfer among program budget line items for direct costs when cumulative transfers exceed or are expected to exceed 10% of the total approved program budget.

(5) Other. Items requiring prior approval in accordance with the Uniform Grant Management Standards or the appropriate Office of Management and Budget (OMB) circular.

*§144.132. Equipment and Supplies.*

(a) Equipment includes all tangible personal property that costs $1,000 or more per unit and has a useful life of more than one year. A set of components designed to function together shall be treated as a single unit.

(b) Supplies include all materials and other expendable property needed to carry out a contract with a unit cost of less than $1,000.

(c) The provider shall conduct an annual physical inventory of all equipment and controlled items purchased with commission funds no later than 60 days after the close of the provider's fiscal year.

(1) Controlled items are those that have a unit cost of $500 - $999 and/or a high risk of theft. Examples include televisions, fax machines, video recorder/players, printers, software, and mobile telephones.

(2) The inventory shall conform with standards found in the Uniform Grant Management Standards or the applicable Office of Management and Budget (OMB) circular.

(3) Inventory records shall be current, maintained at the program site, and reported as part of the annual contract closeout.

*§144.133. Travel.*

(a) Expenses for transportation, lodging, meals, and related items are allowable when they are incurred by an employee or volunteer on official business which is directly attributable to the contract or required for administration of the provider.

(b) Costs for lodging, meals, and related items may not exceed the State of Texas per diem rates and costs for mileage may not exceed the State of Texas rate for mileage reimbursement. When applicable, the provider may use the state's schedule of per diem rates for out-of-state travel. If the provider's policies and procedures establish a lower per diem rate, the lower rate shall apply.

(c) Alcoholic beverages and tobacco products are not allowable costs.

*§144.134. Minor Remodeling.*

(a) Minor remodeling is work which is required to change the interior arrangements or other physical characteristics of an existing building, or to install equipment so that the building may be used more effectively. It does not include work which substantially increases the value of the building.

(b) The provider shall have written approval from the commission before starting any minor remodeling project.

(c) Any remodeling project must meet the following conditions:

(1) The building's useful life shall be consistent with the funded program purposes;

(2) The remodeling shall be essential to the commission-funded program;

(3) The remodeled space shall be occupied by the program; and

(4) The building shall be owned by the provider; or if the facility is leased, there shall be at least three years remaining in the lease period.

(d) If the program is funded only in part by the commission, only a pro-rata share of the total minor remodeling costs may be charged to the commission.

(e) Costs for minor remodeling shall not exceed an aggregate of $5,000 per provider per year.

(f) The following expenses are examples of unallowable costs:

(1) relocation of exterior walls, roof, and floors in order to increase the amount of space to be used;

(2) development or repair of parking lots; and

(3) completion of unfinished shell space to make it suitable for human occupancy.

(g) A written request for remodeling must include a narrative description of the proposed functional utilization of the space and the final cost estimate. The following documents must accompany the request, as applicable:

(1) a single line drawing of the existing space and proposed alterations;

(2) equipment requirements prepared by the persons who will use and be responsible for the working space;

(3) final working drawings and specifications; and

(4) the design analysis report describing the heating, ventilation, air conditioning, plumbing, and electrical systems.

*§144.141. Procurement of Goods and Services.*

(a) The provider may use small purchase procurement procedures to obtain services, supplies, or other property if the total cost of all purchases does not exceed $25,000 for the contract period. These rules do not apply to obtaining the services of a professional as defined in Texas Government Code, Chapter 2254.

(1) For any purchase under $2,000, price or rate quotations are not required.

(2) The provider shall obtain three verbal or written price or rate quotations for any purchase between $2,000 and $10,000. Telephone and other verbal quotations must be documented and available for inspection.

(3) The provider shall obtain three written price or rate quotations for any purchase of over $10,000. Facsimiles or printed copies of electronic transmissions are acceptable.

(b) The provider shall select the vendor providing the best value for the goods or services desired and document the rationale for selection.

(c) A single purchase may include more than one item. Large purchases shall not be divided into small lots in order to avoid bid requirements, especially when bought from the same vendor in the same fiscal year.

(d) If purchases for the contract period are expected to exceed $25,000, the provider shall comply with requirements found in the Uniform Grant Management Standards or the applicable Office of Management and Budget (OMB) circular.

*§144.142. Subcontracting.*

(a) The provisions in this section apply when a provider subcontracts, assigns, or transfers any activity central to the purposes of the contract to a third party.

(1) The subcontractor shall be a corporation, partnership, sole proprietor, or other entity with legal authority to operate in the State of Texas.

(2) The subcontractor shall be in good standing with all applicable legal, regulatory and funding agencies. If the subcontractor has been funded by the commission, the organization shall not be suspended or delinquent on a repayment agreement, and shall not have had a contract terminated by the commission for cause within the past three years. The provider shall require any potential subcontractor to disclose all legal, regulatory, or contractual actions initiated against it in the past three years, including pending actions and/or investigations.

(3) The provider shall submit the following information about each subcontractor within five business days after entering a contract:

(A) the name, address, and telephone number of the subcontractor;

(B) the names, addresses, and telephone numbers of the chief executive officer, chief financial officer, clinical director, and members of the governing authority; and

(C) the name of any person employed by or associated with the subcontractor who has been sanctioned by the commission within the past three years, and a description of the person's relationship and responsibilities with the subcontractor.

(b) The provider shall, in writing, require any subcontractor to comply with applicable laws and regulations and with the provisions and stipulations of the provider's contract with the commission.

(c) The relationship between the provider and the subcontractor shall be formalized in a written agreement that is signed by the governing body or legally responsible party of both the provider and the subcontractor.

(d) The provider shall retain sufficient rights and controls to fulfill its contract responsibilities to the commission. Subcontracting does not relieve the funded provider of any responsibility to the commission under the contract.

(e) The provider shall monitor subcontractor compliance with provisions of the contract and applicable laws and regulations, and shall take appropriate steps to ensure corrective action when issues of non-compliance are identified. The monitoring activity must be documented and will be subject to review by the commission.

(f) The provider is responsible for paying subcontractors. When a contract ends, the provider and each subcontractor shall settle all claims promptly, including those from employees, vendors, and other subcontractors. Claims for reimbursement to pay subcontractors will not be considered more than 90 days after the end date of the contract.

(g) When a subcontractor becomes insolvent or otherwise incapacitated, abandons the contract, or is discharged by the funded provider, the funded provider shall notify the commission in writing within three working days.

(h) Subcontractors must also comply with all applicable state and federal laws and regulations and commission requirements contained in the commission's rules. These specifically include the audit requirements of Office of Management and Budget (OMB) Circular A-133 if applicable, and all other federal and state regulations required in §144.121 of this title (relating to Application of Federal and State Regulations).

(i) Subcontractors are subject to commission oversight. The provider shall, in writing, require the subcontractor to permit access as described in §144.201 (relating to Commission Oversight).

*§144.145. Contract Closeout.*

(a) Submission of Documents. Providers shall submit all financial, performance, and other closeout reports required under the contract within 60 days after the contract end date. The commission is not liable for any claims that are not resolved with the commission within 90 days after the contract end date.

(b) Equipment. Providers shall submit an inventory of commission owned property at closeout and request disposition instructions for commission owned property that is no longer needed.

(c) Payment of Refunds. Any funds paid to the provider in excess of the amount to which the provider is finally determined to be entitled under the terms of the contract constitute a debt to the commission and will result in a refund due. The provider shall pay any refundable amount within the time period established by the commission.

(d) Disallowances and Adjustments. The closeout of the contract does not affect:

(1) The commission's right to disallow costs and recover funds on the basis of a later audit or other review.

(2) The provider's obligation to return any funds due as a result of later refunds, corrections, or other transactions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005536
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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## SUBCHAPTER C. PROGRAM OVERSIGHT

### 40 TAC §§144.201, 144.204, 144.211, 144.214 - 144.216

The Texas Commission on Alcohol and Drug Abuse adopts amendments to §§144.201, 144.204, 144.211, 144.214, 144.215 and 144.216 concerning Program Oversight. Sections 144.201 and 144.214 are adopted with changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5569). Sections 144.204, 144.211, 144.215 and 144.216 are adopted without changes to the proposed text and will not be republished.

These sections contain information regarding commission oversight, on-site reviews, independent audit report, independent audit report submission, corrective action plan, and audit report desk reviews.

These amendments are adopted to reserve for the Commission the right to require an audit for a program with expenditures of less than $300,000; to require that providers submit documentation of their board's approval or disapproval of audit reports; to specify that the commission will approve corrective action plans and may require modifications to the plan before approval; to stipulate that if a desk review identifies excess revenue, the provider must refund the money within the specified time frame; and to make grammatical changes to improve readability and understanding.

Comments on these sections were received from the Association of Substance Abuse Programs and individuals

The following comments were received regarding §144.204. On-site Reviews.

Comment: I suggest TCADA include time frames for its response to agencies much as it has for service providers.

Response: The purpose of rules is to define standards with which providers must comply. Procedures and timeframes for commission staff are located in the commission's internal administrative procedures manual.

Comment: Providers are required to respond to inspection reports within 14 days of the postmark date. Again, the issue of mail time experience from postmark. We recommend 21 days or 14 days from the date it is received through a vehicle such as certified mail.

Response: Issues described in the inspection report are shared with the provider during the exit conference. Commission staff also fax a copy of the report to the provider at the time of mailing. This gives the provider a full 14 days to prepare a response. The following comments were received regarding §144.214. Independent Audit Report Submission.

Comment: The amended paragraph replacing the Audit Report Submission Checklist with Board approval imposes an undue burden to some providers in the timing and method of assurance that information contained in the Single Audit report is accurate. The complexity of an audit for a large, multi-state corporation requires the entire nine-month period allowed in the regulations. The addition of board approval to submit the report would require the external audit to be completed several weeks earlier. The report would need to be approved by the national board and then sent to the Texas board for its approval of the grant information relevant to Texas programs. The Audit Report Submission Checklist requires assurance by the individual CPA or firm that the required disclosures are included in the audit report. Since the audit report is addressed to and presented to board at the next scheduled board meeting, it is an undue burden to require board approval of the report as a prerequisite to timely filing. The required assurances are provided by the required CPA opinions and not by a Board action on those assurances.

Response: The purpose for requiring board approval is to ensure that the board has reviewed the audit report and is aware of any findings in the report and that the report submitted to TCADA is a final report and not a draft version. To avoid placing an undue burden on providers, the commission has revised the rule to require board approval prior to the commission's final acceptance of the report rather than prior to submission.

Comment: I'm glad to see you changed the rule to require that all audits be submitted nine months after the close of the provider's fiscal year. Thirteen months seemed to be a very long time which could have posed problems for TCADA and the agency.

Response: This rule was revised to correspond to a change in federal and state guidance.

One comment was received regarding §144.215 Audit Report Desk Reviews: Providers are required to respond to inspection reports within 14 days of the postmark date. Again, the issue of mail time experience from postmark. We recommend 21 days or 14 days from the date it is received through a vehicle such as certified mail.

Response: This section refers to corrective action plans for the independent audit report, not commission audit reports. The time frame for responses to inspection reports is addressed under §144.204. The rule regarding resolution of desk audits provides an additional 14 day period to submit a satisfactory response.

These amendments are adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the adopted rules is the Texas Health and Safety Code, Chapter 461.

*§144.201. Commission Oversight.*

(a) All commission-funded providers, regardless of the level of funding, are subject to periodic reviews by the commission for adherence with applicable federal, state and commission statutes and regulations and contract requirements. These include desk reviews and on-site reviews.

(b) The commission shall determine the extent of the review.

(c) The commission may conduct a scheduled or unannounced on-site review.

(d) Under certain circumstances, the provider must also submit a single audit or a program-specific audit as described in §144.211 of this title (relating to Independent Audit Report).

(e) The applicant shall allow commission staff to access the facility's grounds, buildings, and records and to interview members of the governing body, staff, participants, and clients.

(f) The provider shall allow commission staff to examine all property and examine or copy all books, recordings, client records, and documents related to or potentially related to the contract or a commission requirement.

*§144.214. Independent Audit Report Submission.*

(a) The provider shall submit four copies of all required audit documentation to the commission, including:

(1) the audit report;

(2) any separately issued management letters;

(3) management responses as required in §144.215 of this title (relating to Corrective Action Plan); and

(4) documentation of board approval or disapproval of the audit report.

(b) Audits shall be completed and submitted no later than nine months after the provider's fiscal year end. Documentation of board approval may be submitted separately if the board is unable to review the audit report before the due date, but this documentation must be provided before the commission's final acceptance of the audit.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-2000005538
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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**40 TAC §144.203**

The Texas Commission on Alcohol and Drug Abuse adopts the repeal of §144.203 concerning Program Oversight without changes to the proposal as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5570).

This section contains the requirements for on-site contract reviews.

The repeal is adopted because the requirements contained in this section have been incorporated into other sections.

No comments were received regarding the repeal of this section.

The repeal is adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the repeal is the Texas Health and Safety Code, Chapter 461.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005539
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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## SUBCHAPTER D. ORGANIZATIONAL

**40 TAC §§144.311, 144.313, 144.321 - 144.323, 144.325**

The Texas Commission on Alcohol and Drug Abuse adopts amendments to §§144.311, 144.313, 144.321-144.323, and 144.325 concerning organizational requirements. Section 144.311 is adopted with changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5571). Sections 144.313, 144.321-144.323, and 144.325 are adopted without changes to the proposed text and will not be republished.

These sections contain information regarding general requirements, management and organization, policies and procedures, documentation and records, commission logo and slogan, and complaints and reports.

These amendments are adopted to reorganize a portion of these rules; to expand the policies and procedures section to include a listing of all the policies and procedures that must be contained in the organization's policy and procedures manual; to specify that documentation must be complete, current, factual, accurate, permanent and legible; to add requirements for authentication and error correction; to expand the rule regarding use of the commission's logo to include electronic media; to require that all providers report serious incidents to the commission within 24 hours of discovery; and to make other changes to improve readability and understanding. The change made to §144.311 is to correct a spelling error.

The following comments were received from the Association of Substance Abuse Programs and individuals regarding §144.321 Policies and Procedures.

Comment: We appreciate the listing of required polices and procedures for the policy and procedure manual.

Comment: This seems redundant and somewhat confusing. We all know we have to maintain a policy and procedure manual which addresses all requirements in the chapter. However, (b) seems to imply as stated that those items (1) through (19) are all that are required to be in the manual. I know that is not the case but if all of these items are enumerated elsewhere in the rules why restate them here?

Response: The proposed rules do not require that the policy and procedure manual address all requirements in the chapter. This is a comprehensive listing of procedures required by Chapter 144. The inclusion of other policies and procedures is left to the discretion of the provider based on internal management needs.

These amendments are adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the adopted rules is the Texas Health and Safety Code, Chapter 461.

*§144.311. General Requirements.*

Funded providers shall establish and maintain effective internal programmatic and financial controls to ensure:

(1) commission-funded programs are operated efficiently and effectively;

(2) the provider maintains compliance with other funding and regulatory agencies;

(3) appropriate controls are in place to safeguard assets;

(4) commission funds are properly spent;

(5) commission funds are properly accounted for;

(6) client/participants receive appropriate services; and

(7) client services are adequately documented.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005540
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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**40 TAC §144.312**

The Texas Commission on Alcohol and Drug Abuse adopts the repeal of §144.312 concerning organizational requirements without changes to the proposal as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5573).

This section contains the requirements for organizational structure.

The repeal is adopted because requirements for organizational structure have been incorporated into other sections.

No comments were received regarding the repeal of this section.

The repeal is adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the repeal is the Texas Health and Safety Code, Chapter 461.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005542
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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**40 TAC §144.326**

The Texas Commission on Alcohol and Drug Abuse adopts amendments to § 144.326 concerning organizational requirements without changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5574).

This section contains information regarding staffing.

The amendments are adopted to establish minimum qualifications for clinical program directors; to stipulate that annual training must include both cultural competency and standards of conduct; and to make grammatical changes to improve readability and understanding.

The following comments were received from the Association of Substance Abuse Programs and individuals.

Comment: The rule states that every program shall have an employee designated to serve as director and that the individual must have appropriate education and training and at least two years of experience providing related services. Does these mean each program has to have an individual program director, or can one person serve as director over several programs. Does this imply the title has to be Director or does a job description describing managerial responsibility suffice?

Response: One person may serve as program director for multiple programs. The job title is not important, but the job description must document that the person is clinically responsible for the program.

Comment: While we support and agree that experience is desirable and necessary for program directors, there are instances when a person can possess a track record of needed program management/clinical skills but not meet two years in direct substance abuse services. Provisions for flexibility need to be incorporated into this rule to allow providers to manage their own programs. Two years should be a benchmark not a requirement. We recommend wording that allows an exception when the candidate's background and experience clearly demonstrate strong ability to perform the job functions.

Response: The commission believes that two years of related experience is a minimal standard for a person who has clinical responsibility for program design and implementation. Exceptions may be addressed by requesting a waiver.

Comment: The proposed rule requires providers to obtain the results of a statewide criminal background check on all staff and to use criteria listed in the Texas Occupations Code 53.022 and 53.023 to evaluate criminal history reports and make related employment decisions. The time and cost (I believe the cost is $17.00 per check plus duplication) and time involved in getting checks has been and remains a concern regarding this rule. Although in and of itself not an exorbitant fee, when added together with the many administrative costs of implementing the new rules it does become an issue. We agree safety is a foremost concern and that background checks for staff working with children and youth is necessary as is counseling staff, but all staff seems over burdensome. The rule clearly states the program shall develop and implement written procedures for reviewing the background and suitability of any employee with access to the program's clients, participants or funds. This rule requires that processes be in place to protect clients and TCADA funds, and along with a program's required liability insurance, should provide needed assurances without requiring background checks on all employees. We recommend keeping the previous wording related to children and youth or expanding to include counseling staff, but removing the proposed language for all staff.

Response: The commission recognizes that criminal background checks add to the provider's administrative cost. However, the commission disagrees that the general language provides sufficient protection and that the requirement should apply only to counseling staff. The commission has a responsibility to protect the health and safety of service recipients and to see that state funds are managed responsibly. Because many crimes are committed by repeat offenders, we believe it is a basic precaution to obtain a criminal background check for all staff with access to service recipients and/or funds.

Comment: I was unable to locate the Texas Occupations Code over the Internet to check the criteria are that providers will use to evaluate. Without knowing what the criteria are, a general caution is that in the substance abuse field many people in recovery are hired who may likely have a criminal background. We hope TCADA has reviewed the criteria and considered this carefully when they elected to adopt these guidelines. Finally, I hope TCADA will make a copy of this available to providers.

Response: The Texas Occupations Code is not yet available on the Internet. The referenced criteria are currently used by the commission in reviewing the criminal histories of licensed counselors and applicants for licensure. They provide a framework for evaluating the history but do not impose rigid mandates. Providers will be given a copy of the guidelines.

Comment: The new rules require prospective employees to pass a pre-employment drug test that meets criteria established by the commission. Drug and alcohol prevention and treatment programs take drug and alcohol use among their employees very seriously. They recognize signs quickly and take action with regard to possible use. Many do test not only at pre-employment but intermittently. We believe pre-employment drug tests should be the choice of a provider organization.

Response: The commission recognizes that many providers have adequate procedures but does not agree that leaving this to the discretion of individual providers is sufficient. It is the commission's intention to contract only with providers who can support that they maintain a drug-free workplace, and requiring employees to pass a drug screen is an essential element of a drug-free workplace.

Comment: The specific criteria for the required employee drug test should be clearly defined in the rule. Providers should have the opportunity to comment on the criteria when it is develop by TCADA staff.

Response: The commission disagrees that the specific parameters of the drug screen must be included in the text of the rule. Providers are welcome to comment on the criteria when they are published.

Comment: I do not like the addition of the required criminal background checks or drug screens. We seem to be getting more and more intrusive in the lives of our employees and prospective employees. Neither one of these checks, criminal background or drug, will prevent someone from doing drugs or stealing funds after they have become employees and its adds more costs to program services. These are unfunded mandates.

Response: The commission agrees that these measures cannot guarantee that an employee will not steal funds or use drugs. They do, however, minimize the risk by identifying individuals with a history of similar behavior. The commission believes the added protection for clients and state funds justifies the additional cost to providers.

These amendments are adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the adopted rules is the Texas Health and Safety Code, Chapter 461.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005541
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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## SUBCHAPTER E. PREVENTION AND INTERVENTION

**40 TAC §§144.411, 144.412, 144.414, 144.415, 144.416, 144.418, 144.446, 144.447, 144.451 - 144.453, 144.455, 144.458, 144.460, 144.462**

The Texas Commission on Alcohol and Drug Abuse adopts amendments to §§144.411, 144.412, 144.414, 144.415, 144.416, 144.446, 144.447, 144.451-144.453, 144.455, 144.458, 144.460, 144.462 and adopts new §144.418 concerning Prevention and Intervention without changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5575).

These sections contain information regarding program design and implementation, program self-evaluation, performance measure review, participant rights, tobacco products, transportation, environmental and social policy, intervention services, youth prevention programs, youth intervention programs, community coalitions, prevention resource centers, pregnant postpartum intervention programs, HIV early intervention services, and HIV outreach services.

These amendments and new section are adopted to change a program name to Youth Intervention Program; to state that programs must perform self-evaluations unless the contract waives this requirement; to delete obsolete references; to clarify actions the commission may take after receiving a corrective action plan, which now include imposing contract restrictions or sanctions or terminating the contract; to require that providers maintain documentation that participants receiving individualized services in an intervention program have received required information and agreed to participate in the program; to clarify requirements regarding tobacco products and related prohibitions; to add requirements regarding transportation of participants; to specify the elements required for documentation of minors and tobacco presentations; to update the requirements for the intervention assessment; to add documentation requirements for intervention services; to expand requirements for Youth Intervention Programs; to stipulate that community coalitions are to implement community-based processes and environmental and social policy strategies; to change the reporting requirement for prevention resource centers from a monthly report to a quarterly report; to enhance the services and outreach efforts of pregnant postpartum intervention programs; to clarify the responsibility of both HIV early intervention services and HIV outreach services to provide interim services; to clarify that these two programs are to link with Texas Department of Health sponsored community or regional planning groups; to stipulate that both of these types of programs are to market their services; to identify the target population for HIV outreach services; and to make grammatical changes to improve readability and understanding.

Comments on these sections were received from the Association of Substance Abuse Programs and individuals.

The following comment was received regarding §144.414 Performance Measure Review: Does the elimination of the statement-a revision of the performance goals and/or interim goals, with appropriate timelines established to measure progress-imply that there will no longer be an action available to TCADA and providers to negotiate new performance goals? Or, is that assumed to be an option within the corrective action plan? There are situations where revising performance measures/goals is reasonable, indicated and warranted. We recommend that the option to negotiate revised performance goals be continued and should be stated in rule.

Response: The commission expects providers to establish realistic goals and will hold providers accountable for performance in relation to those goals. Occasionally, circumstances beyond the provider's control do justify revised measures, and such revisions can be part of a corrective action plan. The commission does not agree that this option should be explicitly stated in the rule.

The following comment was received regarding §144.447 Intervention Services: The provider is required to collect information about family history of ATOD use. For school-based programs, there is a problem in some school districts with asking family members these types of questions. A parent survey was sent out in one school district that caused a major controversy and the school district now will not permit these questions. We recommend excluding this item, at least for school-based intervention programs.

Response: This section does not apply to school-based universal or selected programs that typically involve large groups of adolescents. It applies only to indicated programs when they provide individualized counseling for youth who are showing early warning signs of substance use or abuse and/or exhibiting other high risk problem behaviors. When an adolescent enters intervention counseling services, a thorough assessment is necessary to identify his or her needs and develop an appropriate service plan. The family history of substance use and abuse is a critical element of such an assessment. The rules specify that the assessment shall be conducted in a culturally appropriate face-to-face session. Whenever possible, parents and other family members participate in the assessment interview and subsequent services and can provide the information directly. When it is not possible to engage parents, providers can request such information from the adolescent. It is neither necessary nor appropriate to gather this data through a survey. If the school has policies that prohibit this information from being discussed within the context of a private counseling session, the program can request a waiver.

These amendments and new section are adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the adopted rules is the Texas Health and Safety Code, Chapter 461.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005543
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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**40 TAC §144.417**

The Texas Commission on Alcohol and Drug Abuse adopts amendments to § 144.417 concerning Prevention and Intervention without changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5579).

This section contains information staff training.

These amendments are adopted to increase the basic training required for direct service prevention and intervention staff from eight to 16 hours; to add one required topic; and to make other changes to improve readability and understanding.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the adopted rule is the Texas Health and Safety Code, Chapter 461.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005544
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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**40 TAC §§144.448, 144.456, 144.457, 144.459**

The Texas Commission on Alcohol and Drug Abuse adopts the repeal of §§144.448, 144.456, 144.457, and 144.459 concerning Prevention and Intervention without changes to the proposal as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5579).

These sections contain the requirements for assessment for treatment, core council services, pregnant postpartum prevention programs, and other special prevention programs.

The repeals are adopted because some of these requirements are deleted and others are incorporated into amended or new sections that are concurrently proposed.

No comments were received regarding the repeal of these sections.

The repeals are adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the repeals is the Texas Health and Safety Code, Chapter 461.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005546
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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**40 TAC §144.456**

The Texas Commission on Alcohol and Drug Abuse adopts new §144.456. concerning Prevention and Intervention with changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5580).

This section contains information regarding outreach, screening, assessment, and referral services.

This new section is adopted to establish requirements for outreach, screening, assessment and referral services (OSARs), which were previously referred to as core council services; to require that crisis intervention services be handled by a Qualified Credentialed Counselor or counselor intern; and to permit OSARs to provide brief intervention counseling to motivate and prepare an individual for treatment or self-directed change. The change that was made to the proposed text was to delete a phrase that was inadvertently inserted in paragraph (m).

The following comments on this section were received from the Association of Substance Abuse Programs and individuals.

Comment: The proposed rule allows funded OSAR providers to provide treatment services as well as assessment services. We support the rule revision because it increases the flexibility in rural or underserved areas to provide needed services.

Comment: OSAR providers are required to do Minors and Tobacco activities. This is a service more directly involved in Youth Prevention than in OSAR. This is especially true now that information dissemination for OSARs is limited to increasing the knowledge of how to access services. Furthermore, OSAR staff are already performing multiple functions and do not have sufficient time for the Minors and Tobacco activities.

Response: The commission disagrees that the Minors and Tobacco activities should be performed by Youth Prevention Programs. OSARs are the only providers who are assigned catchment areas that ensure coverage for the entire state. Although the subject matter is different, the activity is not incompatible with other OSAR functions. The Minors and Tobacco activities are an information dissemination function which is one of the OSAR's required services. Providers are expected to budget sufficient staff to provide all required services.

Comment: OSAR Counselors are doing screenings, assessments, and referrals for clients. These are very important but very time consuming functions. It is very difficult for a counselor to stop in midstream to go out of the office in order to carry out the required Outreach component of the OSAR function (and the

Minors and Tobacco function). Also, when outreach is being conducted more clients are accessing the needed service thus creating more business. Increased funding is needed in order for the OSARs to carry out all of their functions.

Response: The commission believes that outreach is a critical function, particularly because priority populations are less likely to access services on their own. Outreach encompasses a variety activities, and many of them do not require face-to-face contact. OSARs are not expected to implement outreach models that rely primarily on street outreach and other intensive casefinding activities. Instead, OSAR providers should design a multi-faceted outreach plan that uses resources as efficiently as possible. Such a plan usually focuses on gatekeepers who already interact with members of the commission's priority population. The commission acknowledges that limited time is always a factor. Assessment, usually the most time-consuming activity, is not required for every person who accesses OSAR services and should only be conducted when necessary. Moreover, OSARs are expected to work with local treatment providers to eliminate duplicative assessments. Because treatment providers need to conduct an in-depth assessment in order to develop a treatment plan, it is possible that some of the assessments currently conducted by your organization could be eliminated by expanding the screening process to elicit information needed to make a referral to an appropriate treatment provider.

Comment: Under the new requirements, how much flexibility will we have within our network regarding the assessment requirements?

Response: The rules provide the fundamental framework for all commission-funded services, including those provided through networks. The commission's contract with the network management organization may include further provisions specific to the network. The specific division of responsibilities within a network is determined through negotiation between the management organization and its subcontractors.

Comment: Wouldn't it be a conflict of interest to allow OSARs to make referrals to themselves-which is what will happen if OSARs are also treatment providers?

Response: Many OSARs have been treatment providers for many years with no apparent problems with conflict of interest. In rural areas, OSARs may be the only accessible treatment provider or the only provider offering the level of services needed by an applicant. Prohibiting self-referral would severely limit access to services. Furthermore, current treatment capacity meets less than 20% of the need. With effective outreach, the capacity of all providers should be fully utilized.

Comment: Programs are required to establish an avenue for a person in crisis to speak with a trained counselor within one hour of the initial call. "Trained counselor" should be clearly defined. Can a person who has received training in crisis intervention provide this service or must it be a QCC? It is also important to note that there is a financial aspect to implementing this rule, as overtime pay may be required of staff responding to crisis calls after normal business hours.

Response: As defined in the rules, a counselor is a QCC, a counselor intern working under direct supervision, or a graduate. Under this rule, the counselor must be trained in crisis intervention. The requirement for after-hours coverage is not new. The change is that coverage must be provided by a trained counselor. This is necessary because crisis calls sometimes involve severely disturbed individuals. The commission considered the financial impact of this rule when it was proposed.

Comment: The OSAR in our area cannot possibly do all of the things outlined in (a) unless TCADA provides additional funding to hire more staff. At present, they are inundated with client screenings. We operate in a managed care network. I recommend that OSARs conduct the client assessments, crisis intervention and other related duties for the network and the Councils on Alcohol and Drug Abuse be given back the responsibility for (and funding associated with) information dissemination, community based process and other community information and education duties.

Response: The commission expects applicants who are competing for funds to budget sufficient staff to provide all required services. The Councils on Alcohol and Drug Abuse are no longer associated with specific programs. Like other community-based organizations, they request funding for a variety of services. Traditionally, these providers have competed for SIC contracts to provide screening, referral, and related services. In FY 2001, SIC contracts are being converted to OSARs. The services required in these contracts have not changed, except that all OSARs are expected to offer treatment assessments (in FY 2000 it was optional for an SIC to have the capacity to conduct assessments). The OSAR provides an integrated package of services that provides essential infrastructure. The commission does not agree that it would be equally effective to divide these activities among different providers. Within a network, the configuration of services and the level of subcontractor funding are determined by negotiations between the managed care organization and the subcontractors.

This new section is adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the adopted rule is the Texas Health and Safety Code, Chapter 461.

*§144.456. Outreach, Screening, Assessment, and Referral Services*

(a) Outreach, Screening, Assessment, and Referral (OSAR) service providers are community-based organizations that provide alcohol, tobacco and other drug prevention and intervention services to the community at large in their identified catchment area. OSAR service providers conduct a variety of services aimed to reduce use and abuse of ATOD in the targeted community.

(b) OSAR services programs shall offer universal, selective and indicated strategies to individuals, families, and communities within the service area defined in the contract.

(c) Information dissemination shall be provided for the purposes of education and awareness in the community. Information dissemination shall be focused on increasing access to services for the community, including the commission's priority populations described in §144.522 of this title (relating to Priority Populations).

(d) Problem identification and referral shall be provided for the purpose of the identification of appropriate service needs through screening, referral, placement and follow-up.

(e) Crisis intervention services shall be provided for the purpose of responding to individuals and/or families in need of immediate services.

(1) Crisis intervention may be a single contact or a short series of contacts.

(2) The program shall develop written policies and procedures for crisis intervention services during and after normal business hours.

(3) Crisis intervention must be provided by a QCC or a counselor intern working under direct supervision.

(4) The program shall establish an avenue for a person in crisis to speak with a trained counselor within one hour of the initial call received during and after normal business hours.

(5) The program shall provide training annually on crisis telephone call policies and procedures for all employees who answer (or may answer) the telephone during or after normal business hours. Training must include crisis intervention techniques and available community resources.

(f) The program shall provide treatment assessments and placements.

(1) All assessments shall be conducted in a confidential, face-to-face interview.

(2) All assessments shall be conducted by qualified credentialed counselors (QCCs) or counselor interns working under direct supervision.

(3) The program shall use an assessment tool that is approved by the commission and appropriate for the target population.

(4) If an individual meets the DSM-IV criteria for substance abuse or dependence, the program shall refer the individual for appropriate treatment services. With written consent, the program shall forward a copy of the assessment to the treatment provider.

(5) The OSAR shall maintain written agreements with referral sources/treatment providers to identify assessment roles in order to minimize duplicate efforts in conducting treatment assessments.

(6) Documentation shall include:

(A) date of assessment;

(B) zipcode of the individual assessed;

(C) demographics of the individual assessed

(D) the written assessment, including a diagnostic impression based on DSM-IV criteria;

(E) referrals and placements made; and

(F) any follow-up contacts.

(g) The program may provide brief motivational counseling to motivate and prepare an individual for treatment or self-directed change in behavior if treatment is not indicated.

(h) Minors and tobacco activities shall be provided for the purpose of reducing minors' access to tobacco products throughout the catchment area served. The OSAR shall submit a quarterly narrative report on minors and tobacco activities, including:

(1) tobacco retailer education;

(2) tobacco information and education;

(3) media awareness; and

(4) tobacco coalition and community involvement.

(i) Community-based process shall be provided for the purpose of enhancing the ability of the community to more effectively provide substance abuse services.

(j) The program shall maintain a resource manual or file that contains current information about local referral resources, including location and contact information, services offered, and eligibility criteria. At a minimum, the resource manual or file shall include information about all prevention, intervention, and treatment programs in the OSAR's catchment area.

(k) The program shall develop and implement written procedures to identify and provide appropriate referrals for individuals exhibiting conditions or behavior that may suggest unmet mental health needs. The program shall also provide annual training on mental health issues to all staff members who interact with service recipients.

(l) OSAR programs shall work with other organizations in the area to coordinate substance abuse and other services for the individual and/or family.

(m) OSAR providers may operate separate prevention, intervention, and/or treatment programs to meet the needs of the community. These services may not, however, be provided with resources allocated to the OSAR function.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005545
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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## SUBCHAPTER F. TREATMENT

### 40 TAC §§144.511, 144.521 - 144.523, 144.525, 144.526, 144.532, 144.541, 144.543, 144.545, 144.551, 144.553

The Texas Commission on Alcohol and Drug Abuse adopts amendments to §§144.511, 144.522, 144.523, 144.526, 144.532, 144.541, 144.543, 144.545, 144.551 and adopts new §§144.521, 144.525, and 144.553 concerning Treatment. Sections 144.511, 144.525, 144.526, 144.532, 144.545, 144.551 and 144.553 are adopted with changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5581). Sections 144.521-144.523, 144.541, 144.543 are adopted without changes to the proposed text and will not be republished.

These sections contain information regarding program plan and implementation, client eligibility, priority populations, waiting list and interim services, admission determination and placement, length of stay guidelines, core program requirements, specialized treatment services for females, pharmacotherapy services, family services, performance measure review, and client record documentation.

These amendments and new sections are adopted to more fully describe the requirements for a written program plan; to require

programs to develop admission criteria that addresses their specific target population; to require a quality improvement system for all treatment programs and to specify the requirements for this system; to revise the rules regarding client eligibility to require the use of financial eligibility criteria and procedures developed by the commission; to delete former Supplemental Security Income recipients previously disabled from substance abuse as a priority population; to stipulate that providers are to accept applicants from the whole state when space is available; to combine requirements for capacity management and interim services into one section; to prohibit providers from holding empty beds or slots for anticipated clients for more than 48 hours; to implement the Texas Department of Insurance admission criteria to place clients in the most appropriate level of care available; to describe the utilization review process that must be used with the length of stay guidelines; to clarify that pregnant women and women with dependent children may remain in residential treatment for three months; to require that programs offering specialized treatment services for females have documented, regular contact with certain programs and organizations that serve the target population; to prohibit these programs from admitting females who are not in their priority population unless they can document that all community outreach contacts have been contacted and no potential priority clients can be identified for admission; to require that pharmacotherapy programs develop and implement a plan to achieve accreditation as required by federal regulations; to stipulate that the consent of the adult client is required before family services are provided; to delete family case management from the list of reimbursable family services; to revise the steps the commission may take after receiving a program's corrective action plan to include imposing contract restrictions or sanctions or terminating the contract; to outline requirements for client record documentation; and to make grammatical changes to improve readability and understanding.

Comments on these sections were received from the Association of Substance Abuse Programs and individuals.

One comment was received regarding §144.511 Program Plan and Implementation: We support continuous quality improvement programs and many of our members operate a system similar to the one outlined in this rule. We believe a system should be in place, but are concerned about specificity of program design and content outlined in the rule(s) related to this function. We believe the direction to establish a quality improvement program can be accomplished in j (1) by adding review of TCADA performance measures. The rest of the subject specific rules--j(2), (k) (1-6) can be removed. This will allow for more flexibility and still provide a provision for quality improvement programs. If need be, documentation guidelines can be included in a rule handbook.

Response: The rule has been revised as suggested.

The following are comments received regarding §144.521 Client Eligibility.

Comment: The rule requires programs to use financial eligibility criteria, forms and assessment procedures established by the commission. To date, there does not seem to be any clear and specific TCADA criteria, forms and assessment procedures established. We recommend these be developed, with provider input, and distributed prior to the rule being placed into effect.

Response: Providers will receive this information with their FY 2001 contracts. The commission will also provide training on how to implement these instruments. The short timeframe did not allow for a period of provider comment prior to implementation, but the commission will consider all suggestions for revisions.

Comment: Sliding fee scales should be the purview of the provider. Can this not be an area of local option? One board may have the funds to not wish to charge in excess of TCADA's payment rate while others may know that the patient will never pay the required match and either choose to waive it entirely or reject the client because the amount owed would work a detriment on the provider's finances. If there is to be a provision for a sliding fee scale, it is important that the provider set it in keeping with their local needs and area financial restraints.

Response: The commission does not agree that the sliding fee scale should be a local option. Financial eligibility is one of the most basic and most important standards relating to publicly funded services. The commission is obligated to establish standards that direct public funds to people who do not have the means to pay for services. The commission recognizes that some people above the income threshold for free services can afford to pay a portion but not the full cost of treatment. Without a sliding fee scale, these clients would not have access to services. The rules require providers to make a reasonable effort to collect client fees, but does not expect that 100% of those fees will be collected. Providers do, however, have the option not to charge client fees and not to bill TCADA.

Comments received regarding §144.522. Priority Populations follow.

Comment: I object to the priority populations. All of us are here to serve those who abuse alcohol and other drugs. Can't we just serve those who need services?

Response: These priority populations are established in the federal Substance Abuse Prevention and Treatment block grant and/or state law.

Comment: I think local funding sources will object when they learn we are required to serve applicants from every region in the state when we do not have sufficient treatment capabilities to serve "our own". I realize that we can give preference to local applicants but will you change this in the future?

Response: These rules apply only to commission-funded services. Although local funding sources may contribute match, most of the cost is borne by the state. The proposed rule requires providers to accept clients from other regions only when capacity is available. An applicant from any part of the state who is part of the commission's priority populations must be given preference over a non-priority applicant. The commission has no plans to change its policy on allowing providers to give preference to local applicants of equal or greater priority status than applicants from other parts of the state.

The following are comments received regarding §144.523. Waiting List and Interim Services.

Comment: The rule states that when a program does not have the capacity to admit an injecting drug user or pregnant female, the program shall place the individual in another treatment facility or provide reasonable access to interim services. We have always complied with a best effort approach to finding help for applicants for service. But no provider has the ability or resources to arrange for services at some other facility. How shall any provider "place" the individual in another treatment facility. "Refer" would be a more appropriate word.

Response: The commission recognizes that a treatment provider cannot ensure that the client will be admitted when a referral is made. In this case, however, if the client is not admitted, interim services must be provided. The term "place" is used to communicate that the provider's responsibility for providing interim services is not absolved by making a referral that does not result in admission.

Comment: There are far too many interim services to arrange in a rural service area. It would be very difficult in an urban area. For us, it is impossible.

Response: Interim services are required by the federal Substance Abuse Prevention and Treatment block grant. The commission does not have the discretion to waive the requirement. Most of the required interim services (counseling and education about HIV and TB and referrals for HIV and TB treatment) can be obtained through the local health department. The additional services required for pregnant women (counseling on the effects of alcohol and drugs on the fetus and referrals for prenatal care) are generally available through local health clinics.

Comments received regarding §144.525 Admission Determination and Placement follow.

Comment: Under the new rules, providers implement TDI admission criteria to determine the appropriate level of service. To comply providers need access to training on administering the criteria and guidelines for documenting administration of TDI admission criteria in a fashion acceptable to TCADA. Rather than immediate implementation of this rule on September 1, we suggest it go into effect following receipt of appropriate TCADA training.

Response: The commission disagrees that training should be a prerequisite to implementation of the rule. Training will be provided, but the rule and the admission criteria are sufficiently detailed to permit immediate implementation.

Comment: The rules state that if an appropriate provider is not accessible to the client, the provider shall arrange for treatment in a program with the most appropriate level of care accessible to the client. If a provider does not offer a program or if a provider is not accessible to the client, a reasonable effort at referral should suffice. The wording in "shall arrange for" suggests a case management function that the treatment provider is not funded to provide.

Response: The rule has been revised to clarify the intent.

Comment: The word applicant should be used and not used interchangeably with client. A distinction needs to be made between someone who has not been accepted because they do not meet TDI criteria for the program, and client who is currently being served but no longer meets criteria.

Response: The commission agrees with the comment and has revised the rule accordingly.

Comment: While we are already involved in a strong QCC program here we object to the rules providing such a strong encroachment into local management prerogatives with all the detail that is provided here. Make it shorter and more permissive.

Response: It is not clear which section the commenter is referencing, but the commission assumes it is the language in paragraph (b). The TDI criteria are designed for a delivery system where clients have access to all levels of service. However, public funds are insufficient to provide all levels of service throughout the state. This detail is provided so that providers know how to apply the placement criteria when a full continuum of services is not available.

Comment: This is very confusing. We are going to utilize the DSM-IV diagnostic criteria then we are going to further evaluate the admission according to TDI admission criteria to determine appropriate level of care? Then, to assess HIV, we are going to use NIDA's reference. You are making this more difficult than it has to be.

Response: The commission disagrees that these requirements are unnecessarily complex. To ensure appropriate use of available treatment dollars, the commission must establish standards to ensure that clients admitted to commission-funded programs need treatment and that they receive the most appropriate treatment available. Furthermore, the federal Substance Abuse Prevention and Treatment block grant requires the commission to improve the process for referring individuals to treatment facilities that can provide the treatment modality that is most appropriate for their individual needs. Structured criteria provide a consistent and reliable way to achieve those goals. The DSM-IV is the single national standard used to establish chemical abuse and dependency, and the TDI admission criteria are the state's uniform standard for chemical dependency treatment placement. HIV is a major health problem in this country, and substance abusers are at high risk. The block grant places great emphasis on HIV issues, and the commission believes that HIV screening and referral is a critical need for this population. The NIDA criteria provide a scientifically sound method for substance abuse professionals to assess an individual's HIV risk.

Comments received regarding §144.526 Length of Stay Guidelines follow.

Comment: The length of stay for women with children Level II Residential Treatment was substantially reduced in FY 00. While we continue to meet all contract performance measures, comparison of FY 99 and FY 00 data shows there has been a 17% decrease in the number of women abstinent at the time of follow-up. It is our experience that all the issues involved in treating women and their children and preparing them for independent living cannot be addressed adequately within this shortened length of stay.

Response: In the proposed rule, TCADA interpreted the TDI length of stay guidelines to address the special needs of this population by adjusting the guideline for residential treatment from 35 days (applicable to other adults) to three months. The intent was to permit three months in a Level II Residential program, and the rule will be clarified to reflect that. An individual client may stay in residential treatment longer than three months if clinical justification is documented in the client record. The guidelines allow an additional 70 days in a Level III Residential program. Providers should also consider whether other levels of care might be sufficient to meet the woman's needs for a portion of her treatment.

Comment: The rule states that women with children and pregnant women with a substance abuse or dependence diagnosis are eligible for three months of residential treatment at a specialized female service provider. Depending at what point in her pregnancy a female arrives in treatment as well as her progress and life situation, a 3 month stay may not take her through delivery or allow time for her to be in a safe environment after treatment to delivery. We recommend a rule be added that outlines extended stay criteria for pregnant females up to delivery and through initial post partum periods.

Response: When the lengths of stay for Level II and Level III are combined, a pregnant woman could stay in residential treatment for more than six months without exceeding the guidelines. Furthermore, the rules already allow extended lengths of stay if clear clinical justification is documented in the client record.

The following are comments received regarding §144.532 Core Program Requirements.

Comment: The rules require programs to implement a written plan of operation explaining outreach efforts, including specific strategies to reach members of the priority populations. There is no funding for treatment centers to provide outreach services to find priority population clients. They are funded to provide treatment services for TCADA's priority and eligible populations. Outreach strategies and activities are often full programs in and of themselves. Unless these outreach "efforts" are meant to be simple and focused on maximizing bed capacity, we believe this rule should removed. And, if this rule is being implemented in an effort to ensure beds are fully utilized, then the phrase that was deleted-the commission may waive this requirement if the program demonstrates high capacity utilization and adequate engagement of the priority population-- should remain.

Response: The outreach efforts are meant to be simple and focused on maximizing utilization by the priority populations. The commission accepts the comment and has revised the rule as requested.

Comment: Levels II, III, and IV treatment programs funded by the commission shall provide family education and counseling related to the client's substance abuse. If you aren't funding this why do you now require it?

Response: Research clearly indicates that family involvement is a critical factor in achieving positive treatment outcomes. The commission believes that these services must be an integral part of every treatment program. The costs associated with these services should be included when calculating the cost of a unit of treatment.

One comment was received regarding §144.551 Performance Measure Review: Does the elimination of the statement-a revision of the performance goals and/or interim goals, with appropriate timelines established to measure progress-imply that there will no longer be an action available to TCADA and providers to negotiate new performance goals? Or, is that assumed to be an option within the corrective action plan. There are situations where revising performance measures/goals is reasonable, indicated and warranted. We recommend that the option to negotiate revised performance goals be continued and should be stated in rule.

Response: The commission expects providers to establish realistic goals and will hold providers accountable for performance in relation to those goals. Occasionally, circumstances beyond the provider's control do justify revised measures, and such revisions can be part of a corrective action plan. The commission does not agree that this option should be explicitly stated in the rule. A comment was received regarding §144.553. Client Record Documentation: Sections (b) and (c) seem to be contradictory. Are you requesting each session attended by the client to be documented or do you want one weekly progress note which addresses all sessions? If counselors try to remember what went on in each session during a once weekly progress note, that might pose some auditing problems. I believe you should state either one weekly progress note or progress note written after each session.

Response: The commission concurs and has revised the rule to require a brief note for each session and a summary note each week addressing the client's progress toward treatment goals.

These amendments and new sections are adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the adopted rules is the Texas Health and Safety Code, Chapter 461.

*§144.511. Program Plan and Implementation.*

(a) The program shall develop a written plan to guide the delivery of services for the contract period. The plan must be approved through the application process and any changes to the plan must be approved through a contract amendment.

(b) The program shall revise the plan each year on the basis of needs data and results of self-evaluation, and these changes must be approved through the contract renewal or amendment process.

(c) The written plan shall include a description of the program design, target population, goals and objectives, admission criteria, and services and activities.

(d) The program design must be based on a logical, conceptually sound framework with the intended result of reducing alcohol, tobacco, and other drug problems. The program shall gather and use reliable evidence of effectiveness from comparable programs to select and guide the program design. The program shall use results that come from sound studies to assess potential effectiveness of the program design related to the needs of the target population.

(e) The program shall identify and describe the target population, including specific information about:

(1) age, gender, and ethnicity;

(2) patterns of substance use;

(3) social and cultural characteristics;

(4) knowledge, beliefs, values, and attitudes; and

(5) needs.

(f) The program shall identify long-range goals which:

(1) address identified needs and/or problems; and

(2) clearly describe behavioral and/or societal changes to be achieved.

(g) The program shall establish objectives for each contract period that are linked to the long range goals. Objectives must:

(1) be realistic, outcome-oriented, measurable, and time-specific; and

(2) address effectiveness, efficiency, and client satisfaction; and

(3) include performance measures required in the contract.

(h) The program shall develop admission criteria that identify members of the target population and ensure that the needs of persons admitted are appropriate to the program's design and services.

(i) The written plan shall include key services and activities used to achieve program goals and objectives. Each service and activity must:

(1) relate directly to the goals and objectives;

(2) address identified needs; and

(3) be appropriate for the target population. The program design, content, communications, and materials shall be:

(A) available in the primary language of the target population; and

(B) appropriate to the literacy level, gender, race, ethnicity, sexual orientation, age, and developmental level of the target population.

(j) The program shall develop and implement a quality improvement system that uses data to monitor and evaluate program implementation and performance. This system shall include a quality improvement team that meets on a regular basis (at least quarterly) to review commission performance measures and other relevant program data, identify issues, and implement appropriate action to improve service delivery.

(k) The program shall maintain documentation of its quality improvement activities, including minutes of each quality improvement meeting.

(l) The program shall conduct and document an annual self assessment of program implementation and performance that covers all components of the written program plan.

(m) The program shall use information gained from the annual self assessment and other quality improvement activities to make appropriate changes to the program plan and the staff training plan. Any change requiring commission approval must be made through the contract renewal or amendment process.

*§144.525. Admission Determination and Placement.*

(a) All admissions must be authorized or denied by a QCC.

(1) For every applicant admitted to treatment, the client record must include documentation signed by a QCC that the individual met all applicable admission criteria, including the DSM-IV diagnostic criteria.

(2) When an applicant is denied admission, the program shall maintain documentation signed by a QCC which explains why the admission was denied.

(b) The admission determination shall include an evaluation based on Texas Department of Insurance (TDI) admission criteria (as interpreted in subsection (c) of this section) to determine the appropriate level of service. The provider shall match individual applicant needs with appropriate treatment intensity and setting.

(1) If the provider does not offer a program appropriate for the applicant as determined by the TDI criteria, the provider shall refer the applicant to a provider that does offer the needed service.

(2) If an appropriate provider is not accessible to the applicant, the provider shall arrange for treatment (through admission or referral) in a program with the most appropriate level of care accessible to the applicant.

(3) If the applicant is placed on a waiting list, the provider may admit the client to a less intensive program on an interim basis.

(4) The client record shall contain documentation demonstrating that the client met the TDI admission criteria or justifying the reason for admission if the criteria were not met.

(c) The commission has interpreted the TDI admission criteria to apply them to the commission's priority populations. Any revisions adopted by the Texas Department of Insurance supercede the admission criteria listed in this section. For pregnant women and/or women with children under their care, a DSM-IV diagnosis of Substance Dependence or Substance Abuse shall suffice for admission to a residential treatment program.

(d) As part of the assessment, the program shall assess each applicant's risk for HIV infection, tuberculosis, and other sexually transmitted diseases. Risk assessments shall follow guidelines as set by the National Institute on Drug Abuse's "Preventing HIV Among Substance Abusers: Risk Assessment/Risk Reduction."

(e) The program's admission criteria shall not exclude members of the commission's priority populations defined in §144.522 of this title (relating to Priority Populations).

(f) The program's admission criteria shall not automatically exclude individuals based on:

(1) physical or mental health history;

(2) current physical or mental health diagnoses or services;

(3) past or present prescription medications;

(4) assumptions of ability to benefit from treatment without documented current behavioral evidence;

(5) drugs being abused;

(6) ability to read and write; or

(7) pregnancy.

(g) The program shall not automatically deny admission to a previous client based on prior treatment. If the applicant has been admitted to the facility three or more times in the past 12 months, the provider may consider this information (including circumstances of prior discharges) in determining whether to admit the applicant. The program shall not deny admission based on prior treatment if the applicant has only one or two prior admissions or if the applicant is in need of detoxification.

(h) The program shall not automatically deny admission based on a perceived threat of harm to self or others. The program shall have a policy and procedures for assessment of potential harm to self or others. If the program determines that an individual is a current risk to self or others, the program may require an evaluation from a qualified mental health provider prior to admission.

(i) The program shall not require a period of abstinence prior to admission or require treatment clients to complete detoxification unless the client meets TDI admission criteria for detoxification services.

(j) All treatment programs shall develop and implement written procedures to identify clients exhibiting conditions or behavior that may suggest unmet mental health needs. The program shall collaborate with and provide referrals to available resources (including qualified and credentialed mental health professionals) to address the client's mental health needs.

(k) The program shall provide appropriate referrals for all persons who are denied treatment. Documentation shall include:

(1) date(s) of application and denial;

(2) identifying information;

(3) the reason the person was denied admission; and

(4) organizations to which the client was referred.

*§144.526. Length of Stay Guidelines.*

(a) Length of stay in treatment shall be determined by the needs of the individual client. Whenever possible, multiple levels of

care shall be used to provide a continuum of care for each individual client.

(b) The commission has adopted Texas Department of Insurance length of stay guidelines to provide a tool for monitoring service utilization. Clients may remain in a specific level of treatment for a longer or shorter period of time based on individual need.

(c) When the client is admitted, the projected length of stay (LOS) shall be documented in the client record. The initial projected length of stay shall not exceed Texas Department of Insurance (TDI) Guidelines.

(d) All facilities shall implement procedures to monitor length of stay according to TDI guidelines.

(1) The program shall conduct the first treatment plan review no later than midway through the client's projected length of stay. The review shall include a comparison of the client's status with the TDI continuing stay criteria.

(2) If the client meets the continuing stay criteria, the program shall revise the treatment plan and the estimated length of stay (not to exceed the TDI guidelines).

(3) If the client does not meet the continuing stay criteria, the program shall confirm that the client meets the discharge criteria. Based on client need, the program shall transfer the client to a lower level of care (if available) or discharge the client.

(4) The program shall conduct a treatment plan review shortly before the estimated date of discharge (or earlier, if appropriate).

(5) If the client has reached the maximum recommended length of stay but is not ready for transfer or discharge, justification for extending treatment shall be documented in the client record. The client's status shall be reviewed regularly, and the client shall be moved to a less restrictive level of care as quickly as clinically appropriate.

(e) The commission has interpreted the Texas Department of Insurance Guidelines to apply them to the commission's defined levels of service. Any revisions adopted by the Texas Department of Insurance supercede the recommended lengths of stay listed in this section.

(1) Residential Level I (Detoxification): 1-14 days for adults and adolescents.

(2) Outpatient Level I (Detoxification) 3-9 days for adults, not applicable for adolescents.

(3) Residential Level II (Intensive Residential): 14-35 days for adults and 14-60 days for adolescents.

(4) Outpatient Level II (Day Treatment): 14-35 days for adults and 14-60 days for adolescents.

(5) Residential Level III (Residential): 28-70 days for adults and 28-120 days for adolescents.

(6) Outpatient Level III (Intensive Outpatient): 30-84 days for adults and 30-84 days for adolescents.

(7) Outpatient Level IV (Outpatient): Up to 180 days for adults and adolescents.

(f) The commission has interpreted the TDI guidelines to apply them to the commission's priority populations and specialized services. Regardless of the length of stay guidelines listed in subsection (e) of this section, women with dependent children and pregnant women with substance abuse or dependence diagnosis are eligible for three months of Level II residential treatment at a specialized female service provider.

*§144.532. Core Program Requirements.*

(a) All treatment programs shall comply with applicable chemical dependency treatment facility licensure requirements for the specified level of service established in Chapter 148 of this title (relating to Facility Licensure).

(b) All programs funded by the commission shall:

(1) implement a systematic process to identify and offer appropriate referrals for family members of clients;

(2) inform clients and involved family members of family services offered directly and through other community resources; and

(3) document family participation and attempts to engage family members in services.

(c) Levels II, III, and IV treatment programs funded by the commission shall provide:

(1) family education and counseling related to the client's substance abuse;

(2) life skills training;

(3) case management;

(4) disease management;

(5) support group opportunities for adolescents and adults, including older adults; and

(6) individual and/or family aftercare. Level IV treatment can be used to satisfy this requirement if it is provided as a transitional level of care for a client transferring from a Level I, II or III treatment program.

(d) The program shall have written descriptions of all educational and didactic sessions, including curricula, outlines, and activities.

(e) Group size shall be limited to a number that allows effective interaction between the group and facilitator and between group members.

(1) Group counseling sessions are limited to a maximum of 16 clients.

(2) Group education sessions, didactic sessions, and other non-therapeutic groups are limited to a maximum of 32 clients. This limitation does not apply to seminars, outside speakers, or other events designed for a large audience.

(f) The program shall establish and demonstrate active use of cooperative agreements with available substance abuse and other mental health, health care, and social services to meet the needs of clients and family members. Agreements to coordinate services must be established in writing and renewed annually (through signature or other documented contact), and shall include:

(1) names of the organizations entering into the agreement;

(2) services or activities each organization will provide;

(3) signatures of authorized representatives; and

(4) dates of action and expiration.

(g) The program shall develop and implement a written plan of operation explaining outreach efforts, including specific strategies to reach members of the priority populations listed in §144.522 of this title (relating to Priority Populations). The commission may waive this requirement if the program demonstrates high capacity utilization and adequate engagement of the priority population.

(h) The program shall document active participation in collaborations to support community resource development.

(i) Levels II, III, and IV residential programs shall schedule planned, structured activities during evenings and weekends. These hours are in addition to those required by licensure rules. The minimum number of additional hours for Levels II, III, and IV are 10 hours for adults and 15 hours for adolescents. The program shall maintain documentation that the activities were provided, including sign-in sheets. Client participation does not need to be individually recorded in client records.

(j) All counseling sessions and other activities counted toward the required hours of service must last at least 30 minutes.

*§144.545. Family Services.*

(a) Providing services to the family of the primary client is required of all commission funded programs. Family centered services are a crucial ingredient in providing comprehensive, community-based services to children, adolescents and adults. The family service program should not duplicate existing community prevention or intervention programs that offer appropriate services. Treatment, intervention, and prevention programs are expected to collaborate to establish a coordinated array of substance abuse services for families.

(b) Family services shall be designed to identify family risk factors associated with the client's chemical dependency, improve the health and functioning of the family unit and/or to assist individual family members to support the client in achieving and maintaining a healthy, drug-free life style. All services provided to family members shall be age and developmentally appropriate. Family services shall be initiated only with knowledge and consent of an adult client, and the timing of all family services shall be clinically appropriate for the individual client.

(c) Family services may be provided to the entire family, including older adults, individual family members, and/or a subset of family members.

(d) Family services must be provided by qualified staff including LCDCs who have the documented education, training and experience needed to perform the specific family services being provided. Qualifications shall be based on industry standards and applicable licensure requirements. LCDCs may provide family education, assessment, and counseling services for issues that are directly related to substance abuse treatment and prevention within the family (including the development of healthy family behavior patterns), commensurate with the individual's training and experience. However, clients and/or family members in need of therapy on issues outside the LCDC's scope of professional practice must be referred to a qualified mental health professional such as an LMSW (Licensed Master Social Worker), LMFT (Licensed Marriage and Family Therapist), LPC (Licensed Professional Counselor) or LPA (Licensed Psychological Associate).

(e) Family services must be documented in the client record. If the client and/or family refuses family services or if the services are clinically contraindicated, supporting documentation must be included in the client record. When family services are provided, the record must include the elements listed.

(1) Family psychosocial assessment. The assessment must be conducted by a licensed and qualified professional based upon education and training.

(2) Family service plan. The counselor, client and family shall develop the plan and update it as goals are accomplished or needs change. This plan must include:

(A) abilities, strengths, preferences, problems and needs identified from the client and family assessment;

(B) goals that are realistic, outcome-oriented, measurable, time limited and stated in behavioral terms that are understandable to the client and family;

(C) specific services to be provided that enable the family to achieve the agreed upon goals; and

(D) aftercare services to be provided upon discharge, including necessary community supports.

(3) Progress notes. Progress notes must document the services provided and the family's response. The provider shall document each service contact in a signed progress note that includes:

(A) date, nature, and duration of the contact;

(B) individuals involved;

(C) content and goals addressed;

(D) progress or lack of progress toward the goals; and

(E) other relevant information.

(4) Discharge plan. Discharge planning shall begin at the time of the initial treatment plan and shall address ongoing family needs and support activities. The family shall receive a copy of the discharge plan, including:

(A) family goals or activities to sustain progress;

(B) referrals for other needed support services;

(C) aftercare services; and

(D) follow-up.

*§144.551. Performance Measure Review.*

(a) The treatment program will be held to specific performance measures as stated in the contract.

(b) The commission shall review actual performance and notify the program in writing if the program failed to achieve the expected level of performance.

(c) If the program fails to achieve the expected level of performance, the program shall respond within 30 days from the postmark date of the commission's written notification. The program must submit a written corrective action plan to the commission. The corrective action plan must include the program's method and timeframes for correcting or resolving the noted deficiencies.

(d) After receiving the response, the commission shall take at least one of the following actions.

(1) Notify the program in writing that the corrective action plan has been approved and should be implemented as outlined.

(2) Specify additional corrective actions or conditions.

(3) Impose contract restrictions or sanctions or terminate the contract.

*§144.553. Client Record Documentation.*

(a) The provider shall maintain complete documentation for all services paid for by commission funds. Documentation shall comply with licensure rules and with the standards in this section.

(b) The progress notes shall contain a record of all sessions attended by the client. The following information shall be included for each session:

(1) the date of the session and beginning and end times;

(2) the topic and/or goal of the session; and

(3) the level of the client's participation.

(c) In addition, a summary progress note shall be written at least weekly. The weekly progress note shall include a summary of observations made over the course of the week, including specific information about the client's progress toward or away from each treatment plan goal. Other significant information relating to the client's status shall also be recorded.

(d) Progress notes shall also include:

(1) documentation of the purpose, duration, justification, and approval of any approved absence from a residential program;

(2) a record of all case management, referral, linkage, and follow-up activities; and

(3) a progress note documenting the information gathered in the 60-day follow-up contact, including:

(A) the date and time of successful follow-up contact;

(B) the name of the person contacted and relationship to the client;

(C) the telephone number of the person contacted;

(D) documentation of any unsuccessful attempts at follow-up; and

(E) the signature of the person who conducted and documented the follow-up interview.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005547
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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**40 TAC §§144.512, 144.521, 144.524, 144.525, 144.531, 144.533, 144.554**

The Texas Commission on Alcohol and Drug Abuse adopts the repeal of §§144.512, 144.521, 144.524, 144.525, 144.531, 144.533, and 144.554 concerning Treatment without changes to the proposal as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5587).

These sections contain the requirements for self-evaluation, client eligibility, facility capacity management, interim services, admission, client billings, and client data systems (CDS) forms.

The repeals are proposed because some of these requirements are deleted and others are incorporated into amended or new sections.

No comments were received regarding the repeal of these sections.

The repeals are adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the repeals is the Texas Health and Safety Code, Chapter 461.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005548
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call:

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## SUBCHAPTER G. NETWORK MANAGEMENT ORGANIZATIONS (NMOS)

**40 TAC §§144.611 - 144.616**

The Texas Commission on Alcohol and Drug Abuse adopts the repeal of §§144.611-144.616 concerning Network Management Organizations (NMOs) without changes to the proposal as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5588).

These sections contain the requirements for service structure; outreach; screening, assessment, and referral; care coordination; monitoring service utilization; and service delivery planning and implementation.

The repeals are adopted because provisions specific to individual network management organizations will be included in their contracts.

The following comments were received from the Association of Substance Abuse Programs and an individual regarding the adoption of the repeal: All items pertaining to NMOs have been eliminated from the rules, so where do networks stand in the scope of things? What happens when contract stipulations conflict with the rules? Which takes precedent?

Response: Should a conflict exist, the rules take precedence over contract stipulations.

The repeals are adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the repeals is the Texas Health and Safety Code, Chapter 461.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2000.

TRD-200005549
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 349-6733

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# PART 4. TEXAS COMMISSION FOR THE BLIND

## CHAPTER 159. ADMINISTRATIVE RULES AND PROCEDURES

## SUBCHAPTER A. GENERAL INFORMATION

### 40 TAC §159.1

The Texas Commission for the Blind adopts the amendment of §159.1 in its administrative rules and procedures pertaining to complaints without changes to the text proposed in the June 2, 2000, issue of the *Texas Register* (25 TexReg 5292). The amendment is adopted to satisfy the requirement in SB 1563 of the 76th Legislature (1999) that agencies must include the method for directing complaints to the agencies on their Internet site. The agency has amended its rule accordingly.

No comments were made in response to the proposal.

The amendment is adopted under the authority of Human Resources Code, Title 5, Chapter 91, §91.018, which authorizes the Commission to promulgate rules establishing methods for directing complaints to the agency. The adoption affects Subtitle C, Title 10, Government Code, Chapter 2113.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005624
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: August 31, 2000
Proposal publication date: June 2, 2000
For further information, please call: (512) 377-0611

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### 40 TAC §159.5

The Texas Commission for the Blind adopts new §159.5 concerning conducting criminal history checks on applicants for employment without changes to the text proposed in the June 2, 2000, issue of the *Texas Register* (25 TexReg 5293). The rule is adopted to satisfy requirements that the agency adopt criteria that will be considered during reviews for the purpose of determining whether to deny a person employment based on the information contained in a criminal history record.

No comments were received on the proposal.

The rule is adopted under the authority of Human Resources Code, Title 5, Chapter 91, §91.0165, which states that the Commission by rule shall establish criteria for denying a person's employment application based on the results of a criminal history check.

The adoption affects no other statutes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005611
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: August 31, 2000
Proposal publication date: June 2, 2000
For further information, please call: (512) 377-0611

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### 40 TAC §159.6

The Texas Commission for the Blind adopts §159.6 concerning payment rates for medical services provided to consumers without changes to the text published in the June 2, 2000, issue of the *Texas Register* (25 TexReg 5294). The rule is adopted to define how rates for medical treatment and procedures are set to ensure that the State is getting the best value for services while at the same time ensuring that consumers have adequate access to assessment and treatment services. The rules also establish a method for waiving rates in cases where a particular rate would deny a person access to services and establishes the Board's schedule for periodic review of all rates.

No comments were received on the proposal.

The rule is adopted under the authority of Human Resources Code, Title 5, Chapter 91, § 91.029, which authorizes the Commission to adopt rules and standards governing the determination of rates the Commission will pay for medical services.

The adoption affects no other statutes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005625
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: August 31, 2000
Proposal publication date: June 2, 2000
For further information, please call: (512) 377-0611

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## CHAPTER 163. VOCATIONAL REHABILITATION PROGRAM

## SUBCHAPTER A. GENERAL INFORMATION

### 40 TAC §163.6

The Texas Commission for the Blind adopts new §163.6 concerning service delivery without changes to the text proposed in the June 2, 2000, issue of the *Texas Register* (25 TexReg 5294). The rule is adopted to comply with statutory requirements that the agency establish standards for the delivery of services. The section addresses oversight and monitoring of service delivery, guidelines to service delivery staff, reasonable time frames for service delivery, and sharing of financial information for planning purposes.

No comments were received on the proposal.

The rule is adopted under the authority of Human Resources Code, Title 5, Chapter 91, §91.022, which authorizes the agency to establish and maintain, by rule guidelines for the delivery of services by the Commission consistent with state and federal law

The adoption affects no other statutes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005622
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: August 31, 2000
Proposal publication date: June 2, 2000
For further information, please call: (512) 377-0611

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## CHAPTER 164. INDEPENDENT LIVING PROGRAM
## SUBCHAPTER A. GENERAL INFORMATION

**40 TAC §164.5**

The Texas Commission for the Blind adopts new §164.5 concerning service delivery without changes to the text proposed in the June 2, 2000, issue of the *Texas Register*(25 TexReg 5295). The rule is adopted to comply with statutory requirements that the agency establish standards for the delivery of services. The section addresses oversight and monitoring of service delivery, guidelines to service delivery staff, reasonable time frames for service delivery, and sharing of financial information for planning purposes.

No comments were received on the proposal.

The rule is adopted under the authority of Human Resources Code, Title 5, Chapter 91, §91.022, which authorizes the agency to establish and maintain, by rule guidelines for the delivery of services by the Commission consistent with state and federal law

The adoption affects no other statutes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005620
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: August 31, 2000
Proposal publication date: June 2, 2000
For further information, please call: (512) 377-0611

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## CHAPTER 169. BLIND AND VISUALLY IMPAIRED CHILDREN'S PROGRAM
## SUBCHAPTER A. GENERAL INFORMATION

**40 TAC §169.7**

The Texas Commission for the Blind adopts §169.7 concerning service delivery without changes to the text proposed in the June 2, 2000, issue of the *Texas Register* (25 TexReg 5296). The rule is adopted to comply with statutory requirements that the agency establish standards for the delivery of services. The section addresses oversight and monitoring of service delivery, guidelines to service delivery staff, reasonable time frames for service delivery, and sharing of financial information for planning purposes.

No comments were received on the proposal.

The rule is adopted under the authority of Human Resources Code, Title 5, Chapter 91, §91.022, which authorizes the agency to establish and maintain, by rule guidelines for the delivery of services by the Commission consistent with state and federal law

The adoption affects no other statutes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2000.

TRD-200005619
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: August 31, 2000
Proposal publication date: June 2, 2000
For further information, please call: (512) 377-0611

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# PART 9. TEXAS DEPARTMENT ON AGING

## CHAPTER 260. AREA AGENCY ON AGING ADMINISTRATIVE REQUIREMENTS

The Texas Department on Aging adopts the repeal of §260.3 relating to Access and Assistance Program, §260.5 relating to Information and Assistance Services, §260.7 relating to Case Management Services, §260.9 relating to Legal Awareness/Legal Assistance Services and §260.13 relating to Implementation of the Options for Independent Living Program and adopts new §260.3 relating to System of Access and Assistance. The repeals of §§260.3, 260.5, 260.7, 260.9 and 260.13 are adopted without changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5588) and will

not be republished. New §260.3 is adopted with changes to the proposed text and will be republished.

New §260.3 consolidates the current rules relating to Access and Assistance and creates a single comprehensive rule. In addition, the new rule provides Area Agencies on Aging with the necessary information and direction needed to provide information and coordinate services for older persons in accordance with the Older Americans Act.

New §260.3 outlines the general requirements of the Area Agency on Aging System of Access and Assistance and outlines the specific requirements for each component making up the system of access and assistance. The new rule includes sections relating to system and client outcomes, professional staffing, system integration, client eligibility, client intake, prohibited service activities, confidentiality of client records, release of client information, client contributions, conflicts of interest, reporting, Information, Referral and Assistance, Care Coordination and Benefits Counseling.

The following comments were received regarding §260.3:

Comment #1, §260.3(b)(1)(D)

North Texas Area Agency on Aging

Comment: The rule does not identify what services are to be included.

Department Response: The Department concurs. Language has been added to clarify. The text of the rule has been modified to read: (D) Access and assistance services are accessible, flexible, coordinated and designed to support an individual's highest level of functioning in the least restrictive environment.

Comment #2, §260.3(b)(1)(E)

North Texas Area Agency on Aging

Comment: The rule does not identify what services are to be included.

Department Response: The Department concurs. Language has been added to clarify. The text of the rule has been modified to read: (E) Access and assistance services are available to persons age 60 years and older regardless of income or location within the service area.

Comment #3, §260.3(e)(1)

Health and Human Services Commission

Comment: We would like to suggest the following change to the rule as currently drafted. In subsection (e), paragraph (1), add the phrase "information about community services" following the word "services" and before the word "maximizes."

Department Response: The Department concurs. Language has been added to include "information about services." The text of the rule has been modified to read: (1) The system of access and assistance shall strive to develop cooperative working relationships with local service providers to build an integrated service delivery system which ensures broad access to and information about community services, maximizes the utilization of existing resources, avoids duplication of effort and gaps in services and facilitates the ability of people who need services to easily find the most appropriate provider.

Comment #4, §260.3(n)

North Texas Area Agency on Aging

Comment: The rule identifies possible activities under Information, Referral and Assistance. The rule should state "...consists of activities such as" instead of "consists of..."

Department Response: The Department concurs. The text of the rule has been modified to read: (n) Information, Referral and Assistance. The information, referral and assistance process consists of activities such as assessing the needs of the inquirer, evaluating appropriate resources, assessing appropriate response modes, indicating organizations capable of meeting those needs, providing enough information about each organization to help inquirers make an informed choice, helping inquirers for whom services are unavailable by locating alternative resources, when necessary, actively participating in linking the inquirer to needed services and following up on referrals to ensure the service was received or provided.

Comment #5, §260.3(n)(5)(A)

Health and Human Services Commission

Comment: We would like to suggest the following change to the rule as currently drafted. In subsection (n), paragraph (5), subparagraph (A), you make reference to developing criteria for inclusion or exclusion of agencies and programs in the resource database. Such criteria have already been developed for use by the I&R Network and should be referenced as available in the rule.

Department Response: The Department generally concurs. The Department believes multiple criteria sources may exist in the network. Language has been added to clarify. The text of the rule has been modified to read: (A) Access and assistance staff shall develop criteria for the inclusion or exclusion of agencies and programs in the resource database or use criteria developed by other information, referral and assistance entities. These criteria shall be uniformly applied and published so that staff and the public will be aware of the scope and limitations of the database.

Comment #6, §260.3(n)(5)(B)

North Texas Area Agency on Aging

Comment: The statement is unclear. Please clarify.

Department Response: The Department concurs. The text of the rule has been modified to read: (B) A standardized profile shall be developed for each organization that is part of the community service delivery system.

Comment #7, §260.3(n)(5)(D)

Health and Human Services Commission

Comment: Similarly, in subparagraph (D) of the same paragraph, you reference using a standard service classification system; we would suggest explicitly referencing the AIRS/Infoline Taxonomy.

Department Response: The Department concurs AIRS/Infoline Taxonomy is the standard service classification system. Language has been added to clarify. The text of the rule has been modified to read: (D) Access and assistance staff shall use the AIRS/Infoline Taxonomy to facilitate retrieval of community resource information and to promote the reliability and consistency of information across the service region and across the state.

Comment #8, §260.3(n)(6)(C)

North Texas Area Agency on Aging

Comment: Please identify what is meant by "this" information. Language is unclear.

Department Response: The Department concurs. Language has been added to clarify. The text of the rule has been modified to read: (C) The area agency on aging shall use recorded information to identify service gaps and overlaps, assist with needs assessments, support the development of products, identify issues for staff training, facilitate the development of the resource information system.

Comment #9, §260.3(n)(7)

Office of the Attorney General

Comment: Spell out acronym (I&R).

Department Response: The suggested change has been made. The text of the rule has been modified to read: (7) Cooperation with Local Information and Referral (I&R) Providers.

Comment #10, §260.3(n)(7)(A)

Health and Human Services Commission

Comment: Finally, in paragraph (7), subparagraph (A), you discuss working with local I&R systems; we would suggest using a little stronger language that explicitly references working with the Area Information Center.

Department Response: The Department concurs. Language has been added to clarify. The text of the rule has been modified to read: (A) In communities with comprehensive and/or specialized I&R providers, including Area Information Centers, when applicable, the area agency on aging shall develop cooperative working relationships to build an integrated system of information, referral and assistance which ensures broad access to services, maximizes the utilization of existing resources, avoids duplication of effort and encourages seamless access to community resource information.

Comment #11, 260.3(n)(8)(A)

Office of the Attorney General

Comment: Insert "which are adopted by reference" after "Systems."

Department Response: The suggested change has been made. The text of the rule has been modified to read: (A) Access and assistance staff providing information, referral and assistance services shall adhere to the standards of conduct set forth by the Alliance of Information and Referral Systems which are adopted by reference.

Comment #12, §260.3(n)(8)(B)

Capital Area Agency on Aging

Comment: While I agree philosophically with having an Information, Referral and Assistance program that performs in a professional manner and follows the standards set out by the Alliance of Information and Referral Systems (AIRS), I strongly disagree with the requirement that we seek AIRS accreditation. In the current form, the accreditation process is onerous for small agencies with little administrative staff to oversee the process, which consists of two steps: consultation and on-site review. This process can take well over a year to complete.

The initial accreditation application fee is $1,000, which is nonrefundable. Additional expenses incurred during the On-Site Review process, all expenses related to travel (hotel, food, incidentals), are also the responsibility of the applying agency. These are funds that would be taken away from providing services to our clients.

I would strongly urge reconsideration of inclusion of this rule or modification of the language that would encourage area agencies to seek AIRS accreditation but not require it.

Department Response: The Department concurs. Language has been added to clarify. The text of the rule has been modified to read: (B) Area agencies on aging are encouraged to seek agency accreditation with the Alliance of Information and Referral Systems.

Comment #13, §260.3(o)(1)(B)

Office of the Attorney General

Comment: Insert "defined as by the program entitled" after "management," and "as required by" after "Living."

Department Response: The suggested change has been made. The text of the rule has been modified to read: (B) Care Management, which includes the model of care management as defined by the program entitled, Options for Independent Living, as required by in Human Resource Code Chapter 101, Subchapter C.

Comment #14, §260.3(o)(2), (o)(2)(A), (o)(2)(A)(i), (o)(2)(A)(ii), (o)(2)(A)(iii)

Office of the Attorney General

Comment: Language is unclear and should include "without an assessment" after authorization wherever listed.

Department Response: The suggested change has been made. The text of the rule has been modified to read: (2) Service Authorization. A process which identifies a need for a service(s) and uses the direct purchase of service procedures to obtain and initiate one or more services. There are two types of service authorization. They include service authorization without an assessment and service authorization requiring an assessment.

(A) Service Authorization Without an Assessment.

(i) Service authorization without an assessment may be used to procure all services except home delivered meals, homemaker, personal assistance and residential repair.

(ii) Service authorization without an assessment may be performed by any area agency on aging- approved access and assistance staff member either by phone or in person.

(iii) Service authorization without an assessment must be based on a client intake completed by area agency on aging access and assistance staff or by a qualified source.

Comment #15, §260.3(o)(2)(C)(i)

Office of the Attorney General

Comment: In this section you should identify the additional criteria identified in Human Resource Code, Chapter 101, Subchapter C, relating to Options for Independent Living for a total of five criteria. In addition, insert "only" after provided.

Department Response: The suggested change has been made. The text of the rule has been modified to read: (i) Care management services may be provided only to persons age 60 years and older, with priority given to those:

(I) who have recently suffered a major illness or health care crisis or have recently been hospitalized and need additional attention

during the recuperation period in accordance with Human Resource Code, Chapter 101, Subchapter C, relating to Options for Independent Living;

(II) who live in a rural area;

(III) who are moderately to severely impaired in activities of daily living and instrumental activities of daily living;

(IV) have insufficient caregiver support; and

(V) who are in great economic or social need, particularly low-income, minority older persons.

Comment #16, §260.3(o)(2)(C)(ii)(II)

Office of the Attorney General

Comment: Insert "Care managers shall develop" before "a written plan."

Department Response: The suggested change has been made. The text of the rule has been modified to read: (II) Care Plan. Care Managers shall develop a written plan that is based upon the client's preferences, as supported by identified priority needs and within available public/private resources. The care plan must specify the amount, frequency and duration of each service to be provided and identify the outcomes to be achieved.

Comment #17, §260.3(o)

North Texas Area Agency on Aging

Comment: Omit "for" after arrange.

Department Response: The suggested change has been made. The text of the rule has been modified to read: (o) Care Coordination. The purpose of care coordination is to assess the needs of a client and effectively plan, arrange, coordinate and follow-up on services which most appropriately meet the identified needs as mutually defined by access and assistance staff, the client, and where appropriate, a family member(s) or other caregiver.

Comment #18, §260.3(o)(2)(C)(ii)(III)

North Texas Area Agency on Aging

Comment: The rule identifies possible activities under Care Coordination. The rule should state "...with the capacity of the provider and may include but is not limited to:"

Department Response: The Department concurs. Language has been added to clarify. The text of the rule has been modified to read: (III) Service Arrangement. Care managers shall arrange for services identified in the care plan to begin at the earliest possible date, consistent with the capacity of the provider and may include, but is not limited to:

Comment #19, §260.3(o)(2)(C)(ii)(IV)

Office of the Attorney General

Comment: Insert "Care managers shall conduct monitoring and follow-up activities which include" before "verifying."

Department Response: The suggested change has been made. The text of the rule has been modified to read: (IV) Monitoring/Follow-up Activities. Care managers shall conduct monitoring and follow-up activities which include verifying service delivery, determining the extent to which services meet the needs and expectations of the client, and where necessary, advocating for improvements in service delivery. Monitoring shall include at least monthly contacts with the client and a home visit not less than every six months.

Comment #20, §260.3(o)(2)(C)(ii)(V)

North Texas Area Agency on Aging

Comment: Change "upon" to "on."

Department Response: The suggested change has been made. The text of the rule has been modified to read: (V) Reassessments shall be conducted and the care plan shall be amended as needed based on changes in client status and provider effectiveness and may be conducted by phone or in person.

Comment #21, §260.3(o)(2)(C)(ii)(VI)(-a-)

North Texas Area Agency on Aging

Comment: Language is unclear. Please clarify.

Department Response: The Department concurs. Language has been added to clarify. The text of the rule has been modified to read: (-a-) the client needs assessment, including initial referral date and date of completion of assessment; re-assessment(s), if applicable;

Comment #22, §260.3(o)(2)(C)(ii)(VIII)

Office of the Attorney General

Comment: Insert "and adopted by reference" after "Managers."

Department Response: The suggested change has been made. The text of the rule has been modified to read: (VIII) Professional Conduct. Care managers must adhere to the pledge of ethics and the standards of practice for professional geriatric care managers as set forth by the National Association of Professional Geriatric Care Managers and adopted by reference.

Comment #23, §260.3(p)(3)(E)

Office of the Attorney General

Comment: Should this say "dispute resolution?"

Department Response: The Department concurs. Language has been added to clarify. The text of the rule has been modified to read: (E) Individual Rights. Age discrimination, disability discrimination, abuse, neglect, exploitation and dispute resolution.

Comment #24, §260.3(p)(4)(D)

North Texas Area Agency on Aging

Comment: This statement is very awkward. System integration is addressed under subsection (e).

Department Response: Department concurs. Subsection (p)(4)(D) has been deleted from rule.

**40 TAC §§260.3, 260.5, 260.7, 260.9, 260.13**

The repeals are adopted under Texas Human Resources Code §101.021, which provides the Texas Department on Aging with the authority to promulgate rules governing the operation 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.

Filed with the Office of the Secretary of State on August 14, 2000.

TRD-200005674

Gary Jessee
Program Specialist
Texas Department on Aging
Effective date: September 3, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 424-6857

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**40 TAC §260.3**

The new section is adopted under Texas Human Resources Code §101.021, which provides the Texas Department on Aging with the authority to promulgate rules governing the operation of the Department.

*§260.3. System of Access and Assistance.*

(a) Purpose and Goals. This rule establishes the requirements for implementation by area agencies on aging of the system of access and assistance. Each area agency on aging shall establish and/or maintain a system of access and assistance. The program shall incorporate necessary strategies and activities to meet the following goals:

(1) to provide persons age 60 years and older efficient access to needed services;

(2) to conduct effective screening and assessment of individual needs and preferences;

(3) to efficiently and effectively target resources so that persons most in need receive assistance; and

(4) to establish a strong local role and clear identity of the area agency on aging as a source of access and assistance for eligible persons and/or their family members or other caregivers.

(b) Outcomes.

(1) The area agency on aging shall achieve the following system outcomes.

(A) The area agency on aging will conduct outreach and/or marketing to inform eligible persons and/or their family members or other caregivers of available services.

(B) The area agency on aging shall serve as a source of connection to comprehensive information on services, benefits and opportunities.

(C) The area agency on aging system of access and assistance shall meet specific local needs and take advantage of specific local strengths and resources including volunteers.

(D) Access and assistance services are accessible, flexible, coordinated and designed to support an individual's highest level of functioning in the least restrictive environment.

(E) Access and assistance services are available to persons age 60 years and older regardless of income or location within the service area.

(F) The area agency on aging system of access and assistance shall have the capability to respond to racially, culturally and ethnically diverse groups.

(2) The area agency on aging shall achieve the following client outcomes.

(A) Eligible persons and/or their family members or other caregivers served are provided sufficient information to make informed decisions about services.

(B) People in need are connected with existing benefits and services.

(C) Clients are provided an opportunity to express their level of satisfaction with access and assistance services received.

(D) Services are provided so that clients maintain hope, dignity, respect and independence.

(c) The area agency on aging system of access and assistance shall include:

(1) Information, Referral and Assistance;

(2) Benefits Counseling;

(3) Care Coordination; and

(4) Ombudsman Services.

(d) Professional Staffing. The area agency on aging shall strive to maintain an adequate level of professional access and assistance staff who possess necessary general and specialized knowledge. Where applicable, access and assistance staff must complete the training and certification requirements set forth by the Department.

(e) System Integration.

(1) The system of access and assistance shall strive to develop cooperative working relationships with local service providers to build an integrated service delivery system which ensures broad access to and information about community services, maximizes the utilization of existing resources, avoids duplication of effort and gaps in services and facilitates the ability of people who need services to easily find the most appropriate provider.

(2) Coordination with the Texas Department of Human Services. Area agency on aging access and assistance staff shall work with the local Texas Department of Human Services (TDHS) staff to ensure any person who may be eligible for TDHS services will be referred to that agency. The area agency on aging may provide services to persons who are eligible for TDHS services in the following instances:

(A) the person is on a interest list for TDHS services;

(B) the person is in need of immediate service provision and awaiting determination of eligibility for TDHS services; or

(C) the person is in need of immediate service provision and awaiting location and placement of a TDHS family care or primary home care service provider.

(f) Client Eligibility. Eligible clients include any person age 60 years and older.

(g) Client Intake. The intake process varies with the type of service indicated. For all clients, access and assistance staff will determine client needs and preferences. If clients have multiple or complex needs, access and assistance staff will gather identifying information to determine eligibility for services funded by the area agency on aging or other agencies.

(h) Prohibited Service Activities. Access and assistance staff will not perform or participate in any of the following activities:

(1) accepting gifts from a client;

(2) lending or borrowing money or articles to or from a client;

(3) transporting a client in an access and assistance staff person's automobile unless appropriate liability insurance is in force; and

(4) driving or riding in a client's automobile.

(i) Confidentiality of Client Records. Area agency on aging access and assistance staff shall comply with the requirements described in 40 TAC §270.1(d), regarding confidentiality of client records.

(j) Release of Client Information. When referrals are made, access and assistance staff must obtain and clearly document the consent of the client for release of confidential information to other service provider agency(ies). This consent may be obtained from the client verbally or in writing.

(k) Client Contributions.

(1) Area agency on aging access and assistance staff must comply with the requirements described in 40 TAC §270.1(j), regarding client contributions.

(2) Care management clients who meet the criteria identified in Human Resource Code 101, Subchapter C relating to Options for Independent Living shall be encouraged to contribute towards the cost of their care through a suggested co-payment schedule.

(l) Conflicts of Interest. The area agency on aging shall ensure that any conflicts of interest between the function of access and assistance and the provision of direct client services are disclosed to the Department. The intent is to separate the function of access and assistance from the provision of other client services.

(m) Reporting. The area agency on aging must comply with the reporting requirements identified in §260.1(c)(2) of this title (relating to programmatic reports).

(n) Information, Referral and Assistance. The information, referral and assistance process consists of activities such as assessing the needs of the inquirer, evaluating appropriate resources, assessing appropriate response modes, indicating organizations capable of meeting those needs, providing enough information about each organization to help inquirers make an informed choice, helping inquirers for whom services are unavailable by locating alternative resources, when necessary, actively participating in linking the inquirer to needed services and following up on referrals to ensure the service was received or provided.

(1) Target Population.

(A) Information, referral and assistance services shall be provided to any person age 60 years and older and/or his/her family member or other caregiver.

(B) Information, referral and assistance services shall be provided to Medicare and Medicaid beneficiaries of any age under the provisions of funds received from the Health Care Financing Administration.

(2) Access and assistance staff shall provide telephone, electronic or walk-in information, referral and assistance services in which the inquirer has one-to-one contact with an information, referral and assistance specialist.

(3) Service providers shall coordinate with emergency response organizations, such as local law enforcement agencies or other existing agencies/activities as appropriate to provide the necessary coverage.

(4) The area agency on aging telephone messaging system will provide callers with appropriate emergency phone numbers when calls are received after hours.

(5) Resource Information.

(A) Access and assistance staff shall develop criteria for the inclusion or exclusion of agencies and programs in the resource database or use criteria developed by other information, referral and assistance entities. These criteria shall be uniformly applied and published so that staff and the public will be aware of the scope and limitations of the database.

(B) A standardized profile shall be developed for each organization that is part of the community service delivery system.

(C) Information in the resource database shall be indexed and accessible in ways that support the information, referral and assistance process.

(D) Access and assistance staff shall use the AIRS/Infoline Taxonomy to facilitate retrieval of community resource information and to promote the reliability and consistency of information across the service region and across the state.

(E) The resource database shall be updated through continuous revision or at intervals sufficiently frequent to ensure accuracy of information and comprehensiveness of its content.

(6) Information, Referral and Assistance Log.

(A) Access and assistance staff shall maintain a system for collecting and organizing inquirer information that facilitates appropriate referrals and provides a basis for describing requests.

(B) A unit of service is a client's initial request for information or assistance. The area agency on aging shall have a system for recording both initial inquiries and follow-up contacts made by either the client or the agency.

(C) The area agency on aging shall use recorded information to identify service gaps and overlaps, assist with needs assessments, support the development of products, identify issues for staff training, facilitate the development of the resource information system.

(7) Cooperation with Local Information and Referral (I&R) Providers.

(A) In communities with comprehensive and/or specialized information and referral (I&R) providers, including Area Information Centers, when applicable, the area agency on aging shall develop cooperative working relationships to build an integrated system of information, referral and assistance which ensures broad access to services, maximizes the utilization of existing resources, avoids duplication of effort and encourages seamless access to community resource information.

(B) If the area agency on aging is designated by the Texas Information and Referral Network as an Area Information Center, the area agency on aging must meet the expectations of the designation.

(8) Professional Conduct.

(A) Access and assistance staff providing information, referral and assistance services shall adhere to the standards of conduct set forth by the Alliance of Information and Referral Systems which are adopted by reference.

(B) Area agencies on aging are encouraged to seek agency accreditation with the Alliance of Information and Referral Systems.

(o) Care Coordination. The purpose of care coordination is to assess the needs of a client and effectively plan, arrange, coordinate and follow-up on services which most appropriately meet the identified needs as mutually defined by access and assistance staff, the client, and where appropriate, a family member(s) or other caregiver.

(1) Program Design. The operational design of care coordination is dictated by the needs of the area agency on aging service area and includes a combination of levels of care. These levels of care coordination include:

(A) Service Authorization; and

(B) Care Management, which includes the model of care management as defined by the program entitled, Options for Independent Living, as required by in Human Resource Code Chapter 101, Subchapter C.

(2) Service Authorization. A process which identifies a need for a service(s) and uses the direct purchase of service procedures to obtain and initiate one or more services. There are two types of service authorization. They include service authorization without an assessment and service authorization requiring an assessment.

(A) Service Authorization Without an Assessment.

*(i)* Service authorization without an assessment may be used to procure all services except home delivered meals, homemaker, personal assistance and residential repair.

*(ii)* Service authorization without an assessment may be performed by any area agency on aging- approved access and assistance staff member either by phone or in person.

*(iii)* Service authorization without an assessment must be based on a client intake completed by area agency on aging access and assistance staff or by a qualified source.

(B) Service Authorization Requiring an Assessment.

*(i)* Service authorization requiring an assessment may be used to procure home delivered meals, homemaker, personal assistance and residential repair.

*(ii)* Service authorization requiring an assessment may be performed by any area agency on aging-approved access and assistance staff member either by phone or in person.

*(iii)* In addition to completing the client intake, a modified assessment must be conducted which may include:

*(I)* TDHS Form 2060;

*(II)* Nutritional Risk Assessment; or

*(III)* Service appropriate assessment.

*(iv)* Area agency on aging access and assistance staff may conduct the assessment, procure it or accept it from a qualified source.

(C) Care Management. Care management is a process that assists clients with multiple needs by developing and implementing comprehensive plans of care.

*(i)* Care management services may be provided only to persons age 60 years and older, with priority given to those:

*(I)* who have recently suffered a major illness or health care crisis or have recently been hospitalized and need additional attention during the recuperation period in accordance with Human Resource Code, Chapter 101, Subchapter C, relating to Options for Independent Living;

*(II)* who live in a rural area;

*(III)* who are moderately to severely impaired in activities of daily living and instrumental activities of daily living;

*(IV)* have insufficient caregiver support; and

*(V)* who are in great economic or social need, particularly low-income, minority older persons.

*(ii)* Care management must include the following:

*(I)* Comprehensive Client Assessment: A needs assessment may be provided, procured or accepted from a qualified source and must include the following components:

(-a-) cognitive status (if applicable);
(-b-) emotional status (if applicable);
(-c-) physical environment (requires on-site evaluation);
(-d-) social environment, including informal or family support;
(-e-) physical status;
(-f-) economic status;
(-g-) self-care capacity; and
(-h-) services presently received.

*(II)* Care Plan. Care Managers shall develop a written plan that is based upon the client's preferences, as supported by identified priority needs and within available public/private resources. The care plan must specify the amount, frequency and duration of each service to be provided and identify the outcomes to be achieved.

*(III)* Service Arrangement. Care managers shall arrange for services identified in the care plan to begin at the earliest possible date, consistent with the capacity of the provider and may include, but is not limited to:

(-a-) exploring the availability and quality of services, eligibility criteria and accessibility of a service to the client;
(-b-) making and documenting referrals to community service agencies;
(-c-) working with volunteers to provide services;
(-d-) working with family and friends of the client to help achieve specific service goals; and
(-e-) authorizing services deemed appropriate by the area agency on aging using direct purchase of service procedures.

*(IV)* Monitoring/Follow-up Activities. Care managers shall conduct monitoring and follow-up activities which include verifying service delivery, determining the extent to which services meet the needs and expectations of the client, and where necessary, advocating for improvements in service delivery. Monitoring shall include at least monthly contacts with the client and a home visit not less than every six months.

*(V)* Reassessment. Reassessments shall be conducted and the care plan shall be amended as needed based on changes in client status and provider effectiveness and may be conducted by phone or in person.

*(VI)* Client Case Records. A confidential client case record shall be maintained on each client served and shall be protected from damage, theft and unauthorized inspection and shall contain at least:

(-a-) the client needs assessment, including initial referral date and date of completion of assessment; re-assessment(s), if applicable;
(-b-) the care plan including amount, frequency and duration of each service to be provided;
(-c-) names of service providers and informal caregivers who render services to the client;
(-d-) a notation explaining any lapse in service;

(-e-) notation of hospital admission and/or discharge, with dates;

(-f-) date and signature for each notation;

(-g-) record of all care manager contacts and visits;

(-h-) record of any client complaints and action taken;

(-i-) record of termination or closure; and

(-j-) list of names and phone numbers for notification in event of an emergency.

*(VII)* Care management may not be provided by any entity with a vested interest in the delivery of services purchased by the area agency on aging without an approved waiver from the Department.

*(VIII)* Professional Conduct. Care managers must adhere to the pledge of ethics and the standards of practice for professional geriatric care managers as set forth by the National Association of Professional Geriatric Care Managers and adopted by reference.

(p) Other key components of the area agency on aging system of access and assistance include Benefits Counseling and Ombudsman Services. The requirements for the Ombudsman Program are identified in §260.11 of this title (relating to Ombudsman Services).

(1) Benefits Counseling. Benefits counseling includes both legal assistance and legal awareness services.

(A) Legal Assistance. Legal assistance includes the provision of client-specific advice, counseling and/or representation on matters involving insurance issues, public/private benefits, consumer problems and other legal issues.

(B) Legal Awareness. Legal awareness includes general education and outreach on matters involving insurance issues, public/private benefits, consumer problems and other legal issues.

(2) Targeting.

(A) Benefits counseling services shall be provided to persons age 60 years and older and/or their family members or other caregivers.

(B) Benefits counseling services shall be provided to Medicare and Medicaid beneficiaries of any age under the provisions of funds received from the Health Care Financing Administration.

(3) The area agency on aging shall focus its benefits counseling services on the following priority issue areas:

(A) Income Maintenance/Public Benefit. Food Stamps, Social Security, Social Security Disability, Supplemental Security Income, veterans benefits, pensions, railroad retirement, child support, unemployment compensation, general assistance and other income benefits.

(B) Medical Entitlements. Medicare, Medicaid, QMB/SLMB, Veterans Administration Medical, indigent health and other medical entitlements.

(C) Insurance. Medicare Supplement, HMO, long-term care policies, individual health policies, group health policies/COBRA and non-health insurance.

(D) Surrogate Decision Making. Advanced directives, durable/general powers of attorney, money management, guardianship, custody and other probate matters.

(E) Individual Rights. Age discrimination, disability discrimination, abuse, neglect, exploitation and dispute resolution.

(F) Housing. Landlord/tenant issues, repair/modification, utilities, rent subsidy, alternative housing, home equity lending/reverse mortgage, homestead tax credit, weatherization, property tax, housing relocation and general property.

(G) Institutional Care. Acute care, nursing facility care, assisted living facility care and mental health care.

(H) Consumer Issues. Bankruptcy, collections, financial counseling, bill reductions, solicitation and unfair sales practices/fraud.

(4) Benefits counseling services shall be provided according to the following:

(A) If a request for assistance involving any of the priority issue areas identified in Paragraph (3) of this subsection requires intervention by an attorney or paralegal, the client shall be referred to an appropriate provider in the area.

(B) For the purpose of handling requests or referrals which originate from sources other than the area agency on aging, the benefits counselor, in consultation with the local legal provider(s), shall develop an appropriate and timely referral process.

(C) Regardless of the referral source, it shall first be determined whether or not the client may be assisted with other resources, such as the Legal Hotline for Older Texans, pro-bono or reduced-fee providers or through services funded by the Legal Services Corporation.

(5) Relationship with Providers. The area agency on aging shall establish the following procedures when working with providers of benefits counseling and related legal services:

(A) To accomplish Paragraph (4), Subparagraph (A) of this Subsection, the area agency on aging shall coordinate with the Legal Hotline for Older Texans, Texas Young Lawyers Association, the private bar and local legal programs (such as law clinics or student law programs), Legal Services Corporation grantees, the Ombudsman Program or other programs.

(B) The area agency on aging shall utilize the Legal Hotline for Older Texans to provide legal consultation and back-up to access and assistance staff, as needed.

(C) If consultation/back-up is needed for access and assistance staff in addition to Paragraph (5), Subparagraph (B) of this Subsection, such assistance may be obtained through agreements with programs such as pro-bono or reduced-fee attorneys, law school students, local legal programs or Legal Services Corporation grantees.

(6) Education and Outreach.

(A) Education and outreach activities include the dissemination of accurate, timely and relevant information regarding any issue identified under the priority areas in paragraph (3) of this Subsection to persons identified under Paragraph (2) of this Subsection.

(B) Education and outreach may be provided to individuals or through a group setting such as forums, workshops, seminars and training sessions and other public venues, and shall be reported as legal awareness.

(7) Classification of Activities.

(A) The provision of activities described in Paragraph (6) of this Subsection to eligible persons in a one-on-one setting or by telephone where detailed information is provided but no client intake is necessary shall be reported as legal awareness.

(B) The provision of advice, counseling and/or representation on matters involving insurance issues, public/private benefits, consumer problems and other legal issues shall be reported as legal assistance if a client intake is completed.

(C) If a client has a simple request for information on any topic including those identified under Paragraph (3) of this Subsection, it shall be reported as information, referral and assistance.

(D) While education and outreach initiatives that include the dissemination of information through mass media may be budgeted as associated costs under legal awareness, the activities may not be reported as units of service.

(E) Presentations or other activities that describe the services of the area agency on aging in general including the benefits counseling program may not be reported as units of service.

(8) The area agency on aging shall collaborate and/or partner with local, state and federal entities to provide education and outreach. Such entities may include but are not limited to the Texas Department of Insurance, Texas Legal Services Center, Texas Medical Foundation, Health Care Financing Administration and the Social Security Administration.

(9) Benefits counselors shall complete the training and certification requirements as set forth in the benefits counseling certification manual issued by 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.

Filed with the Office of the Secretary of State on August 14, 2000.

TRD-200005675
Gary Jessee
Program Specialist
Texas Department on Aging
Effective date: September 3, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 424-6857

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## CHAPTER 270. GENERAL SERVICE REQUIREMENTS

The Texas Department on Aging adopts the repeal of §270.5 and adopts new §270.5 relating to Nutrition Service Requirements. The repeal is adopted without changes to the proposed text as published in the June 9, 2000, issue of the *Texas Register* (25 TexReg 5594) and will not be republished. New §270.5 is adopted with changes and will be republished.

New §270.5 provides Area Agencies on Aging and contracted meal providers with the information necessary to ensure the provision of congregate and home delivered meals meets the requirements of the Older Americans Act as well as state and local regulations. In addition, this rule is the result of a coordinated rule making process between the Texas Department on Aging and the Texas Department of Human Services.

The new rule as adopted includes sections relating to compliance with laws and regulations, compliance with USDA, match requirements, program income, facilities, record keeping, service days, meal requirements, menus, standard recipes, modified diets, meal packaging, holding times, delivery windows, training, nutrition outreach, nutrition education, monitoring, complaint handling, subcontracting and customer satisfaction surveys.

The following comments were received regarding §270.5:

Comment #1, §270.5(c), (d), (q)(3)

North Texas Area Agency on Aging

Comment: There are several places in the rule where "vendor" as well as "contract agency" should be identified.

Department Response: The Department concurs. Language has been added to clarify. The text of the rule has been modified to read: (c) Compliance with Laws and Regulations. The contract agency/vendor shall follow procedures and maintain facilities that are in compliance with all applicable federal, state and local fire, health, sanitation and safety laws and regulations. All food preparation, handling, and service activities shall comply with Texas Department of Health Division of Food and Drug, "Rules on Food Service Sanitation." The contractor must provide a copy of all required inspection results to the area agency on aging within five calendar days of receipt of the results.

(d) USDA Compliance. Contract agencies/vendors must comply with the Older Americans Act, §311, concerning surplus commodities and United States Department of Agriculture Food Distribution Regulations, 7 Code of Federal Regulations, Part 350; must ensure that only eligible meals served by Older Americans Act funded projects are reported for USDA cash/commodity reimbursement; and must ensure that cash will only be used to purchase food grown in the United States.

(3) Contract agencies/vendors may be reimbursed for up to two consecutive deliveries per month per client when a meal is delivered and the participant is not home to accept it. However, contract agencies must have written procedures in place to ensure a follow-up with participants when they are not home to receive meals.

Comment #2, §270.5(b)(2)

Texoma Area Agency on Aging

Tri-County Senior Nutrition Project, Inc.

Comment: Does TDoA currently dictate a minimum score requirement? We feel that this would be contradictory to the OAA, as we currently use their definitions for an eligible home delivered meal client, not a score from the 2060.

Department Response: The Department does not concur. The Older Americans Act defines general eligibility for home delivered meal clients. However, the Department in coordination with the Texas Department Human Services (TDHS) has established requirements which will target services to those persons most in need.

Comment #3, §270.5(b)(1), (b)(2)

Texoma Area Agency on Aging

Tri-County Senior Nutrition Project, Inc.

Comment: Subsection (b)(1) seems to contradict subsection (b)(2).

Department Response: The Department concurs. Language has been added to clarify. The text of the rule has been modified to read: (1) Eligibility criteria shall meet the provisions stated in the Older Americans Act, §307 (a)(13)(A) and (I) relating to eligibility.

Comment #4, §270.5(b)(4)

Texoma Area Agency on Aging

Tri-County Senior Nutrition Project, Inc.

Comment: Do you mean the nutritional risk assessment? If so, perhaps the proper wording should be used here.

Department Response: The Department concurs. Language has been added to clarify. The text of the rule has been modified to read: (4) All meal participants must complete a Nutritional Risk Assessment not less than once per year.

Comment #5, §270.5(c)

Texoma Area Agency on Aging

Tri-County Senior Nutrition Project, Inc.

Comment: It usually takes our nutrition provider up to 10 days to collect the information from all 20 sites. Can this be modified?

Department Response: The Department does not concur. The rule requires contract agency provider sites to provide a copy of all required inspection results to the area agency on aging within five calendar days of receipt of the results. It does not require the contract agency wait until all provider sites have their inspections completed. They should be submitted as they are completed. Five days seems reasonable for provider sites to submit the information.

Comment #6, §270.5(e)(1), (e)(2)

Combined Community Action, Inc.

Hill County Community Action Association, Inc.

Meals on Wheels Nutrition and Fellowship Project

Texas Association of Aging Programs

Comment: We strongly oppose the 10% cash match requirement in the proposed new rule. The 10% match currently required by the Older Americans Act is not a required cash match.

Department Response: The Department concurs. A workgroup was held to discuss the match requirement. Language has been added to clarify. The text of the rule has been modified to read: (e) Match. Contract agencies will provide a minimum of 10% cash or in-kind match.

Because a cash match is no longer required, the need for a waiver has become obsolete. Subsection (e)(2) has been deleted from rule.

Comment #7, §270.5(k)(1)

Office of the Attorney General

Comment: Include "meal included on the" after "each."

Department Response: The suggested change has been made. The text of the rule has been modified to read: (1) Each meal included on the menu and a list of allowable substitutions must be approved by a dietician consultant as meeting 1/3 of the recommended dietary allowance (RDA) for older adults and the Dietary Guidelines for Americans. The approval must occur and be documented prior to the date the meal is served. The dietary consultant must be a registered dietician who is:

Comment #8, §270.5(q)(3)

Texoma Area Agency on Aging

Tri-County Senior Nutrition Project, Inc.

Comment: Can the same protocols established by TDHS for Title XX meals be referenced here so providers will not have to use two different procedures?

Department Response: The Department does not concur. These rules were written in coordination with the TDHS. In the near future, TDHS nutrition standards will be modified to include the same language in subsection (q)(3).

Comment #9, §270.5(q)(4)

Office of the Attorney General

Comment: Modify "changes" to "change."

Department Response: The suggested change has been made. The text of the rule has been modified to read: (4) Contract agencies must have written procedures in place to ensure significant change in the meal participant's physical or mental condition or environment is reported, investigated and appropriate action is implemented within one business day following notification of the change.

Comment #10, §270.5(r)(2)

Office of the Attorney General

Comment: End the sentence after duties and insert "Training" before "must include."

Department Response: The suggested change has been made. The text of the rule has been modified to read: (2) The contract agency must provide all staff, including volunteers who come in contact with clients in a capacity other than just serving or delivering meals, with at least two hours of training before assuming duties. Training must include:

Comment #11, §270.5(r)(4)

Office of the Attorney General

Comment: Include "to be completed no later than" after training, remove "within" and include "after" before "assumption."

Department Response: The suggested changes have been made. The text of the rule has been modified to read: (4) The contract agency must provide the food service supervisor with at least six hours of training to be completed no later than 30 days after assumption of duties in the following food preparation areas:

Comment #12 & #13, §270.5(r)(5)

Coastal Bend Area Agency on Aging

Comment: We pulled the current state standards and compared the proposed requirement. We recommend this be changed as follows: Texas Food Protection Management certification requires 14 hours of food safety education by the state accredited FPM program and passing an examination. Recertification is required every 3 years after initial certification and entails 6 hours of education by a state accredited FPM program and passing an examination. Students passing the examinations are issued a state FPM certification card entitling them to reciprocity for FPM certification throughout all jurisdiction of the state.

Texoma Area Agency on Aging

Tri-County Senior Nutrition Project, Inc.

Comment: We do not believe the requirements in the Texas Food Establishment Rules published by the Texas Department of Health give the food service supervisor the option of being certified within one year.

Department Response: The Department generally concurs. Language has been added to clarify the requirements for the food service supervisor. The text of the rule has been modified to read: (5) The food service supervisor must comply with the Texas Department of Health rules regarding the knowledge and demonstration of a food protection manager.

By clarifying (r)(5), (r)(6) is unnecessary. Subsection (r)(6) has been deleted from rule. Subsection (r)(7) has been renumbered (r)(6).

Comment #14, §270.5(t)

Office of the Attorney General

Comment: Remove "includes" after which and insert "identifies." After "source" insert "of information presented."

Department Response: The suggested changes have been made. The text of the rule has been modified to read: (t) Nutrition Education. Nutrition Education must be provided on a monthly basis to congregate and home delivered meal clients. An annual written plan for nutrition education must be developed which identifies subject matter, presenter, materials used and source of information presented. This plan must be maintained for monitoring purposes.

Comment #15, §270.5(u)(1)

North Texas Area Agency on Aging

Comment: I believe this section should make reference to the monitoring requirements for vendors.

Department Response: The Department concurs. Language has been added to clarify. The text of the rule has been modified to read: (1) The contract agency will be monitored by the area agency on aging in accordance with 40 TAC 260.1 (d) relating to provider reviews or, for a vendor, 40 TAC 260.19 (f) relating to quality assurance.

Comment #16, §270.5(w)(1)

Office of the Attorney General

Comment: Include "by the contract agency" after maintained.

Department Response: The suggested change has been made. The text of the rule has been modified to read: (1) The contract agency must inform clients in writing of complaint procedures on or before initiation of service. Documentation of receipt of the complaint procedure by the meal participant must be maintained by the contract agency for monitoring purposes.

**40 TAC §270.5**

The repeal is adopted under Texas Human Resources Code §101.021, which provides the Texas Department on Aging with the authority to promulgate rules governing the operation 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.

Filed with the Office of the Secretary of State on August 14, 2000.

TRD-200005676

Gary Jessee
Program Specialist
Texas Department on Aging
Effective date: September 3, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 424-6857

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**40 TAC §270.5**

The new section is adopted under Texas Human Resources Code §101.021, which provides the Texas Department on Aging with the authority to promulgate rules governing the operation of the Department.

*§270.5. Nutrition Service Requirements.*

(a) Purpose. This rule establishes the requirements for providing congregate and/or home delivered nutrition services.

(b) Eligibility.

(1) Eligibility criteria shall meet the provisions stated in the Older Americans Act, §307(a)(13)(A) and (I) relating to eligibility.

(2) Home delivered meal participants, at the time of service initiation, must meet the minimum score requirement on the DHS Form 2060 as established by the Department and must have demonstrated need.

(3) Home delivered meal participants must be reassessed by the area agency on aging or the contract agency not less than once per year.

(4) All meal participants must complete a Nutritional Risk Assessment not less than once per year.

(c) Compliance with Laws and Regulations. The contract agency/vendor shall follow procedures and maintain facilities that are in compliance with all applicable federal, state and local fire, health, sanitation and safety laws and regulations. All food preparation, handling, and service activities shall comply with Texas Department of Health Division of Food and Drug, "Rules on Food Service Sanitation." The contractor must provide a copy of all required inspection results to the area agency on aging within five calendar days of receipt of the results.

(d) USDA Compliance. Contract agencies/vendors must comply with the Older Americans Act, §311, concerning surplus commodities and United States Department of Agriculture Food Distribution Regulations, 7 Code of Federal Regulations, Part 350; must ensure that only eligible meals served by Older Americans Act funded projects are reported for USDA cash/commodity reimbursement; and must ensure that cash will only be used to purchase food grown in the United States.

(e) Match. Contract agencies will provide a minimum of 10% cash or in-kind match.

(f) Program Income.

(1) Contract agencies will comply with the requirements described in 40 TAC §260.2 relating to program income.

(2) Contract agencies shall recover at a minimum the full meal cost as defined for ineligible meals for staff and guests under 60. Payment for ineligible meals shall be receipted separately from contributions and handled the same as program income. The meal cost for purposes of cost recovery from staff and guests under age 60 shall be posted in a prominent location and easily visible to guests.

(g) Facilities. Facilities must meet all requirements as described in Subsection (c) relating to compliance with applicable federal, state and local fire, health, sanitation and safety laws and regulations laws and regulations and the Older Americans Act, §307 (a)(13)(D).

(h) Records. Contract agencies must comply with the requirements described in 40 TAC §260.1 (e) relating to records.

(i) Service Days. The contract agency shall serve meals in accordance with the provisions identified in the Older Americans Act, §331 and §336 concerning program authorization.

(j) Meal Requirements. Each meal shall comply with the provisions of the Older Americans Act, §339, concerning compliance with Dietary Guidelines for Americans and recommended dietary allowances.

(k) Menus.

(1) Each meal included on the menu and a list of allowable substitutions must be approved by a dietician consultant as meeting 1/3 of the recommended dietary allowance (RDA) for older adults and the Dietary Guidelines for Americans. The approval must occur and be documented prior to the date the meal is served. The dietary consultant must be a registered dietician who is:

(A) licensed by the Texas State Board of Examiners of Dieticians; or

(B) has a baccalaureate degree with major studies in food and nutrition, dietetics or food service management.

(2) Planned menus should provide for variety in flavor, consistency, texture, temperature and variety.

(l) Standard Recipes. Food production shall be planned and managed by the contract agency through the use of standardized recipes adjusted to yield the number of servings needed, and to provide for consistency in quality and documented nutrient content of food prepared.

(m) Modified Diets.

(1) Therapeutic medical diets may deviate from the standard menu pattern as required by the participant's medical condition as documented by his/her physician.

(2) The provision of therapeutic medical diets will be determined by a nutrition/meal provider agency's ability to provide therapeutic medical diets.

(n) Frozen, chilled or shelf-stable meals shall be provided in accordance with the Department's procedures and may be used only if the following conditions exist:

(1) Sanitary and safe conditions can be provided by the contract agency and the participant for storage, thawing and reheating.

(2) Meals can be safely handled by the participant or by another available person when the participant is confused, frail or otherwise disabled and unable to safely handle the meal.

(o) Meal Packaging.

(1) Supplies and carriers will be used so that hot foods are packaged and transported separately from cold foods.

(2) Meal carriers used to transport trays or containers of hot or cold foods that may be easily damaged will be enclosed to protect such food from contamination, crushing or spillage and will be equipped with insulation and/or supplemental hot or cold sources as is necessary to maintain safe temperatures.

(3) Meal packaging must meet the following criteria:

(A) be sealed to prevent the moisture loss or spillage to the outside of the container, and to maintain a safe temperature throughout transport;

(B) be designed with compartments to separate food items for visual appeal and minimize spillage between compartments; and

(C) be easy for the participant to open.

(p) Holding Time. Holding time for hot food shall not exceed four hours from the time when the food is taken from the equipment in which cooking or reheating is completed until it is served to the participant.

(q) Delivery of Home Delivered Meals.

(1) Meals will be prepared and packaged so that delivery can be made within the preferred delivery window of 11:00 am to 1:00 pm.

(2) Meals may not be left unattended. Written procedures for meal delivery shall be developed by the contract agency which require maximum sanitation and safety for the meal participant.

(3) Contract agencies/vendors may be reimbursed for up to two consecutive deliveries per month per client when a meal is delivered and the participant is not home to accept it. However, contract agencies must have written procedures in place to ensure a follow-up with participants when they are not home to receive meals.

(4) Contract agencies must have written procedures in place to ensure significant changes in the meal participant's physical or mental condition or environment is reported, investigated and appropriate action is implemented within one business day following notification of the change.

(r) Training.

(1) The contract agency must provide at least one hour of training to all staff and volunteers who serve and/or deliver meals. Alternatively, the same information may be provided to staff and volunteers in an area agency on aging contract manager-approved written document. This information must be provided before staff assume duties and must include:

(A) client confidentiality;

(B) procedures used in handling emergency situations involving clients;

(C) sanitary methods used in serving and delivering meals;

(D) general knowledge and basic techniques of working with persons who are aged and persons who are disabled; and

(E) personal hygiene.

(2) The contract agency must provide all staff, including volunteers who come in contact with clients in a capacity other than just serving or delivering meals, with at least two hours of training before assuming duties. Training must include:

(A) client confidentiality;

(B) procedures used in handling emergency situations involving clients;

(C) sanitary methods used in serving and delivering meals;

(D) general knowledge and basic techniques of working with persons who are aged and persons who are disabled; and

(E) orientation in applicable Department, area agency on aging and contract agency forms, rules, procedures and policies.

(3) The contract agency must provide the food service supervisor with at least two hours of training before assuming duties. The training must cover the following sanitation and safety areas:

(A) personal hygiene;

(B) food storage, preparation and service;

(C) equipment cleaning before, during and after meal service;

(D) selections of proper utensils and equipment for transporting and serving foods; and

(E) automatic and manual dishwashing procedures.

(4) The contract agency must provide the food service supervisor with at least six hours of training to be completed no later than 30 days after assumption of duties in the following food preparation areas:

(A) practical procedures for food preparation, storage and serving;

(B) portion control of food in appropriate dishes;

(C) use of standardized recipes;

(D) nutritional needs and meal pattern requirements of older adults to be served; and

(E) quality control of:

*(i)* flavor;

*(ii)* consistency;

*(iii)* texture;

*(iv)* temperature; and

*(v)* appearance (including the use of garnishes).

(5) The food service supervisor must comply with the Texas Department of Health rules regarding the knowledge and demonstration of a food protection manager.

(6) Verification of all training activities and the completion thereof as described in this Subsection must be maintained by the contract agency for monitoring purposes.

(s) Nutrition Outreach. A written activity plan must be designed to identify eligible clients, with an emphasis on high risk clients within the target population as identified in the Older Americans Act §306 (a)(1). This plan must be maintained by the contract agency for monitoring purposes.

(t) Nutrition Education. Nutrition Education must be provided on a monthly basis to congregate and home delivered meal clients. An annual written plan for nutrition education must be developed which identifies subject matter, presenter, materials used and source of information presented. This plan must be maintained for monitoring purposes.

(u) Monitoring.

(1) The contract agency will be monitored by the area agency on aging in accordance with 40 TAC §260.1 (d) relating to provider reviews or, for a vendor, 40 TAC §260.19 (f) relating to quality assurance.

(2) The contract agency shall conduct in-house monitoring to document holding times, safe temperatures and quality of meals.

(v) Weather-Related Emergencies, Fire and Other Disasters.

(1) Facilities and equipment of the contract agency shall be available in emergencies and disasters according to a plan that puts high risk older participants as a priority.

(2) The contract agency shall adopt written procedures to provide for the availability of food to participants in emergencies and disasters.

(w) Complaints.

(1) The contract agency must inform clients in writing of complaint procedures on or before initiation of service. Documentation of receipt of the complaint procedure by the meal participant must be maintained by the contract agency for monitoring purposes.

(2) Contract agencies shall investigate and respond in writing to all written complaints in a timely manner.

(3) The contract agency shall maintain documentation of complaints that includes but is not limited to:

(A) the date the complaint is received by the contract agency;

(B) who the complaint is from;

(C) the nature of the complaint;

(D) the outcome of the complaint; and

(E) the date final action was taken.

(4) The contract agency shall promptly initiate investigation by local health authorities of complaints involving two or more persons with symptoms of foodborne illnesses within a similar timeframe after consuming food from the contract agency. Contract agencies shall report such complaints as required in Department procedures.

(x) Subcontracting. If the contract agency intends to subcontract meal preparation and or service delivery, the contract agency must obtain written prior approval from the area agency on aging.

(y) Customer Satisfaction Survey.

(1) The contract agency must provide meal participants the opportunity to complete a customer satisfaction survey not less than once per year.

(2) The contract agency will use the results from the completed customer satisfaction surveys to establish benchmarks and to make necessary improvements identified through the surveys.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 14, 2000.

TRD-200005677
Gary Jessee
Program Specialist
Texas Department on Aging
Effective date: September 3, 2000
Proposal publication date: June 9, 2000
For further information, please call: (512) 424-6857

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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 Department of Banking

**Title 7, Part 2**

Filed: August 15, 2000

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Texas Commission for the Blind

**Title 40, Part 4**

Filed: August 11, 2000

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Comptroller of Public Accounts

**Title 34, Part 1**

Filed: August 14, 2000

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Texas Department of Economic Development

**Title 10, Part 5**

Filed: August 14, 2000

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Finance Commission of Texas

**Title 7, Part 1**

Filed: August 15, 2000

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Interagency Council on Early Childhood Intervention

**Title 25, Part 8**

Filed: August 11, 2000

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State Securities Board

**Title 7, Part 7**

Filed: August 11, 2000

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## Agency Rule Review Plan--Revised

State Board for Educator Certification

**Title 19, Part 7**

Filed: August 10, 2000

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## Proposed Rule Review

Comptroller of Public Accounts

**Title 34, Part 1**

The Comptroller of Public Accounts proposes to review and consider for readoption, revision, or repeal all sections of Texas Administrative Code, Title 34, Part I, Chapter 3, Subchapter A (General Rules); Subchapter E (Miscellaneous Taxes Based on Gross Receipts); Subchapter G (Cigarette Tax); Subchapter H (Cigar and Tobacco Tax); Subchapter M (Inheritance Tax); Subchapter U (Public Utility Gross Receipts Tax); and Subchapter X ( Pari-mutuel Wagering Racing Revenue) and all sections under Chapter 5 (Funds Management, Fiscal Management) and Chapter 9 (Property Tax Administration) and all chapters of Title 34, Part II (Treasury Operations). This review and consideration is being conducted in accordance with Government Code, §2001.039. The review will include, at a minimum, whether the reasons for adopting or readopting the rules continue to exist.

In accordance with the above referenced §2001.039, the Comptroller will accept comments regarding whether the reason for adopting or readopting each of these rules continues to exist. The comment period will last for 30 days beginning with the publication of this notice in the *Texas Register.*

Comments pertaining to this notice to review Subchapters A, E, G, H, and U may be submitted to Bryant K. Lomax, Manager, Tax Policy Division , P.O. Box 13528, Austin, Texas 78711-3528.

Comments pertaining to this notice to review Subchapter M may be submitted to Tom Ellis, Manager, Revenue Accounting Division, P.O. Box 13528, Austin, Texas 78711-3528.

Comments pertaining to this notice to review Subchapter X may be submitted to Jimmy Archer, Manager, Criminal Investigation Division, P.O. Box 13528, Austin, Texas 78711-3528.

Comments pertaining to this notice to review all sections under Chapter 5 may be submitted to Ken Welch, Assistant Director, Fiscal Management, P.O. Box 13528, Austin, Texas 78711-3528.

Comments pertaining to this notice to review all sections under Chapter 9 may be submitted to Buddy Breivogel, Manager, Property Tax Division, P. O. Box 13528, Austin, Texas 78711-3528.

Comments pertaining to this notice to review all chapters of Title 34, Part II may be submitted to Mike Doyle, Director, Treasury Operations, P. O. Box 13528, Austin, Texas 78711-3528.

TRD-200005756
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Filed: August 15, 2000

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## Texas Department of Economic Development

**Title 10, Part 3**

The Texas Department of Economic Development (department) files this notice of intention to review Chapter 182. Small Business Assistance, Subchapter A. Business Permit Office pursuant to the Appropriations Act of 1997, House Bill 1, Article IX, §167.

As part of this review process the department is proposing the repeal of §§182.1-182.4 and the readoption of new subsections. The proposed amendments may be found in the Proposed Rules section of the *Texas Register*. As required by §167, the department will accept comments regarding whether the reason for adopting the rules continues to exist in the comments filed on the proposed new section. The comment period will last for thirty days beginning with the publication of this notice of intention to review.

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

§182.1. Definitions

§182.2. Comprehensive Application Procedure

§182.3. Comprehensive Application Request Form

§182.4. Agency Response Form

TRD-200005695
Tracye McDaniel
Deputy Executive Director
Texas Department of Economic Development
Filed: August 14, 2000

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## Texas Department of Economic Development

**Title 10, Part 5**

The Texas Department of Economic Development (department) files this notice of intention to review Chapter 172. Texas Rural Economic Development Program pursuant to the Appropriations Act of 1997, House Bill 1, Article IX, §167.

As part of this review process the department is proposing the adoption of amendments to §172.1. The proposed amendments may be found in the Proposed Rules section of the *Texas Register*. As required by §167, the department will accept comments regarding whether the reason for adopting the rules continues to exist in the comments filed in the proposed amendments section. The comment period will last for thirty days beginning with the publication of this notice of intention to review.

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

§172.1. General Provisions

§172.2. Texas Rural Economic Development Fund

§172.3. Eligibility Requirements

§172.4. Filing Requirements and Consideration of Applications

§172.5. Contents of Application

§172.6. General Terms and Conditions of Department's Financial Commitment

§172.7. Criteria for Approval of Loan Guaranty

§172.8. Loan Administration

§172.9. Loan Review Committee

§172.10. Eligible Lenders

TRD-200005699
Tracye McDaniel
Deputy Executive Director
Texas Department of Economic Development
Filed: August 14, 2000

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## Commission on State Emergency Communications

**Title 1, Part 12**

The Commission on State Emergency Communications proposes to review §251.9, concerning Guidelines for Addressing Maintenance Funds, in accordance with the Appropriations Act, Article IX, §167.

The Commission on State Emergency Communications previously proposed and adopted the review regarding this section, which was effective August 16, 1999. The agency would again like to invite public comment and feedback regarding this section.

The Commission on State Emergency Communications will accept comments for 30 days following the publication of this rule review in the *Texas Register*. Comments on the proposal may be submitted to: James D. Goerke, Executive Director, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701; phone (512) 306-6911; or fax (512) 305-6937.

The Commission on State Emergency Communications will hold a public hearing regarding §251.9, Guidelines for Addressing Maintenance Funds, on September 5, 2000, at 2:00 p.m. The public hearing will be held at 333 Guadalupe Street, Room 100, Austin, Texas. This notice of public hearing has also been published in the miscellaneous section of this issue of the *Texas Register*.

This notice is in accordance with the Appropriations Act, Article IX, §167.

TRD-200005691
James D. Goerke
Executive Director
Commission on State Emergency Communications
Filed: August 14, 2000

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## General Services Commission

**Title 1, Part 5**

The General Services Commission (the "Commission") proposes to complete the review Title 1, Texas Administrative Code, Part V, Chapter 111, Subchapter A - Administration, §§111.1 through 111.5, Subchapter B - Historically Underutilized Business Program, §§111.11 through 111.28, and Subchapter C, - Cost of Copies of Open Records, §§111.61 through 111.71. The rule review is pursuant to Texas Government Code, §2001.039 (relating to Agency Review of Existing Rules).

As part of the rule review process, the Commission proposes amendments to Title 1, Texas Administrative Code, Subchapter A - Administration, §§111.1 - Organization, 111.2 - Definitions, 111.3 - Protests/Dispute Resolution/Hearing, 111.4 - Ethical Standards and 111.5 - Complaints; and new rules §§111.6 - Petition for Adoption of Rules and 111.7 - Negotiation and Mediation of Certain Contract Disputes. The proposed rules may be found in the proposed section of this publication of the *Texas Register.* Amendments are also proposed for Subchapter C - Cost of Copies of Public Information, §111.62 concerning Definitions.

The Proposed Notice of Intent to Review Subchapter B - Historically Underutilized Business Program, was conducted and published in the November 12, 1999, issue of the *Texas Register,* 24 Tex Reg 9903, and the Notice to Adopt the Review of Subchapter B - Historically Underutilized Business Program was published in the February 11, 2000, publication of the *Texas Register*, 25 TexReg 1157. Amendments were proposed and adopted at the time of the Review of Subchapter B - Historically Underutilized Business Program for §§111.12, 111.15, 111.16, 111.17, 111.18, 111.20, 111.22 and 111.23. The adoption of these rules appeared in the December 17, 1999, of the *Texas Register,* 24 TexReg 11255 and became effective December 21, 1999.

The assessment by the Commission at this time indicates that the reason for adopting or readopting these rules continues to exist.

Comments on the review of Title 1, T.A.C., Chapter 111 - Executive Administration Division, may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Ann Dillon, General Counsel, General Services Commission, P.O. Box 13047, Austin, TX 78711-3047.

TRD-200005665
Ann Dillon
General Counsel
General Services Commission
Filed: August 11, 2000

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## Texas Natural Resource Conservation Commission

**Title 30, Part 1**

The Texas Natural Resource Conservation Commission (commission) notices the intention to review and proposes the readoption of Chapter 281, Applications Processing.

The review of Chapter 281 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 require 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 281 establishes the general policy for the processing of applications for permits, licenses, and other types of approvals. Chapter 281 also identifies those agency actions which are subject to review for consistency with the goals and policies of the Texas Coastal Management Program under the Coastal Coordination Act, Texas Natural Resources Code, Subchapters C and F, Chapter 33, and the rules of the Coastal Coordination Council contained in 31 TAC Chapters 501 and 505. The chapter identifies, addresses, and resolves consistency issues prior to final agency action to avoid the referral of agency actions to the council for review, thereby avoiding unnecessary delay in final agency action with respect to a request or application for a permit, order, or other authorization from the commission.

The commission has conducted a preliminary review of the rules under Chapter 281 and has determined that the reasons for adopting the rules continue to exist. The rules are needed to implement provisions of state law, including Health and Safety Code, §§361.064, 361.0641, 361.066, 361.068, 361.079, 361.082(c), and 361.084, regarding the industrial solid waste and municipal solid waste programs; §§361.0232, 361.0234, and 361.0871(c), regarding the prioritization process for commercial hazardous waste management facility permit applications; §§401.107, 401.108, 401.110, 401.112 - 401.114, and 401.116, regarding radiation control; Local Government Code, §375.022 and §375.025, regarding the creation of municipal management districts, and §395.080, regarding impact fees; Natural Resources Code, §§33.205, 33.2051, 33.2053, and 33.208(a), regarding consistency with the Coastal Management Program as it applies to the commission; and Texas Water Code, §5.115, regarding notice; §5.235, regarding fees; §§11.124, 11.125 - 11.129, 11.132, and 12.011, regarding water rights; §13.244 and §13.246(a), regarding certificates of convenience and necessity; §16.092, regarding local sponsor designation; §16.236, regarding levees for reclamation projects; §§18.011, 18.053, 18.054, 18.056, 18.081, 18.082, 18.084, and 18.085, regarding weather modification; §§26.027, 26.028, and 26.0281, regarding water quality; §§27.012 - 27.014 and 27.051(e), regarding underground injection control; §§36.304 - 36.306, 49.071, 49.105(c), 49.153(c), 49.181, 49.182, 49.231, 49.274, 49.321 - 49.324, 49.351, and 49.456, regarding other water district applications and petitions such as dissolution of groundwater districts, name changes, appointment of directors, revenue notes, bonds, supervision of projects, standby fees, emergency projects, dissolution of districts other then groundwater districts, fire plans, and bankruptcy; §§36.013, 36.015, 49.011, 51.027, 51.333, 54.014, 54.021, 54.030, 54.033, 55.040, 55.043, 58.027, 58.030, 59.003, 59.007, 65.014, 65.021, 66.014, and 66.019, regarding water district creations, conversions, and addition of powers. The commission invites comments on whether the reasons for the rules in Chapter 281 continue to exist.

The commission's review of Chapter 281 has also revealed the need for a number of modifications that may be needed for clarification of application processing requirements and to enhance consistency among the various programs. The commission intends to propose another rulemaking in the future. Today's proposal is limited to the review in accordance with the requirements of Texas Government Code, §2001.039; and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999.

Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin,

Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 1999-062Q-281-AD. Comments must be received by 5:00 p.m., September 11, 2000. For further information or questions concerning this proposal, please contact Debi Dyer, Policy and Regulations Division, at (512) 239-3972.

TRD-200005687
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: August 14, 2000

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## Adopted Rule Review

### 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 1, concerning General 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 with the amendments and new sections proposed in its notice of intention to review. The proposed notice of intention to review was published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 4195).

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 amendments to Title 4, §§1.3, 1.5, 1.200, 1.404, 1.700 and 1.701, new §1.201 and §1.206, and the repeal of §1.91 and §1.201. These proposals were also published in the May 5, 2000, issue of the *Texas Register*. No comments were received on the department's notice of intention to review or on the proposed amendments, new sections or repeals. These proposals are all being adopted without changes. The adoptions may be found in the adopted rule section of this publication of the *Texas Register*.

The department has determined that with the exception of sections repealed, that the reason for adopting the above-referenced amendments and new sections added to Chapter 1, and readopting without changes all remaining sections in Title 4, Part 1, Chapter 1, continues to exist.

TRD-200005576
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: August 10, 2000

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### Texas Agriculture Resources Protection Authority

**Title 4, Part 8**

The Board of Directors of the Agriculture Resources Protection Authority (ARPA Board) adopts the review of Title 4, Texas Administrative Code, Part 7, Chapter 101, concerning General Rules and Chapter 105, concerning Chlordane Regulations, pursuant to the Texas Government Code, §2001.039 and the General Appropriations Act, Article IX, §§9-10.13, 76th Legislature, 1999 (§§ 9-10.13), and readopts these chapters with the amendments proposed in its notice of intent to review. The proposed notice of intent to review was published in the June 30, 2000, issue of the *Texas Register* (25 TexReg 6391).

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 ARPA Board proposed amendments to Title 4, Part 7, §101.20 and §105.12. These proposals were also published in the June 30,2000, issue of the *Texas Register*. No comments were received on the proposals or the Board's notice of intent to review Chapters 101 and 105. The adopted amendments may be found in the adopted rule section of this issue of the *Texas Register*

The ARPA Board has determined that in addition to readopting the above-referenced sections with amendments, the reason for readopting without changes all remaining sections in Title 4, Part 7, Chapters 101 and 105 continues to exist.

TRD-200005582
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: August 10, 2000

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### Texas Commission for the Blind

**Title 40, Part 4**

The Texas Commission for the Blind has completed its review of all rules in Chapter 164 of the Texas Administrative Code in accordance with the Appropriations Act, Article IX, §9-10.13, passed by the 76th Texas Legislature (1999).

The Board received no public comments in response to its notice of the rule review filed in the January 14, 2000, issue of the *Texas Register* (25 TexReg 275).

As part of this review process, the Commission identified rules that can be deleted or improved. Concurrent with this notice, the Commission is proposing various actions that affect §§164.1, 164.2, 164.3, 164.10, 164.11, 164.13, 164.25, 164.26, 164.30, 164.31, 164.32, 164.41, 164.43, and 164.45. The Commission will receive public comments on the proposed actions to these chapter rules during the normal rule-making process and intends to adopt them at a future date.

The Commission finds that the reason for adopting all other rules in the chapter continues to exist and they are hereby readopted without changes.

TRD-200005602
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Filed: August 11, 2000

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### State Board for Educator Certification

**Title 19, Part 7**

The State Board for Educator Certification (Board or SBEC) adopts the agency's review of Board rules in 19 Texas Administrative Code Chapter 230, relating to Professional Educator Preparation and Certification, pursuant to Article IX-74, §§9-10.13, of the General Appropriations Act (H. B. 1, 76th Leg., 1999); §1.11 of S. B. 178, (76th Leg., 1999); and §2001.039 of the Texas Government Code.

The proposed rule review was published in the January 28, 2000, issue of the *Texas Register* (25 TexReg 601) and posted on the agency's website.

No public comments were received in response to the Notice of Rule Review.

The Board adopts the rule review of Chapter 230 with the following changes to that chapter:

Subchapter A. Assessment of Educators: §230.5 (amendment).

Subchapter D. Local Cooperative Teacher Education Centers: §230.91 (repeal).

Subchapter E. Centers for Professional Development and Technology: §230.121 (amendment).

Subchapter F. Professional Educator Preparation: §§230.151-230.161 (repeals).

Subchapter G. Program Requirements for Preparation of School Personnel for Initial Certificates and Endorsements: §§230.191-230.193, 230.195-230.199 (amendments).

Subchapter H. Alternative Certification of Teachers: §230.231 (repeal).

Subchapter I. Standards for Approval of Institutions Offering Graduate Education Programs for Professional Certification: §230.261-230.271 (repeal)

Subchapter J. Graduate Education Programs for Professional Certification: §§230.301 (amendment); 230.302-230.303 (repeals); and 230.305-230.308, 230.310, 230.311, 230.313-230.314, 230.316, and 230.319 (amendments).

Subchapter K. Alternative Certification of Administrators: §230.361 (repeal).

Subchapter L. Postbaccalaureate Requirements for Persons Seeking Initial Teacher Certification Through Approved Texas Colleges and Universities: §230.391 (repeal).

Subchapter M. Certification of Educators in General: §230.413 (amendment)

Subchapter N. Certificate Issuance Procedures

Subchapter O. Texas Educator Certificates Based on Certification and College Credentials from Other States or Territories of the United States

Subchapter P. Requirements for Standard Certificates and Specialized Assignments or Programs: §230.481 (amendment).

Subchapter Q. Permits: §230.506 and §230.507 (amendments).

Subchapter R. Record of Certificates: §230.531 and §230.532 (repeals).

Subchapter S. Paraprofessional Certificates: §§230.551- 230.560 (amendments).

Subchapter U. Assignment of Public School Personnel

Subchapter V. Continuing Education

Subchapter Y. Definitions

For the rest of Chapter 230, the Board's reasons for adopting the rules continue to exist.

This concludes the review of Chapter 230. Professional Educator Preparation.

TRD-200005560
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Filed: August 10, 2000

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## Texas State Board of Medical Examiners

**Title 22, Part 9**

The Texas State Board of Medical Examiners adopts the review of Chapter 167, concerning Reinstatement, pursuant to the Appropriations Act of 1997, HB 1, Article IX, §167.

The proposed review was published in the July 2, 1999, issue of the *Texas Register* (24 TexReg 5030).

The Texas State Board of Medical Examiners adopted new §§167.4-167.6 in the May 12, 2000, issue of the *Texas Register* (25 TexReg 4349).

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of chapter 167. Reinstatement.

TRD-200005578
F. M. Langley, D.V.M., M.D., J.D.
Executive Director
Texas State Board of Medical Examiners
Filed: August 10, 2000

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## Texas State Board of Pharmacy

**Title 22, Part 15**

The Texas State Board of Pharmacy adopts the review of Chapter 291 (§§291.71- 291.76), concerning Institutional Pharmacies (Class C), pursuant to the Appropriations Act, 76th Legislature, §§9-10.13. The proposed rule review was published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5950).

In conjunction with this review, the agency adopts amendments to Chapter 291 (§§291.71-291.76) published elsewhere in this issue of the *Texas Register*.

No comments were received regarding adoption of this review. The agency finds that the reason for adopting the rule continues to exist.

TRD-200005659
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: August 11, 2000

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# TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

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.

## Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were received for the following projects(s) during the period of August 2, 2000, through August 10, 2000:

FEDERAL AGENCY ACTIONS:

Applicant: Sullivan Land & Cattle Company; Location: The project is located on 99th Street adjacent to Sydnor Bayou, Galveston, Galveston County, Texas. Approximate UTM coordinates: Zone 15; 319000; Northing: 3237300. CCC Project No.: 00-0277-F1; Description of Proposed Action: The applicant proposes to construct a subdivision with a community pier. The applicant will raise the grade of his property with approximately 3,000 cubic yards of clean sand. A portion of the work will fill 0.356 acre of wetlands along the shore of Sydnor Bayou. The applicant also proposes to construct a 200-foot-long community pier with a 20-foot by 20-foot gazebo end structure. The applicant proposes to place 4.394 acres of existing wetlands on the site under a deed restriction. He will enhance wetlands along the southern edge of his property by scraping down a high marsh area to create 0.481 acre of low marsh and excavating 0.367 acre to create a small lake and a circulation channel to allow tidal circulation into the area. He will also scrape down upland to create 0.172 acre of wetlands. Type of Application: U.S.A.C.E. permit application #21995 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: Davis Petroleum Corporation; Location: The project site is located in Carancahua Bayou at its intersection with the Gulf Intracoastal Waterway in Galveston County, Texas. CCC Project No.: 00-0278-F1; Description of Proposed Action: The applicant proposes to hydraulically dredge approximately 6,000 cubic yards of material from Carancahua Bayou in order to drill up to 6 wells for the production of oil and/or gas. The dredged material will be placed in an upland area located adjacent to and northwest of the project site. Levees will be constructed around the placement area with a 16-inch drain carrying the effluent back into the slough. The applicant also requests authorization to construct at least four pile clusters with navigation aids along the Gulf Intracoastal Waterway. In addition, the applicant proposes to install well guards and a production platform if the wells are productive. Type of Application: U.S.A.C.E. permit application #22107 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Applicant: Tepco, Inc. Location: The site is in Well No. 1 in State Tract 62, West Galveston Bay, east of Greens Lake at the Gulf Intracoastal Waterway near Galveston, Galveston County, Texas. CCC Project No.: 00-0279-F1; Description of Proposed Action: The applicant proposes an extension of time to drill Well No. 1 in State Tract 62. Type of Application: U.S.A.C.E. permit application #21246(01)/001 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: Floyd and Robin Edmonds; Location: The project is located at the northern end of a man-made canal off Double Bayou at 208 Eagle Road in Oak Island, Chambers County, Texas. Approximate UTM coordinates: Zone 15; Easting: 336400; Northing: 3282100. CCC Project No.: 00-0280-F1; Description of Proposed Action: The applicant proposes to maintain 231 cubic yards of fill material previously placed into approximately 1,000 square feet of wetlands without a Department of the Army permit. The applicant placed the fill material to clean up the area and prevent the deposition of dead fish and debris behind a commercial facility. Type of Application: U.S.A.C.E. permit application #21873 under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Friede Goldman Offshore, TX, L.P.; Location: The project is located along the west bank of the Sabine River, south of the intersection of Interstate 10 and State Highway 358, Orange, Orange County, Texas. The disposal sites are located in Corps of Engineers Disposal Areas 31 (in Texas) and 37 (in Louisiana), just south and east of the project site, respectively. Approximate UTM coordinates for the project site: Zone 15; Easting: 430260; Northing: 3328850. Approximate UTM coordinates for the disposal sites: Disposal Area 31; Zone 15; Easting: 429800; Northing: 3325500. Disposal Area 37; Zone 15; Easting: 430730; Northing: 332850. CCC Project No.: 00-0281-F1; Description of Proposed Action: The applicant proposes to install 800 feet of sheet pile bulkhead behind (landward of) the existing bulkhead and dock, then remove the existing 800-foot bulkhead and

800- by 30-foot dock and hydraulically dredge an area approximately 180 feet by 800 feet along the shoreline in front of the bulkhead. The applicant proposes to maintain this dredged area to a depth of 30 feet. However, since the majority of this area is already at or near a depth of 30 feet, the currently proposed amount of material to be dredged is approximately 30,500 cubic yards. Type of Application: U.S.A.C.E. permit application #22035 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: Crown Central Petroleum Corporation; Location: The site is located at Mile 45 at Corps of Engineers Station 985+00, downstream of the Washburn Tunnel, in Pasadena, Harris County, Texas. Approximate UTM coordinates: Zone 15; Easting: 295800; Northing: 3292000. CCC Project No.: 00-0282-F1; Description of Proposed Action: The applicant proposes to modify Permit Number 10141(05) to add the Dynegy Dredge Material Placement Area for use during previously authorized dredging activities. Type of Application: U.S.A.C.E. permit application #10141(06) under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action 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-200005781
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: August 16, 2000

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## Comptroller of Public Accounts

### Notice of Request for Proposals

Notice of Request for Proposals: Pursuant to Chapter 2254, Subchapter B, Texas Government Code, and Section 403.020, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces the issuance of its Request for Proposals (RFP) from qualified, independent firms to provide consulting services to the Comptroller. The successful respondent will assist the Comptroller in conducting a management and performance review of the Fort Worth Independent School District (Fort Worth ISD). The services sought under this RFP will culminate in a final report, which shall contain findings, recommendations, implementation timelines, plans, and be a component part of the review of the Fort Worth ISD. The successful respondent will be expected to begin performance of the contract on or about October 17, 2000.

Contact: Parties interested in submitting a proposal should contact Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., ROOM G-24, Austin, Texas, 78744, telephone number: (512) 305-8673, to obtain a copy of the RFP. The Comptroller will mail copies of the RFP only to those specifically requesting a copy. The RFP was made available for pick-up at the above-referenced address on Friday, August 25, 2000, between 2 p.m. and 5 p.m., Central Zone Time (CZT), and during normal business hours thereafter. The Comptroller also made the complete RFP available electronically on the Texas Marketplace after Friday, August 25, 2000, 2 p.m. (CZT). All written inquiries, questions, and mandatory Letters of Intent to propose must be received at the above-referenced address prior to 2 p.m. (CZT) on Tuesday, September 12, 2000. Prospective respondents are encouraged to fax Letters of Intent and Questions to (512) 475-0973 to ensure timely receipt. The Letter of Intent must be addressed to Clay Harris, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFP and be signed by an official of that entity. Mandatory Letters of Intent and Questions received after this time and date will not be considered. The responses to questions and other information pertaining to this procurement will be posted on Friday, September 15, 2000, on the Texas Marketplace http://www.marketplace.state.tx.us.

Closing Date: Proposals must be received in Assistant General Counsel's Office at the address specified above (ROOM G-24) no later than 2 p.m. (CZT), on Friday, September 22, 2000. Proposals received after this time and date will not be considered.

Evaluation and Award Procedure: All proposals will be subject to evaluation by a committee based on the evaluation criteria and procedures set forth in the RFP. The Comptroller will make the final decision.

The Comptroller reserves the right to accept or reject any or all proposals submitted. The Comptroller of Public Accounts is under no legal or other obligation to execute a contract on the basis of this notice or the distribution of any RFP. The Comptroller shall pay for no costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - August 25, 2000, 2 p.m. CZT; Mandatory Letters of Intent and Questions Due - September 12, 2000, 2 p.m. CZT; Responses to Questions - September 15, 2000; Proposals Due - September 22, 2000, 2 p.m. CZT; Contract Execution - October 2, 2000, or as soon thereafter as practical; Commencement of Project Activities - October 17, 2000.

TRD-200005771
David R. Brown
Assistant General Counsel for Contracts
Comptroller of Public Accounts
Filed: August 16, 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 and §303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 08/21/00 - 08/27/00 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by §303.003 and §303.09 for the period of 08/21/00 - 08/27/00 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.

TRD-200005719
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: August 15, 2000

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## Texas Credit Union Department

Application(s) to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department and are under consideration:

An application was received from First Educators Credit Union, Houston, Texas to expand its field of membership. The proposal would permit the employees of StafUSA who are employed and paid by StafUSA from its headquarters in Conroe, Texas to be eligible for membership in the credit union.

An application was received from United Heritage Credit Union, Austin, Texas to expand its field of membership. The proposal would permit the employees of E3 Group, Inc., who are paid from Dallas, Texas to be eligible for membership in the credit union.

An application was received from United Heritage Credit Union, Austin, Texas to expand its field of membership. The proposal would permit persons that work or reside within Smith County, Texas to be eligible for membership in the credit union.

An application was received from Centex Citizens Credit Union, Mexia, Texas to expand its field of membership. The proposal would permit persons who work or reside in Limestone County and that portion of Freestone County west of I-45 and specifically Fairfield; the portion of Navarro County west of I-45 and south of Highway 22; and the portion of Hill County south of Highway 22 and east of I-35 to include Hillsboro; with the following exclusion: persons that are eligible for primary membership in existing occupational or association-based credit unions in Navarro and Hill Counties, Texas to be eligible for membership in the credit union.

An application was received from Premier America Credit Union, Chatsworth, California to expand the field of membership of its out-of-state branch offices located in Houston and Dallas, Texas. The proposal would permit the employees, retirees, annuitants, and their family members of TeleCheck Services, Inc. who are paid from Houston, Texas to be eligible for membership in the credit union.

An application was received from Premier America Credit Union, Chatsworth, California to expand the field of membership of its out-of-state branch office located in Houston, Texas. The proposal would permit the employees, retirees, annuitants, and their family members of Americaid Community Care, who work out of the Bellaire, Texas office to be eligible for membership in the credit union.

An application was received from Premier America Credit Union, Chatsworth, California to expand the field of membership of its out-of-state branch office located in Houston, Texas. The proposal would permit the employees, retirees, annuitants, and their family members of Houston West Chamber of Commerce, Houston, Texas to be eligible for membership in the credit union.

An application was received from Premier America Credit Union, Chatsworth, California to expand the field of membership of its out-of-state branch office located in Houston, Texas. The proposal would permit the employees, retirees, annuitants, and their family members of Richfield Investment Corporation, who work at or are paid from Houston, Texas to be eligible for membership in the credit union.

An application was received from Premier America Credit Union, Chatsworth, California to expand the field of membership of its out-of-state branch office located in Houston, Texas. The proposal would permit the employees, retirees, annuitants, and their family members of Westchase District, who work at or are paid from Houston, Texas to be eligible for membership in the credit union.

An application was received from Premier America Credit Union, Chatsworth, California to expand the field of membership of its out-of-state branch office located in Houston, Texas. The proposal would permit the employees, retirees, annuitants, and their family members of Surpas Resource Corporation, who work at or are paid from Houston, Texas to be eligible for membership in the credit union.

An application was received from Premier America Credit Union, Chatsworth, California to expand the field of membership of its out-of-state branch office located in Houston, Texas. The proposal would permit the employees, retirees, annuitants, and their family members of Trendsetter Staffing, who are paid from Houston, Texas to be eligible for membership in the credit union.

An application was received from Premier America Credit Union, Chatsworth, California to expand the field of membership of its out-of-state branch office located in Houston, Texas. The proposal would permit the employees, retirees, annuitants, and their family members of Roxar, Inc., who work at or are paid from Houston, Texas to be eligible for membership in the credit union.

An application was received from Premier America Credit Union, Chatsworth, California to expand the field of membership of its out-of-state branch office located in Houston, Texas. The proposal would permit the employees, retirees, annuitants, and their family members of AssembleTech, Inc., who work at or are paid from Sugar Land, Texas to be eligible for membership in the credit union.

An application was received from Premier America Credit Union, Chatsworth, California to expand the field of membership of its out-of-state branch office located in Houston, Texas. The proposal would permit the employees, retirees, annuitants, and their family members of Ruska Instrument Corporation, who work at or are paid from Houston, Texas to be eligible for membership in the credit union.

An application was received from Premier America Credit Union, Chatsworth, California to expand the field of membership of its out-of-state branch office located in Houston, Texas. The proposal would permit the employees, retirees, annuitants, and their family members of Baker Hughes INTEQ, who work at or are paid from Houston, Texas to be eligible for membership in the credit union.

An application was received from Premier America Credit Union, Chatsworth, California to expand the field of membership of its out-of-state branch office located in Houston, Texas. The proposal would permit the employees, retirees, annuitants, and their family members of Image Concepts, who work at or are paid from Stafford, Texas to be eligible for membership in the credit union.

An application was received from Premier America Credit Union, Chatsworth, California to expand the field of membership of its out-of-state branch office located in Houston, Texas. The proposal would permit the employees, retirees, annuitants, and their family members of Petroleum Geo-Services, who work at or are paid from Houston, Texas to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200005789

Harold E. Feeney
Commissioner
Credit Union Department
Filed: August 16, 2000

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC Section 91.103, the Credit Union Department provides notice of the final action taken on the following application(s):

Application(s) to Expand Field of Membership - Approved

United Heritage Credit Union, Austin, Texas - See Texas Register issued dated June 30, 2000

Denton Area Teachers Credit Union, Denton, Texas (2 Appls.) - See Texas Register issue dated June 30, 2000

Educational Employees Credit Union, Fort Worth, Texas (Amended) - Individuals who live or work in the cities of Fort Worth, Haslet, or Mansfield, Texas; excluding persons eligible for primary membership in any other credit union with a full service office in the specified geographic area on June 19, 2000, and having a total membership of less than 20,000 members at the time membership is sought unless such credit union overlaps Educational Employees Credit Union's Select Employee Groups as a result of having sought a low-income or other community field of membership expansion.

Mid-County Teachers Credit Union, Port Neches, Texas - See *Texas Register* issue dated June 30, 2000

Mesquite Credit Union, Mesquite, Texas - See *Texas Register* issue dated June 30, 2000

Gulf Employees Credit Union, Groves, Texas - See *Texas Register* issue dated June 30, 2000

Vought Heritage Credit Union, Grand Prairie, Texas - See *Texas Register* issue dated June 30, 2000

TRD-200005790
Harold E. Feeney
Commissioner
Credit Union Department
Filed: August 16, 2000

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## Texas Commission for the Deaf and Hard of Hearing

Grant Funds Available

The Texas Commission for the Deaf and Hard of Hearing (TCDHH) has $20,000 available for projects to (1) provide services to adults or children who are hard of hearing, late-deafened or oral deaf or (2) provide services that will impact on the provision of services to persons who are hard of hearing, late-deafened or oral deaf. Applicants must complete and submit the attached form to be considered for funding. Applications will be received and considered until such time as the funds are depleted. Applications will be evaluated on the basis of the selection criteria printed elsewhere in this document. Applications receiving a score of 80 or higher maybe funded on a "first-come first-serve" basis, pending availability of funds.

Project Requirements

Projects are to:

* serve persons who are hard of hearing, late-deafened or oral deaf either as direct services or to impact services provided to these groups;

* be a one-time event and not more than 1 week in duration;

* seek other funds and use TCDHH funding only as a last resort (when no one else will provide funding); and

* acknowledge Commission funding during the event, and on publications, letterhead, materials, etc (TCDHH artwork will be supplied if necessary).

Sample Projects:

Sample projects may include:

* workshops/training regarding legal rights, advocacy, communication strategies and communication access; hearing loss technology; coping strategies for improving daily living; resources and available services

* establishment of new support/education groups

* mentoring and training projects for children

* assistive device demonstrations

Projects not appropriate include:

* funding of services that are legally required by entities

* equipment purchases for individuals

Additional Information:

Preference will be given to:

* not-for-profit groups

* projects which can provide matching funds and

* projects which address the needs of the Spanish-speaking community.

Deadline for submitting proposals: Applications may be received at any time but no later than August 1, 2001.

Maximum funds available: $20,000

Maximum award amount: $4,500

Project performance period: Projects funded shall provide services before September 1, 2001.

Selection Criteria:

Applications will be evaluated based on the following:

Points

1. The extent to which the project narrative is clear and comprehensive 10

2. The extent to which the proposed cost allocations are reasonable in relation to the objectives of the project. 10

3. The extent to which the qualifications of project staff are sufficient for project. 10

4. The extent to which the project would serve unmet needs, or serve underserved or unserved areas 30

5. The extent to which the project is innovative 10

6. The extent to which the project is meeting the needs of the Hard of Hearing program 20

7. The extent to which the project can be duplicated in other areas 10

TRD-200005769

David W. Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Filed: August 16, 2000

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## Texas Education Agency

### Notice of Correction: Deadline for Receipt of Proposals in Request for Proposals Concerning Texas Permanent School Fund Investment Management Services: Domestic Small/Mid Cap Broad Style

The Texas Education Agency (TEA) published Request for Proposals (RFP) #701-00-042 concerning domestic small/mid cap broad style investment management services to be provided to the Texas Permanent School Fund in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7917). The TEA is amending the Deadline for Receipt of Proposals paragraph in the *Texas Register* Notice to read, "Proposals must be received in the Document Control Center of the Texas Education Agency by 5:00 p.m. (Central Time), Wednesday, September 6, 2000, to be considered." This correction reflects a change from the original deadline for receipt of proposals from Friday, September 8, 2000.

Further Information. For clarifying information about the RFP, contact Paul Ballard, Texas Permanent School Fund, Texas Education Agency, (512) 463-9l69.

TRD-200005777
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: August 16, 2000

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### Notice of Correction: Deadline for Receipt of Proposals in Request for Proposals Concerning Texas Permanent School Fund Investment Management Services: Domestic Small/Mid Cap Growth Style

The Texas Education Agency (TEA) published Request for Proposals (RFP) #701-00-043 concerning domestic small/mid cap growth style investment management services to be provided to the Texas Permanent School Fund in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7917). The TEA is amending the Deadline for Receipt of Proposals paragraph in the *Texas Register* Notice to read, "Proposals must be received in the Document Control Center of the Texas Education Agency by 5:00 p.m. (Central Time), Thursday, September 7, 2000, to be considered." This correction reflects a change from the original deadline for receipt of proposals from Friday, September 8, 2000.

Further Information. For clarifying information about the RFP, contact Paul Ballard, Texas Permanent School Fund, Texas Education Agency, (512) 463-9l69.

TRD-200005776
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: August 16, 2000

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### Notice of Correction: Deadline for Receipt of Proposals in Request for Proposals Concerning Texas Permanent School Fund Investment Management Services: Domestic Small/Mid Cap Value Style

The Texas Education Agency (TEA) published Request for Proposals (RFP) #701-00-044 concerning domestic small/mid cap value style investment management services to be provided to the Texas Permanent School Fund in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7918). The TEA is amending the Deadline for Receipt of Proposals paragraph in the *Texas Register* Notice to read, "Proposals must be received in the Document Control Center of the Texas Education Agency by 5:00 p.m. (Central Time), Monday, September 11, 2000, to be considered." This correction reflects a change from the original deadline for receipt of proposals from Friday, September 8, 2000

Further Information. For clarifying information about the RFP, contact Paul Ballard, Texas Permanent School Fund, Texas Education Agency, (512) 463-9l69.

TRD-200005775
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: August 16, 2000

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## Commission on State Emergency Communications

### Notice of Public Hearing

The Commission on State Emergency Communications will hold a public hearing regarding §251.9, Guidelines for Addressing Maintenance Funds, on September 5, 2000, at 2:00 p.m. The public hearing will be held at 333 Guadalupe Street, Room 100, Austin, Texas.

A notice of intent to review §251.9, concerning Guidelines for Addressing Maintenance Funds, has also been published in the rule review section of this issue of the *Texas Register*. The review is in accordance with the Appropriations Act, Article IX, §167.

The Commission on State Emergency Communications previously proposed and adopted the review regarding this section, which was effective August 16, 1999. The agency would again like to invite public comment and feedback regarding this section.

TRD-200005692
James D. Goerke
Executive Director
Commission on State Emergency Communications
Filed: August 14, 2000

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## Golden Crescent Workforce Development Board

### Public Notice

The Golden Crescent Workforce Development Board, Inc. will release it's Requests for Applications for 1) transportation; 2) non-traditional child care; 3) marketing; and 4) Rapid Response activities on August 25, 2000.

BIDDERS' CONFERENCE SCHEDULE Wednesday, August 30, 2000, @ 10:00 a.m. Transportation, Wednesday, August 30, 2000, @ 2:00 p.m. Marketing, Thursday, August 31, 2000, @ 10:00 a.m. Child Care, Thursday, August 31, 2000, @ 2:00 p.m. Rapid Response

The deadline for response for all of these procurements is 5 p.m., September 25, 2000.

A complete set of specifications may be obtained at 2710 Airline, Victoria, Texas, Phone: (361) 576-5872, Fax: (361) 573-0225, or email: sandy.heiermann@twc.state.tx.us.

TRD-200005725
Isabel Simmons
Administrative Clerk
Golden Crescent Workforce Development Board
Filed: August 15, 2000

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## Texas Health and Human Services Commission

Notice of Adopted Medicaid Provider Payment Rates

As single state agency for the state Medicaid program, the Health and Human Services Commission adopts new per diem payment rates for the nursing facilities program operated by the Texas Department of Human Services. Payment rates are adopted to be effective September 1, 2000, as follows: Rates by TILE (Texas Index for Level of Effort) class: see Table 1

| TILE | Facilities Participating in the Enhanced Direct Care Staff Rate | Facilities not Participating in the Enhanced Direct Care Staff Rate |
|---|---|---|
| 201 | $138.89 | $138.21 |
| 202 | $123.98 | $123.40 |
| 203 | $117.35 | $116.80 |
| 204 | $98.22 | $97.81 |
| 205 | $91.26 | $90.89 |
| 206 | $92.28 | $91.90 |
| 207 | $83.89 | $83.56 |
| 208 | $81.06 | $80.75 |
| 209 | $75.67 | $75.39 |
| 210 | $66.01 | $65.80 |
| 211 | $63.64 | $63.45 |
| 212 (default) | $63.64 | $63.45 |
| Supplemental Payments: | | |
| Ventilator - Continuous | $74.75 | $74.26 |
| Ventilator - Less than Continuous | $29.90 | $29.70 |
| Pediatric Tracheostomy | $44.85 | $44.56 |

Methodology and justification. The adopted rates in the chart above were determined in accordance with the rate setting methodology

at 1 Texas Administrative Code (TAC) Chapter 355, subchapter C, §355.307 (relating to Reimbursement Setting Methodology) and §355.308 (relating to Enhanced Direct Care Staff Rate). These rates were subsequently adjusted in accordance with 1 TAC 355, subchapter A, §355.101 and §355.109 (relating to Cost Determination Process).

Participating facilities requesting to staff above the minimum staffing requirements included in the rates in the above chart may receive one of the following payment rates per day in addition to the above payment rates (within available funds): see Table 2

| Minutes Associated with Rate | Rate Per Diem |
|---|---|
| 1 LVN Minute = 1.93 Aide Minutes = 0.67 RN Minutes | $0.29 |
| 2 LVN Minutes = 3.87 Aide Minutes = 1.35 RN Minutes | $0.58 |
| 3 LVN Minutes = 5.80 Aide Minutes = 2.02 RN Minutes | $0.87 |
| 4 LVN Minutes = 7.73 Aide Minutes = 2.70 RN Minutes | $1.16 |
| 5 LVN Minutes = 9.67 Aide Minutes = 3.37 RN Minutes | $1.45 |
| 6 LVN Minutes = 11.60 Aide Minutes = 4.05 RN Minutes | $1.74 |
| 7 LVN Minutes = 13.53 Aide Minutes = 4.72 RN Minutes | $2.03 |
| 8 LVN Minutes = 15.47 Aide Minutes = 5.40 RN Minutes | $2.32 |
| 9 LVN Minutes = 17.40 Aide Minutes = 6.07 RN Minutes | $2.61 |
| 10 LVN Minutes = 19.33 Aide Minutes = 6.74 RN Minutes | $2.90 |
| 11 LVN Minutes = 21.27 Aide Minutes = 7.42 RN Minutes | $3.19 |
| 12 LVN Minutes = 23.20 Aide Minutes = 8.09 RN Minutes | $3.48 |
| 13 LVN Minutes = 25.13 Aide Minutes = 8.77 RN Minutes | $3.77 |
| 14 LVN Minutes = 27.07 Aide Minutes = 9.44 RN Minutes | $4.06 |
| 15 LVN Minutes = 29.00 Aide Minutes = 10.12 RN Minutes | $4.35 |

Methodology and justification. The adopted rates in the chart above were determined in accordance with the rate setting methodology at 1 Texas Administrative Code (TAC) Chapter 355, subchapter C, §355.308 (relating to Enhanced Direct Care Staff Rate).

TRD-200005764
Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: August 15, 2000

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## Texas Department of Health

Notice of Draft Proposed 2001-2002 Texas State Health Plan Update

The Statewide Health Coordinating Council announces the availability of the Draft Proposed 2001-2002 Texas State Health Plan Update: Ensuring a Quality Health Care Workforce for Texas, for public comment from August 25, 2000 until September 15, 2000.

The plan is available for review from the Texas Department of Health, Office of Policy and Planning, Moreton Building, Room M-660, 1100 West 49th Street, Austin, Texas 78756. A meeting of the council will be held on September 21, 2000, at the Texas Department of Health, Room M-739 from 9:00 a.m. until 3:30 p.m. A public comment session will be held from 1:00 p.m. to 3:30 p.m.

Written comments on the plan may be sent to Dennis Finuf, Texas Department of Health, Office of Policy and Planning, Moreton Building, Room M-660, 1100 West 49th Street, Austin, Texas 78756; by electronic mail to Dennis.Finuf@tdh.state.tx.us; or by Fax to (512) 458-7344.

TRD-200005782
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 16, 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 CELTIC LIFE INSURANCE COMPANY to CELTIC INSURANCE COMPANY, a foreign life company. The home office is in Chicago, Illinois.

Application to change the name of MICHIGAN MUTUAL INSURANCE COMPANY to AMERISURE MUTUAL INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Farmington Hills, Michigan.

Application for admission to the State of Texas by BROKERS NATIONAL LIFE ASSURANCE COMPANY, a foreign life company. The home office is in Sherwood, Arkansas.

Application for admission to the State of Texas by MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Minneapolis, Minnesota.

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-200005778
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: August 16, 2000

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## Notice

The Commissioner of Insurance, or his designee, will consider approval of a rating manual request submitted by Kemper Insurance Companies proposing to use a rating manual different than that promulgated by the Commissioner of Insurance pursuant to TEX. INS. CODE ANN. art 5.101, 3(l). They are proposing to adopt a companion policy discount. The 7% discount provides a reduction in premium for private passenger automobile policyholders if the named insured has a homeowner's policy written through one of the Kemper Insurance companies. The discount is applicable to premiums for liability, medical payments, personal injury protection, collision and comprehensive coverages.

Copies of the filing may be obtained by contacting George Russell, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 305-7468.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101, 3(h), is made with the Senior Associate Commissioner for Property & Casualty, Mr. C.H. Mah, at the Texas Department of Insurance, MC 105-5G, P.O. Box 149104, Austin, Texas 78701, within 30 days after publication of this notice.

TRD-200005763
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: August 15, 2000

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## Notice of Applications by Small Employer Carriers to be Risk-Assuming Carriers

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 Bob McClosky Agency, Inc., a foreign third party administrator. The home office is Matawan, New Jersey.

Application for admission to Texas of American Agency System, Inc., a foreign third party administrator. The home office is Oklahoma City, Oklahoma.

Application for incorporation in Texas of Assurance Resources, Inc., (doing business under the assumed name of A.R.I.), a domestic third party administrator. The home office is Houston, Texas.

TRD-200005565
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: August 10, 2000

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## Notice of Call for Issues Related to 2000 Biennial Title Hearing

Texas Insurance Code Article 9.07(c) requires the Department of Insurance to hold a biennial hearing to consider adoption of premium rates and such other matters and subjects relative to the regulation of the business of title insurance as may be requested by any association, any title insurance company, any title insurance agent, any member of the public, or as the commissioner may determine necessary to consider. Notice of the hearing will appear in the *Texas Register* at a later date. Any association, any title insurance company, any title insurance agent, or any member of the public that would like to request that any matter or subject, other than the rates for title insurance, be considered at the biennial hearing must provide a detailed description of the matter or subject no later than September 25, 2000.

All requests should be addressed to the Office of the Chief Clerk, Mail Code 113-2A, P.O. Box 149104, Austin, Texas 78714-9104 (please refer to reference number O-0800-20-I). It is encouraged that the requests be additionally submitted in 3 1/2 inch diskette format.

TRD-200005767
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: August 15, 2000

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## Notice of Open Meeting

The Commissioner of Insurance will hold an open meeting under Docket No. 2456 on Friday, September 15, 2000, at 10:00 A.M. in Austin, Texas, to consider the manual rate filing for commercial risks and classes of risks submitted by the Texas Windstorm Insurance Association. Interested persons may present either oral or written comments on the filing of the open meeting.

Copies of the manual rate filing are available for review in the Office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701. For further information or to request copies of the filing, please contact Sylvia Gutierrez, at (512) 463-6327, (refer to Reference No. P-0800-19).

Comments on the filing must be submitted no later than September 8, 2000, to the Office of the Chief Clerk, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104.

This notification is made pursuant to the Insurance Code, Article 21.49, which requires notification to the Texas Register of the manual rate filing and exempts the proceeding from the contested case hearing procedures in Chapter 40, Texas Insurance Code (formerly Article 1.33B) and Chapter 2001, Government Code.

TRD-200005564
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: August 10, 2000

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## Texas Commission on Jail Standards

Request for Proposals

Grant

Pursuant to the Texas Government Code, Title 10, Article 2254, Subchapter B, the Commission on Jail Standards invites proposals for consulting services from qualified individuals to advise and assist TCJS in a survey of jails across the state under the terms of the Juvenile Justice and Delinquency Prevention Act, Public Law 93-415, as modified.

The individual selected will conduct analyses of records for county and municipal jails and prepare required documentation and reports to verify compliance information regarding the removal of juveniles from the facilities. The selected consultant shall report directly to Terry Julian at the Texas Commission on Jail Standards.

All work performed under this contract shall be reimbursed on an hourly basis and is expected to be completed by August 31, 2001.

Travel expenses shall be reimbursed upon state per diem rates with direct operating expenses provided by TCJS.

Detailed specifications are contained in the Consultant Proposal Request available August 25, 2000 from the Texas Commission on Jail Standards, 300 W. 15th Street, Suite 503, Austin, Texas between the hours of 8:30 a.m. and 4:30 p.m., Monday-Friday. For detailed information, contact Brandon S. Wood at (512) 463-5505.

Responses will be accepted only if actually received in writing in the Texas Commission on Jail Standards office no later than September 5, 2000, no later than 5:00 p.m., Central Daylight Time on this date. The Texas Commission on Jail Standards reserves the right to reject any or all proposals.

All proposals submitted by the deadline will be reviewed by the executive director. The executive director may request interviews with the top rated proposers. Based on proposers response, availability, experience, qualifications and demonstrated ability to work independently, the executive director will select the individual most qualified to provide services.

TRD-200005768
Jack E. Crump
Executive Director
Texas Commission on Jail Standards
Filed: August 16, 2000

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## Texas Department of Licensing and Regulation

Request for Funding for Consumer and Auctioneer Education

The Texas Department of Licensing and Regulation and the Auctioneer Education Advisory Board hereby solicits requests for funding. Requests must include education for the advancement of the auctioneer profession. The subject matter should concern universal standards of auctioneering, including the subjects of ethics, deceptive trade practice act, laws and administrative rules concerning taxes to be collected and paid to the State of Texas by auctioneers, and all other state and federal statutes that apply to the auction business in the State of Texas, including the Texas Auctioneer Law. Requests for funding must encompass all four of the above subject areas, target delivery to all areas of the state, and seek to attract both full time and part time licensed auctioneers.

To receive copies of the Request for Funding contact Caroline Jackson at (512) 463-7348 or electronically at caroline.jackson@license.state.tx.us. Requests for Funding must be received by September 29, 2000, at 5:00 p.m.

Requests for Funding will be evaluated for completeness, content, and usefulness. More than one request may be recommended for funding. Requests may be made for clarification, but no changes to requests will be accepted. A recommendation will be made by the Auctioneer Education Advisory Board to the Commissioner of Licensing and Regulation at a public meeting to be scheduled and announced at a later date.

The Department reserves the right to accept or reject any or all requests submitted. The Department is under no legal or other obligation to execute a contract on the basis of this Request for Funding. The Request for Funding does not commit the Department to pay for any costs incurred prior to the approval of a request.

TRD-200005706
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: August 14, 2000

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## Texas Natural Resource Conservation Commission

Air Quality Standard Permit for Concrete Batch Plants

EXECUTIVE SUMMARY

The Texas Natural Resource Conservation Commission (TNRCC or commission) is issuing a new standard permit for concrete batch plants. The new air quality standard permit will be effective September 1, 2000, and is applicable to permanent, temporary, and specialty concrete batch plants. The air quality standard permit is based on statutory requirements of the Texas Health and Safety Code (THSC), Chapter 382 and a comprehensive evaluation of air quality emissions and potential impacts. This air quality standard permit for concrete batch plants will also implement portions of Senate Bill (SB) 1298 from the 76th Session of the Texas Legislature, 1999.

OVERVIEW OF STANDARD PERMIT

The commission is issuing an air quality standard permit for concrete batch plants under 30 TAC Chapter 116, Subchapter F, Control of Air Pollution by Permits for New Construction or Modification, based on the results of the extensive protectiveness review. The commission previously authorized the majority of concrete batch plants under the conditions of 30 TAC Chapter 106. This standard permit would combine requirements for new or relocated concrete batch plants currently in §106.201, Permanent and Temporary Concrete Batch Plants; §106.202, Temporary Concrete Batch Plants; and §106.203, Specialty Batch Plants, into one standard permit issued under §116.602. This consolidation of requirements is consistent with the desire of the commission to simplify its regulatory structure and recognize the potential significance of some sources by developing standard permits

to replace existing permits by rule that provide qualification criteria that are lengthy, complex, widely used, and potentially contentious. The general public often expresses concern with concrete batch plant registration applications. These objections often include: traffic safety; noise; appearance; and property values. These concerns are beyond the commission's jurisdiction to address. The general public also expresses concerns over nuisance dust, ambient air quality, and potential negative health impacts and are the focus of the concrete batch plant protectiveness review and the proposed conditions of the standard permit. In accordance with TCAA, §382.058, some concrete batch plant registrations must undergo public notification and provide opportunity for a contested case hearing. Any contested case hearing will be limited to whether or not a plant meets the conditions of the standard permit. Issues such as noises, traffic, aesthetics, and property values will be outside the scope of the hearing.

The standard permit is designed to allow for registration of a typical concrete batch plant. However, it is not intended to provide an authorization mechanism for all possible plant configurations and production rates. Those facilities which cannot meet the standard permit conditions may apply for a case- by-case review air quality permit under §116.111.

In addition to combining the requirements in the permits by rule, the commission is adding requirements to control dust based on current best available control technology (BACT) as required by §116.602(c) and distance limitations or setbacks based on emission estimations, computer dispersion modeling, impacts analysis, and plant observations performed to verify the protectiveness of the standard permit. The detailed technical evaluations and modeling results are available from the Air Permits Division (APD) upon request. The commission has concluded extensive research which shows that the standard permit for concrete batch plants is protective of the public health and welfare and that facilities which operate under the conditions specified will comply with TNRCC rules and regulations.

PUBLIC MEETING AND COMMENTERS

In accordance with §116.603, the TNRCC published notice of the proposed standard permit in the *Texas Register* and newspapers of the largest general circulation in the following metropolitan areas: Amarillo; Austin; Corpus Christi; Dallas; El Paso; Houston; Lower Rio Grande Valley; Lubbock; Permian Basin; San Antonio; and Tyler. The date for these publications was April 28, 2000, and listed a public comment period from April 28th to May 31st, 2000.

COMMENTS REQUESTED

The commission solicited, in particular, comments regarding a fee for each standard permit registration. Several commenters raised serious concerns over a proposed fee being imposed for each permit registration request, and the standard permit was revised based on these comments.

COMMENTS

A public meeting on the proposal was held May 16, 2000, in Room 254S of the TNRCC Building E, located at 12100 Park 35 Circle, Austin. Oral comments were provided by several individuals and trade associations, including: Association of General Contractors or Texas (AGC); Site Concrete (Site); Pioneer Concrete (Pioneer); and Westward Environmental (Westward).

The period for written comments on the proposed standard permit closed at 5:00 pm, May 31, 2000.

Written comments were submitted by the following: Chairman, Residents for a Better Community; Association of General Contractors of Texas (AGC); Texas Aggregates and Concrete Association (TACA); Sundt Construction, Inc. (Sundt); Environmental Engineering Department of TXI Operations, LP (TXI); Safety & Environmental Manager, Transit Mix (Transit Mix); Westward Environmental, Inc. (Westward); CSR Pipe & Concrete Products (CSR); and Pioneer South Central, Inc. (Pioneer).

ANALYSIS OF COMMENTS

Notice of Standard Permit

Ms. Scheinder raised concerns over the sufficiency of notice regarding the new standard permit.

This standard permit has followed the THSC, §382.05195 and §116.602 requirements for notice of the proposed standard permit, including publication in the *Texas Register* and newspapers across the state in areas which may be affected by this standard permit. The TNRCC provided outreach to several interested persons, provided a comment period of over 30 days, and held the required public meeting regarding this standard permit. All statutory and regulatory requirements for notification have been met by this standard permit.

Applicability of Standard Permit

Ms. Scheinder commented that the new standard permit requirements should not be retroactive to pending registrations.

The TNRCC appreciates this comment and has clearly stated that the standard permit for concrete batch plants is effective only for new registrations received after its effective date of September 1, 2000, and will not affect any other registrations received prior to that date.

Consistency of Enforcement

Transit Mix believes that TNRCC inspections might not always be as focused on the "smaller" concrete companies with two or three plants. Transit Mix believes that equal attention should be paid to this group. Small businesses, which are never inspected, not only have a greater potential to pollute the environment, but, also have a financial advantage. Small businesses can add up to a large number of concrete plants in the state.

TACA expressed concern that TNRCC enforcement activity "has not been meted out in equal shares." They continue to state that it is imperative for the success of the standard permit and the public image of the concrete industry that violators of these requirements be processed with equal enforcement standards. In the past there have been a number of ready mix plants which have begun construction and operation without even applying for the former Standard Exemption No. 71 (currently §106.201, Permit by Rule). Even though this was an egregious violation of TNRCC rules, these companies were allowed to remain operational as long as they begin application processing. The excuse cited by the TNRCC for not shutting down these operations was that they were traditionally small operators who could not afford a stoppage in business. TACA strongly disagrees with this rationale and believes that a violator of this kind should be met with a balanced, yet strict, enforcement action.

Pioneer also commented that every plant operator should be treated equally during enforcement considerations and raised concerns over the existing enforcement fine schedule.

The TNRCC is concerned about equal enforcement of the rules across not only a specific regulated entity group, like concrete batch plants, but against all sources subject to its jurisdiction. The agency has an adopted penalty policy that further describes the statutory-based factors that are taken into consideration in enforcement proceedings, and that policy is followed. Each enforcement action has its own unique circumstances, and the ultimate outcome of a given enforcement action is a combination of the circumstances, source response and state

law. It is the goal and objective of the TNRCC to implement a fair and equitable application of these laws. Although the commission appreciates these comments, it is important to note that these issues are beyond the scope of the standard permit issuance.

General Conditions

TACA appreciates the efforts of the TNRCC staff in developing a comprehensive package for concrete batch plants and other related facilities. TACA and its members realize that it is time to promote responsible environmental standards relating to those facilities associated with the production of ready mix concrete. They recognize that a few bad operators in the construction materials arena have done undue damage to the reputation of its members and the ready mix industry. They stated that they stand ready to continue working with the TNRCC in establishing a standard permit that "raises the bar" of environmental standards.

Pioneer noted that the public image of ready mix and portable batch plants is not always the best and, in some cases, sites are not maintained, resulting in "quite a bit of dust." Pioneer and their associations throughout the state commended the TNRCC for raising the bar to some degree with this process and are willing to provide any additional information to assist in these goals. In addition, the written comments by Pioneer noted appreciation for the TNRCC efforts in developing a comprehensive proposal and the belief that the end product of the cooperative efforts would be a standard permit that is protective of public health and safety, as well as creating a better public image for the concrete industry as a whole. Pioneer expressed support of heightened environmental standards relating to this highly contentious industry.

The TNRCC appreciates the recognition from the commenters. The commission agrees with these comments and is committed to ensuring that all facilities protect the public health and welfare as well as establishing air emissions control criteria which consists of BACT. This standard permit has been designed to address both of these goals.

Requirement for Registration Fees

AGC (oral and written comments), Site (oral), and Pioneer (oral) raised concerns over the proposed fee of the standard permit to require each application to submit $450. According to the commenters, this fee requirement would be extremely burdensome on the regulated community, and would place an economic hardship on small businesses. In addition, the fee would be passed on to public entities and private citizens in increased prices for concrete products. In some instances, portable plants may move as often as every two weeks, creating a significant burden on the company, and subsequently, their customers, as well as potentially creating an unfair advantage to permanent facilities that would only pay a one-time fee. In their oral comments, the AGC pointed out that in the past, different state agencies have refrained from taxing or creating costs when an individual is working for another state agency (Texas Department of Transportation (TxDOT)) and that a change in this practice would be inconsistent with the goals of the state of Texas. The AGC suggested that an annual fee payment would be an acceptable alternative.

TACA commented that the proposed $450 standard permit fee should not be "too onerous" for ready mix companies operating in Texas. Opponents to this permit fee need to understand that this fee should be associated with operating a facility in a responsible manner. TACA and its members understand that small businesses may voice their concerns relating to the amount of the fee, however, TACA represents a number of smaller concrete companies operating throughout Texas. To date, each of these smaller producers has supported the $450 standard permit fee as necessary to ensure a higher overall standard for the concrete industry.

Pioneer stated that the proposed $450 standard permit fee should not be "too onerous" for ready mix companies operating in Texas and that complainants should not be bidding jobs with low profit margins or without enough capital to run a property operated facility.

After careful consideration of these comments, the commission is issuing the standard permit with a $450 fee for each registration which must complete public notice. Even though the commission does not currently charge a fee for the review of concrete batch plant permit by rule registrations under Chapter 106, the public notification and the resulting comments and hearing requests require a great deal of agency resources. This proposal requires public notifications which are expected to result in a similar amount of staff time spent reviewing and responding to comments and hearings requests, and the fee is intended to recover staff expenses. The fee requirement has no other justification other than recouping resource expenses. Finally, the requirement as issued would exclude entities who are working exclusively on public works projects from having to pay a fee each time they relocate.

Registration Review Times and Approvals

Site verbally discussed concerns over the registration and review process by the TNRCC with regard to the amount of information and details required as well as the amount of time a standard permit registration review process might take. Any review process which needed more information or took longer to review than the current permit by rule process would have a significant negative impact on the responsiveness of the industry and product availability.

AGC (oral and written comments) discussed the history of development for the concrete batch plant exemption from permitting and their involvement in balancing the need to minimize the public exposure to nuisance dust and ensuring that public works projects could occur in a timely manner and that portable concrete batch plants not be impeded in their movements around the state. The AGC stressed that, due to timing of public works projects, the industry needs certainty in knowing that a plant can be located at a particular site without the threat of public notification or contested case hearing to ensure an accurate bid on the contract with the public entity. This is especially important considering the millions of dollars in bids which have already been let, but facilities have not yet registered or constructed. There was concern raised that the standard permit process would jeopardize this level of certainty, decrease the flexibility to move the plants as often as possible, and potentially increase time and cost to the industry for these types of contracts. AGC also raised concerns over the scope of standard permit reviews as compared to the previous level of review for standard exemptions/permits by rule, particularly with respect to review times and flexibility of issues.

Westward commented that, assuming public notice requirements remain, for unopposed standard permit applications, the TNRCC should be required to comply with the 45-day time period in §116.614(b) and public notice requirements (newspaper text and signs) could be standardized to facilitate this process; and for contested applications the total time, including contested case hearings, should be limited to a maximum of 180 days.

Pioneer recommended that the 45-day review period of §116.116(b) should apply to all CBP standard permit registrations which complete the public notice comment period uncontested.

The commission agrees with the comments with regard to the need for certainty of application contents and review time expectations. The standard permit registration process should be considered as very similar to the current permit by rule review and will not include subjective case-by-case reviews of BACT or impacts, thus ensuring efficient processing of these applications and establishing a level of certainty with regard to the required information to be submitted by applicants. In

addition, to further clarify understanding, the commission has emphasized the requirements for start of construction (§116.115(2)(A)). Finally, the commission has committed to a 45-day review period for all concrete batch plant standard permit registrations without public notice. However, due to the application-specific nature of the public participation statutes and rules under 30 TAC Chapters 39, 50, 55 and 80, those applications which are subject to public notice cannot be guaranteed to be completed in short periods of time. The TNRCC rules establish notice requirements for applicants and these rules allow applicants up to 70 days (30 days to publish under THSC, §382.056(a), 15-day comment period under §55.152, 30 days to submit confirmation of proper newspaper notice, and 10 days to verify the file availability and sign posting from the end of the comment period) from the day the TNRCC declares the application administratively complete. If notice results in comments or hearing requests, the entire public participation process must be completed and may take several months to complete. The commission is committed to expediting these reviews and completing these projects in the shortest time possible and will continue to work on process streamlining as the standard permit is implemented. Therefore the standard permit time lines are separated into two categories, that of which are with and without public notice. When an application is not subject to public notice, the TNRCC is committed to reviewing these registrations within the time periods specified in §116.611(b), however, no time limits are specified for those applications which must undergo notice requirements. In any case, written approval must be obtained prior to beginning construction.

Record keeping Requirements

Pioneer commented (verbally and in writing) that the production record requirements were unclear as to how records should be kept. In particular, the proposal was unclear as to where the records should be made available (on-site or at a central company location) and for what period of time (hourly, daily, monthly, etc.). The commenter proposed that the TNRCC consider production records to be maintained on a monthly basis for two-year period.

Westward recommended that the standard permit be changed to require records on an annual basis in accordance with one of the following periods: 1.) to correspond with the operating year used by the operation; 2.) by the calendar year; or 3.) by the TNRCC emissions inspection year. The commenter noted that a 24-month rolling production period does not mirror operating practices in the real world, not the TNRCC's operating nor budgeting cycle. If the 24-month rolling calendar does not serve a purpose which protects human health and safety or protection of the environment, then it should not be required.

TACA commented that the language regarding recordkeeping is slightly convoluted and confusing to operators. TACA questions if these records are to be kept on an hourly basis for a rolling 24-month period, hourly, or month. TACA supports production records being kept on site on a monthly basis for a 24-month period.

TXI commented that the specifics for maintenance of on-site production records need to be clarified. It is unclear whether the hourly average is calculated according to the hours of operation and production for that day or on a rolling 60-minute basis for the duration of daily operation. In order to ensure consistency in records inspections and for operators to determine compliance, a clearer understanding is necessary. Additionally, more specific language is needed regarding when these records must be complied, such as daily or monthly.

The commission agrees that the recordkeeping requirements should specifically identify the agency's expectations for operators to demonstrate compliance. Facilities must be able to keep records which confirm compliance with the standard permit conditions, as required by §116.615(8), and must be retained for at least two years following the date that the information is obtained. Since hourly production limits are a major component of the concrete batch plant standard permit, the standard permit records kept on site must demonstrate continuous compliance with these limitations. To demonstrate compliance with standard permit representations (§116.615(2)), the commission has clarified that production records be compiled on an hourly basis. These records should be kept for each clock hour, however, if the plant is equipped with computerized production records, permit holders may present information on a rolling 60-minute period. In addition, these records should be maintained on site for a rolling 24-month period or the occupation of a particular site, whichever is less.

Public Notification

Westward commented that the TNRCC should not require public notification and opportunity for a contested case proceeding for standard permits as THSC, Chapter 382 requires notice for concrete batch plant "exemptions" and does not explicitly require notice for "standard permits." The commenter goes onto say that it may be argued that the standard permit authorization replaces the exemptions/permits-by- rule registration and that the "assumed legislative intent" is to continue this public notice requirement, there is no statutory or regulatory basis for this position. The transfer of this requirement then becomes one of personal preference rather than strict application of law.

The commission disagrees with the comment and believes that the rules of statutory construction require that all concrete batch plants must meet the notice requirements of THSC, §382.056. Senate Bill 766 amended THSC, §382.058(a) - (c), which specifically states that any concrete plant under a standard permit must comply with THSC §382.056 notice requirements and, therefore, paragraph (2) is required by law.

Filter and Conveying Systems Emissions Capture and Control Device Design and Performance Standards

Pioneer (verbally and in writing) and Westward (verbally) commented that the EPA Test Method nine ( TM 9) and a 5% opacity limitation would be more appropriate than the methods proposed for determining compliance and ensuring control of dust emissions. The proposed visible emission limit is not based on technical or scientific criteria, does not require a trained or certified visible emissions evaluator, and could result in false readings of non-compliance. Further, Pioneer stated a strong belief that a 5% opacity using EPA TM 9 would be more appropriate and realistic.

In lieu of establishing a TM 9, 5% limit, Westward verbally suggested that the ten second period of time be consecutive and not cumulative over the five minute period as a properly operating abatement system may have ten one-second incidents of visible emissions and that a cumulative reading would give flawed information on the proper performance status of the equipment and not be representative of an actual air emission concern. In written comments, Westward proposed the following alternatives: 1.) As confirmed by a certified visible emissions evaluator with delegation from the TNRCC executive director, the visible emissions from a control device shall not result in any single reading of visible emissions for ten consecutive seconds or more in a five minute observation period; or 2.) Emissions from a control device shall be limited to 5% opacity which shall be determined using TM 9 by a certified visible emissions evaluator with delegation from the TNRCC executive director.

TACA comments that the visible emission requirements for filter systems, mixer loading, conveying systems, and batch truck loading control exhausts are extremely cumbersome and not based on scientific data. A properly operated plant would be extremely fortunate to comply with no visible emissions over the cumulative ten seconds of a five minute period. TACA strongly supports a 5% opacity standard based

on EPA TM 9. This method is more widely accepted due to its scientific longevity and is better suited for visible emissions testing.

The TNRCC concurs with the comments that the compliance method specified in the standard permit should be based on an established scientific method. In addition, the TNRCC's goal is to require a method which is feasible for plant operators to use for compliance confirmations. After diligent research and consideration, and in response to the comments, the TNRCC has modified the standard permit to require EPA TM 22 as the compliance determination method in the standard permit. This method does not require annual re-certification, as with EPA TM 9, but only initial training or independent study of available reference materials which is easily achievable by plant operators. The standard permit limits visible emissions of up to 30 seconds in any six minute period for the performance criteria using this EPA TM. Based on engineering judgement and wide experience with these types of facilities, the TNRCC believes that the 30 second period should allow for normal equipment operation, but ensure proper abatement performance. While the original proposal allowed visible emissions for only ten seconds out of any five minute period, which is 3.33% of operation time, the issued standard permit allows visible emissions for 8.33% of the time, a more reasonable and flexible limitation. Finally, the TNRCC has not required compliance determinations to be performed by a delegated representative of the TNRCC executive director as both the THSC, Chapter 382, Subchapter E, Authority of Local Governments, and the Texas Water Code, Chapter 7, Subchapter H, Suits by Others provide for local governments to enter properties and enforce air quality standards and, therefore, enforcement proceedings cannot be limited as requested.

Westward submitted written comments concerning the requirement to provide lighting of abatement system exhausts during early morning or night operations. The commenter states that this requirement would create a unique set of problems, including the following: 1.) most pollution control device exhausts are elevated above the control device and the plant and lighting of these areas will create illumination problems; 2.) these lights would become a nuisance to neighbors and, while light pollution is not under the purview of the TNRCC, it would cause complications and affect public opinion and opposition to these facilities; and 3.) for temporarily located plants on public works projects, the problems are further compounded as road dust emissions generated from construction activities during the early morning (when ground level air movement is low) could easily be mistaken for emissions from abatement devices as the dust rises through the beam of light, resulting in inappropriate violations.

TACA also raised strong concerns relating to the proposed requirements for sufficient illumination during non-daylight hours. Many ready mix facilities are located in residential areas and it is imperative that the proposed standard permit be amended to make certain that the neighboring public is not adversely affected by excessive lighting during the early morning hours.

TXI commented that the illumination requirements appears to exacerbate the common citizen complaint that lighting in and around a concrete plant property is a nuisance. Currently, many batch plant operators are currently challenged to reduce the effects of lighting on their current neighbors. Any additional illumination requirements are likely to increase neighbor complaints and may conflict with local zoning ordinances that limit such lighting.

The TNRCC concurs with the concern that the standard permit performance requirements should not adversely affect neighbors to concrete batch plants. However, based on the controversial nature of these facilities, the concern that continuous compliance be demonstrable, and historical problems with certain activities at the plants, the TNRCC has included a modified compliance requirement for lighting of abatement systems when facilities operate during non-daylight hours. This illumination requirement is limited to the exhaust of the abatement device vents on the cement and flyash storage silos only when being filled during non-daylight hours. This activity occurs infrequently, and therefore lighting should minimize any disturbance to neighbors .

Temporary Plant Truck Drop Point/ Mixer Dust Controls

AGC (oral and written comments) raised concerns over requiring filtration systems for temporary plants which would supply concrete for a single project and occupy a site for greater than 180 consecutive days and suggested that this requirement be phased in over a five-year period.

Transit Mix commented that they agree that water fog rings should be an acceptable control mechanism for temporary batch plants and that facilities which are temporary should not be burdened with a high expense ($40,000) to equip these plants with suction shrouds.

Pioneer (verbally and written) and Westward (orally) commented in an opposite manner, noting a desire to "outlaw" water fog rings as a method of controlling dust at these plants. It was noted that water fog rings historically create a mess, do not give adequate control of dust during operation, and transfer air emissions to water runoff issues. Pioneer orally remarked that there is some room for improvement throughout the industry with regard to additional control of dust from facilities around the state and commended the TNRCC for "raising the bar to some degree". In writing, Pioneer also stated that the use of fog rings at temporary facilities is bothersome to the neighboring public and the general image of the ready mix industry.

TACA stated that a suction shroud which meets BACT should be in place on all temporary batch plants. TACA stated that water fog rings do not work and the allowance of water fog rings of any kind at a temporary plant is bothersome to the neighboring public and the public image of the industry.

The TNRCC concurs with a majority of commenters to "raise the bar" and establish tighter control measures on the most culpable source (per the modeled impacts review) at these plants. After an extensive and critical review of the dust control technologies, the TNRCC has concluded that water fog rings should be allowed only in limited circumstances. Currently, water fog ring technology is used rarely in the field and has a control efficiency of 85%, as compared to 99% for a properly operated suction shroud/baghouse system. However, since the difference in controlled emission releases is negligible (approximately 0.1 tpy PM) and the retrofit cost of suction shroud/baghouse systems can be significant ($25,000 to $50,000), the TNRCC will continue to allow water fog ring use only for temporary plants occupying a site less than 180 days and if the production is equal to or less than 200 yd3/hr. Given these limited circumstances, the TNRCC believes that the water fog ring provides sufficient emission control to meet particulate regulations and health impacts review. However, the TNRCC will continue to monitor the industry and may determine to amend the standard permit at a later time to remove the option of control by a water fog ring. The standard permit requirements do not allow for a phase-in period for the use of suction shroud/baghouse controls for most plants as the TNRCC is actively committed to establishing greater control requirements with consideration given both to technical feasibility and economic reasonableness.

Temporary Plant Production Limits

AGC (oral and written comments) raised concerns over limiting production for temporary plants as this limitation would result in prolonging projects and lengthening the time batch plants would be located at a given site, thus exposing the public to the potential nuisance emissions for a greater length of time. Larger production plants that are capable

of operating in an environmentally more efficient manner would be excluded due to this production limitation. Plants in this category would be forced to obtain a regular permit and lose the opportunity to be free of public comment that is afforded to temporary plant on public works projects under the standard permit. The AGC recommends that the production limit for temporary plants be increased to 400 cubic yards an hour.

Transit Mix commented that the 200 yd3/hr limit is unrealistic for plants which support state highway projects as plants need to be capable of 300 yd3/hr . TxDOT highway projects include a specified number of days to complete the project and if not completed, the contractor will be fined daily. With these constraints, plants must pour a certain number of yards per hour. A more realistic limit for temporary plants should be the same as for permanent plants and be 300 yd3/hr .

Sundt operates temporary concrete batch plants in Texas, most recently at Austin-Bergstrom International Airport from 1996 to 1998. The plants used on these projects batched in excess of 450 yd3/hr . These higher production rates enable plants to overcome bad weather delays and ensured the opening of the Austin airport on its scheduled opening date. Hourly batching restrictions would have required multiple plants operated and maintained to meet the schedule, this would have resulted in substantial additional cost to the owner, with no significant improvement to the environment. Sundt requests that the proposal be amended to allow for maximum utilization of sophisticated plant equipment. The public is ultimately better served with substantially faster completion of civil projects at a much lower cost. Hourly production rates for large, sophisticated CBPs should not be the sole consideration in determining a best course of action for air quality standards.

The TNRCC concurs with the comments that the commonly seen, larger facilities should be able to meet the conditions of the standard permit. The TNRCC has developed the standard permit to allow typical concrete batch plant facilities to register via an abbreviated method, instead of obtaining a permit under Chapter 116. The standard permit is not intended to cover all possible equipment scenarios, plant layouts, or production rates, but only the majority of facilities seen in the field. Since PM emission rates are directly proportional to the amount of material handled, production rates were chosen as the most reasonable tracking mechanism to confirm air emission estimates. Based on an extensive review of historical applications, a survey of the industry, and input at Focus Group Meetings, the TNRCC has determined that the most common production rates for concrete batch plants range from 100 to 300 yd3/hr. Three concrete batch plant companies reporting production rates on a survey indicated an average production rate of 157 yd3/hr and a survey of 35 in-house applications being processed by permit engineers resulted in an average production rate of 176 yd3/hr. Additionally, industry representatives participating in Focus Group meetings confirmed that a 200 yd3/hr production rate is a reasonable worst case assumption for most plants in Texas with the exception for a central mix style plant that could approach 300 yd3/hr. The standard permit was therefore developed to cover the most common plant type, and includes production limits up to 300 yd3/hr for both temporary and permanent plants. The limited number of larger concrete plants are encouraged to obtain a case-by-case review permit under Chapter 116.

Traffic Area Best Management Practice Requirements

TACA and Pioneer submitted written comments which strongly contend that all roads and traffic areas for every plant in Texas, temporary or permanent, should be required to be paved with a cohesive hard surface that is maintained intact and clean.

Transit Mix concurs with the TNRCC proposal to not require paving of traffic areas at temporary batch plants and believes that the dust controls provided by watering, dust-suppressant chemicals, or tire chips should adequately suppress road dust. In addition, temporary plants are frequently located on leased property and property owners are not fond of having an area of that land paved. To further justify this position, Transit Mix notes that the cost of paving is an unnecessary burden ($30,000 to pave, $20,000 for removal) when other mitigation techniques are available.

Observations and technical evaluation of available documentation show that, if properly maintained, the Best Management Practices (BMP) proposed by the TNRCC adequately control dust from traffic areas. BMP includes watering, dust-suppressant chemicals, cleaning, or paving. Requiring all facilities to pave, regarding of the duration of time at a particular site would be an unnecessary financial burden on plant operators, and ultimately result in more waste to be disposed in either landfills or by concrete recycling operations, especially for temporary plants.

CSR raised concerns over the requirement to pave traffic areas at previously grandfathered permanent batch plants with a cohesive hard surface to meet dust control requirements. The sites discussed have ten or more acres, with the batch plants located in the center of a property with traffic areas hundred of yards long, resulting in a n excessive economic burden to plant owners and operators and, in fact, punishes those who place plants well away from property lines. This requirement would affect new plants as well, as the plant owner/operators may be motivated to keep their plants closer to off-site roads to minimize paving costs. CSR suggests that these requirements be subject to a case-by-case review and, if a facility can demonstrate undue hardship, exemptions or alternative control limitations be granted.

The TNRCC would like to clarify that the THSC does not mandate that grandfathered facilities to obtain authorization by a standard permit. Additionally, paragraph (1)(D) clearly states that this standard permit applies to new registrations received after the effective date of the standard permit. If a previously grandfathered facility is modified and requires authorization to obtain a permit, but cannot meet the conditions of this standard permit, the owner/operators are encouraged to apply for a permit under Chapter 116. A regular permit allows for a case-by-case review of BMP for control of traffic and road dust which, depending on circumstances, will or will not require paving of the traffic areas.

Equipment, Traffic and Stockpile Distance Setbacks and Alternatives TXI commented that the distance limitations apply to "stationary equipment and stockpiles". However, there may be stationary equipment associated with plant operations that is not associated with any health or environmental risk or nuisance conditions. Such equipment may include ice block machines, water tanks, etc. The standard permit should be modified to exempt these types of equipment from the distance limitations.

The TNRCC concurs with some of these comments and has modified the standard permit to specify that the distance limitations are applicable only to equipment directly associated with the operation of the concrete batch plant.

AGC (oral and written comments) raised concerns over requiring at least 25 foot buffer distance for industrial traffic due to the operation of a concrete batch plant as proposed. This limitation would severely limit availability of acceptable sites, especially in urban areas. The AGC states their belief that application of dust control on facilities and roads adequately addresses any concerns over location of temporary plants and alleviates the need for distance limitations.

CSR suggested that the distance requirements be subject to a case-by-case review and, if a facility can demonstrate undue hardship, exemptions or alternative control limitations be granted.

Pioneer and Westward (orally and in writing) commented that engineering standards should be used instead of buffer distances required by the standard permit conditions. While the buffer distances were recognized to provide additional protection against dust nuisance, the benefit to a 25 to 50 foot distance was considered to be minor. Instead options on alternative controls were recommended to facilitate a variety of circumstances such as when facilities are required to place plants in sites which are confined by size. The conditions of the standard permit should allow for a plant to apply additional controls (high walls, shrubs, etc.) in lieu of meeting distance requirements when these situations occur. In the commenters experience, these controls would be better dust deterrent than a short buffer distance.

Westward suggested modifications to the standard permit, including: "If an owner/operator wishes to have traffic, stockpiles, or other activities within the specified distance limitations, then the following approved alternatives may be used in lieu of the meeting the distances: stockpiles must be contained within a three-walled bunker which extends at least two feet above the top of the stockpile" (this will provide an additional 50% control of stockpile emissions and provide more active control than distance buffers); and "Roads and other activities must be bordered by decorative screening in the form of sound suppressive fencing or dense vegetative strips along all traffic routes or work areas within the 25 to 50 foot specified buffer areas. These borders shall be constructed to either TxDOT standards for this type of structure or to a height of two feet greater than the activity or traffic in the area" (TxDOT has design standards for noise and dust suppression systems associated with various road traffic situations and these systems can greatly mitigate noise 40 to 80%-- and dust minimizing air movement reduces the potential for transporting dust). Other options include establishing a speed limit for truck traffic, which has a much greater impact on the potential for emissions than a minor buffer distance." According to the commenter, the addition of bunkers, fencing or dense vegetation provides visual screening, plant beautification, as well as providing superior control of air pollution - all long term benefits to the plant and the community.

TXI noted that property availability and zoning cause many batch plants to be located on tracts of land that are space prohibitive. Though an ideal property may afford the room for the proposed distance limitations, it may not always be possible to procure such a property for a particular project. TXI feels that alternatives to a buffer zone should be addressed to give operators the flexibility in setting up plant layout, while still protecting public health and the environment and avoiding nuisance situations. Such alternatives may include concrete-walled bunkers that are higher than aggregate stockpiles, vegetated buffer zones, or other engineered controls. With appropriate design, nuisance conditions should be averted with virtually no buffer zone to the property line.

TACA agrees with distance limitations as proposed by the TNRCC, however, they also believe that engineering standards should also be included in the standard permit conditions. Examples of alternative controls could include a concrete wall or continuous shrubbery which is two feet higher than the stationary equipment and/or stockpiles, eliminating the need for a 25 foot buffer.

The TNRCC concurs with most of the comments and has included alternatives for roads and stockpiles for nuisance dust control similar to those proposed by commenters in all applicable paragraphs of the standard permit. However, no alternatives to setbacks for stationary equipment directly associated with the operation of the concrete batch plant has been included since these emission sources are culpable for the off-property impacts which were analyzed by the TNRCC. These sources (silos, conveyors, material bins, etc.) were calculated to have a greater quantity of emissions than those from the stockpile areas, and thus contributed to a greater extent to the PM concentrations. If these sources and facilities were located closer to property lines, they could cause or contribute to a condition of air pollution. Owners and operators are reminded that any facility may apply for a permit under Chapter 116 and provide a case-by-case impacts analysis to demonstrate any other facility site layout meets all rules and regulations.

Based on the comments, the standard permit has been modified to specify alternatives for traffic areas and stockpiles. Although the commenters proposed that the fencing meet TxDOT noise suppression standards, after additional research, no clear written criteria for this proposal could be found for inclusion in the standard permit. In addition, the TNRCC considered the option of vegetation as an alternative, but it was determined that vegetation would not necessarily grow fast enough or be sufficiently dense to completely cover the desired area from the ground to a height above the dust sources. However, if some vegetative buffer is represented which meets the conditions of the standard permit it may be used. Unfortunately, due to the nature of the standard permit registration process, an open-ended alternative to be reviewed case-by-case is not appropriate. Facilities which cannot meet either the distance setbacks or provide a barrier may apply for a permit under §116.111, which allows for case-by-case reviews and dust control determinations. Therefore, the TNRCC has instead included an option for fencing or other barriers of at least 12 feet in height in lieu of the setback distances for roads and traffic areas. Based on observations and experience, the size of a dust plume will be about twice the height of the vehicle generating the road dust. To achieve approximately 50% control of the dust plume, the height of the barrier should be at the height of the plume center line. Based on the modeling, this height is about 12 feet. The TNRCC has also included the proposed alternative for stockpiles to have a three-walled bunker with a height of at least two feet higher than the stockpiles. These options should provide equal or better abatement of traffic dust.

TRD-200005786
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: August 16, 2000

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## Notice of Opportunity to Comment on Agreed 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 Agreed Orders (AOs) pursuant to Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the Commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 25, 2000**. Section 7.075 also requires that the Commission promptly consider any written comments received and that the Commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the 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 25, 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) Arete Real Estate and Development Company, Incorporated dba Port Adventure; DOCKET NUMBER: 1999-0564-PWS-E; TNRCC IDENTIFICATION (ID) NUMBER: 2280031; LOCATION: ten miles west of Onalaska on Highway 356, Trinity County, Texas; TYPE OF FACILITY: public water system; RULES VIOLATED: §290.106(a), (e)(2) and the Code, §341.033(d), by failing to collect and submit water samples for bacteriological analysis for June and July 1998 and failing to provide public notice for the bacteriological sampling; PENALTY: $750; STAFF ATTORNEY: Scott McDonald, Litigation Division, MC 175, (512) 239-6005; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 892-2119.

(2) COMPANY: Schenectady International Incorporated; DOCKET NUMBER: 1997-1072- IHW-E; TNRCC ID NUMBER: 30763; LOCATION: 702 Farm-to-Market Road 523, Freeport, Brazoria County, Texas; TYPE OF FACILITY: chemical manufacture; RULES VIOLATED: §335.221(a)(11) and 40 Code of Federal (CFR) Regulations, §266.103(c)(1)(i), by failing to control the waste feed rate to Boiler B-503; §335.221(a)(13) and 40 CFR §266.103(g)(l)(i) and (2), by failing to attain the required combustion temperature prior to feeding waste to Boiler B-503; and §335.221(8) and 40 CFR 265.143(c)(7), by failing to provide a letter of credit in place that equals the current closure cost estimate for boiler B-503; PENALTY: $4,000; STAFF ATTORNEY: Booker Harrison, Litigation Division, MC 175, (512) 239-4113; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200005682
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: August 14, 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 25, 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 25, 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: Aero-Marine Engineering, Inc.; DOCKET NUMBER: 2000-0388-AIR-E; IDENTIFIER: Air Account Number JA-0057-J; LOCATION: Bryson, Jack County, Texas; TYPE OF FACILITY: air conditioner coil coating; RULE VIOLATED: 30 TAC §122.146(1) and the Act, §382.085(b), by failing to certify compliance with the Title V general operating Permit No. O-01106; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Kara Dudash, (915) 698-9674; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(2) COMPANY: Maria Beltran dba 1017 Caf,; DOCKET NUMBER: 2000-0418-PWS-E; IDENTIFIER: Public Water Supply (PWS) Number 2140030; LOCATION: San Isidro, Starr County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(a) and (e)(2), by failing to collect, submit, and provide public notice of the failure to collect and submit routine monthly bacteriological samples; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Subhash Jain, (512) 239-5867; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(3) COMPANY: City of Cactus; DOCKET NUMBER: 2000-0485-MSW-E; IDENTIFIER: Municipal Solid Waste (MSW) Registration Number 40031; LOCATION: Cactus, Moore County, Texas; TYPE OF FACILITY: municipal solid waste; RULE VIOLATED: 30 TAC §330.285 and §330.286, by failing to establish financial assurance coverage for the City's Type V MSW transfer station; PENALTY: $2,700; ENFORCEMENT COORDINATOR: Bill Davis, (512) 239-6793; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(4) COMPANY: Coronado Water, Inc.; DOCKET NUMBER: 1999-0917-PWS-E; IDENTIFIER: PWS Number 0590009; LOCATION: Hereford, Deaf Smith County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.41(c)(1)(F) and (3)(N), by failing to obtain sanitary easements, locate a livestock pen more than 500 feet away from a public water source, locate a groundwater source so there is no danger of pollution from insanitary surroundings, and provide flow meters; 30 TAC §290.46(b), (f)(1)(A), and (n), by failing to collect and submit raw water samples, maintain the chlorinator and a chlorine residual of 0.2 milligrams per liter, and prepare a distribution map of the water system; 30 TAC §290.43(c)(9) and (d)(2), by failing to provide pressure tanks that conform with American Water Works Association standards and provide a pressure relief device on all pressure tanks; 30 TAC §290.45(b)(1)(C)(iii), by failing to provide a water storage capacity of 200 gallons per connection; and 30 TAC §290.106(a) and (e)(2), by failing to collect and submit the appropriate number of water samples for bacteriological analysis and provide public notification of the failure to sample; PENALTY: $600; ENFORCEMENT COORDINATOR: Julia

McMasters, (512) 239-5839; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(5) COMPANY: Council Creek Village, Inc. dba Council Creek Creek Village and South Council Creek Number 2 and Jones-Owen Company dba South Silver Creek I, II, III; DOCKET NUMBER: 2000-0242-PWS-E; IDENTIFIER: PWS Numbers 0270014, 0270080, and 0270041; LOCATION: Burnet, Burnet County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.44(a)(4) and (c), by failing to install water distribution lines below the frost level and install properly-sized distribution water lines; 30 TAC §290.42(j), by failing to submit plans and specifications; 30 TAC §290.46(j)(3), (m), and (w), by failing to keep on file and make available for review, copies of customer service inspection certifications, initiate a program to facilitate cleanliness and improve the general appearance of all plant facilities, and provide a legible sign at each production, treatment, and storage facility; 30 TAC §290.45(c)(1)(B)(i), by failing to provide a well capacity of 0.6 gallons per minute per connection; 30 TAC §290.39(j), by failing to submit written notification of changes or modifications to the existing water system; and 30 TAC §290.41(c)(3)(a), by failing to provide well completion data; PENALTY: $5,525; ENFORCEMENT COORDINATOR: Jaime Garza, (512) 239-1406; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(6) COMPANY: City of Dell City; DOCKET NUMBER: 2000-0324-MLM-E; IDENTIFIER: PWS Number 1150001 and Water Quality Permit Number 0010866-001 (Expired); LOCATION: Dell City, Hudspeth County, Texas; TYPE OF FACILITY: public water supply and wastewater treatment; RULE VIOLATED: 30 TAC §290.46(d) and (i), by failing to show daily pumpages on monthly reports and adopt a plumbing ordinance; and 30 TAC §305.125(1) and (2), and the Code, §26.121, by failing to apply for a permit renewal and continuing to operate; PENALTY: $2,575; ENFORCEMENT COORDINATOR: Rebecca Cervantes, (915) 834-4940; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(7) COMPANY: Dynegy, Inc. dba Dynegy Midstream Services, LP; DOCKET NUMBER: 2000-0406-AIR-E; IDENTIFIER: Air Account Numbers WC-0017-V, PE-0190-V, CY-0019-H, and GA-0011-C; LOCATION: near Wickett, Ward, Pecos, Crane and Gaines Counties, Texas; TYPE OF FACILITY: natural gas processing; RULE VIOLATED: 30 TAC §122.146(2) and the Act, §382.085(b), by failing to submit an annual compliance certification; and 30 TAC §122.145(2)(B) and the Act, §382.085(b), by failing to submit a deviation report; PENALTY: $8,000; ENFORCEMENT COORDINATOR: Dan Landenberger, (915) 570-1359; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(8) COMPANY: Steve Laughlin dba Floore's Country Store; DOCKET NUMBER: 2000-0332- PWS-E; IDENTIFIER: PWS Number 0150347; LOCATION: Helotes, Bexar County, Texas; TYPE; OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(a), (b)(1) and (5), and (e)(2), and the Code, §341.033(d), by failing to submit routine water samples for bacteriological analysis, submit repeat water samples for bacteriological analysis following a total coliform-positive sample, submit five additional routine water samples for bacteriological analysis, and provide public notification of the coliform monitoring violations; and 30 TAC §290.51 and the Code, §341.041, by failing to pay public health service fees; PENALTY: $1,563; ENFORCEMENT COORDINATOR: Shawn Stewart, (512) 239-6684; REGIONAL OFFICE: 140 Heimer Road, Suite 360, San Antonio, Texas 78232-5042, (210) 490-3096.

(9) COMPANY: Delores Macrae dba Glenshores Water Company; DOCKET NUMBER: 2000-0535-PWS-E; IDENTIFIER: PWS Number 0180030; LOCATION: Clifton, Bosque County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.120(e)(2), by failing to conduct reduced monitoring tap sampling for lead and copper; PENALTY: $313; ENFORCEMENT COORDINATOR: Bill Davis, (512) 239-6793; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(10) COMPANY: Gary Richter dba Hillside Mobile Home Park; DOCKET NUMBER: 1999-1218-PWS-E; IDENTIFIER: PWS Number 0710050; LOCATION: Canutillo, El Paso County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §291.101(a) and the Code, §13.242(a), by failing to obtain a Certificate of Convenience and Necessity; 30 TAC §290.39(g), by failing to submit written notification of changes or additions to the existing system; 30 TAC §290.41(c)(3)(A), (K), and (N), by failing to submit well completion data, seal the wellhead with a gasket or a pliable crack-resistant caulking compound, and install a flow meter; 30 TAC §290.46(f)(2)(B), by failing to conduct weekly chlorine residual tests; 30 TAC §290.42(i), by failing to use direct additives and chemicals for the treatment of water supplied by public water systems; 30 TAC §290.113, by exceeding the maximum contaminant level for sulfate; 30 TAC §290.45(b)(1)(C), by failing to provide a pressure tank capacity of 20 gallons per connection; and 30 TAC §290.43(c) and (d)(9), by failing to provide a ground storage tank which meets the American Water Works Association standards and failing to ensure no more than three pressure tanks were installed at any one site; PENALTY: $600; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 401 East Franklin, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(11) COMPANY: Inman Christian Center dba Inman Residential Treatment Center; DOCKET NUMBER: 2000-0536-PWS-E; IDENTIFIER: PWS Number 0150418; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.120(e)(2), by failing to conduct reduced monitoring tap sampling for lead and copper; PENALTY: $313; ENFORCEMENT COORDINATOR: Bill Davis, (512) 239-6793; REGIONAL OFFICE: 140 Heimer Road, Suite 360, San Antonio, Texas 78232-5042, (210) 490-3096.

(12) COMPANY: ISP Technologies, Incorporated; DOCKET NUMBER: 2000-0189-IHW-E; IDENTIFIER: Solid Waste Registration Number 30037 and Permit Numbers WDW-34 and WDW- 113; LOCATION: Texas City, Galveston County, Texas; TYPE OF FACILITY: commercial production of chemical intermediates and products; RULE VIOLATED: 30 TAC §335.4 and the Code, §26.121, by failing to prevent the injection of listed hazardous waste into a non-hazardous underground injection control system; PENALTY: $8,000; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: Laboratory Tops, Incorporated; DOCKET NUMBER: 2000-0401-AIR-E; IDENTIFIER: Air Account Number WK-0171-T; LOCATION: Taylor, Williamson County, Texas; TYPE OF FACILITY: countertop manufacturing; RULE VIOLATED: 30 TAC §116.100(a) and the Act, §382.085(b), by failing to obtain an air quality permit or satisfy the conditions for an exempt facility; PENALTY: $800; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(14) COMPANY: Bettye Singletary dba Longhorn Ranch Motel; DOCKET NUMBER: 2000- 0171-PWS-E; IDENTIFIER: PWS

Number 0220032; LOCATION: Study Butte, Brewster County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(a)(1) and the Code, §341.033(d), by failing to collect and submit water samples for bacteriological analysis; and 30 TAC §290.103(5), by failing to provide public notification of the bacteriological sampling violations; PENALTY: $1,200; ENFORCEMENT COORDINATOR: Clint Pruett, (512) 239-2042; REGIONAL OFFICE: 401 East Franklin, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(15) COMPANY: Mobil Producing Texas and New Mexico Inc.; DOCKET NUMBER: 2000- 0628-AIR-E; IDENTIFIER: Air Account Number KE-0007-J; LOCATION: near Jayton, Kent County, Texas; TYPE OF FACILITY: water injection station; RULE VIOLATED: 30 TAC §122.146(1) and the Act, §382.085(b), by failing to certify compliance with Title V Permit O-00207; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Kara Dudash, (915) 698-9674; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(16) COMPANY: Quality Electric Steel Castings, Inc.; DOCKET NUMBER: 2000-0591-AIR-E; IDENTIFIER: Air Account Number HG-0599-P; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: steel foundry; RULE VIOLATED: 30 TAC §116.110(a)(1) and the Act, §382.085(b) and §382.0518(a), by allegedly operating a thermal sand reclaimer system without a permit; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Sheila Smith, (512) 239-1670; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: RK Petroleum Corporation; DOCKET NUMBER: 2000-0409-AIR-E; IDENTIFIER: Air Account Number MF-0117-C; LOCATION: Tarzan, Martin County, Texas; TYPE OF FACILITY: oil and gas production; RULE VIOLATED: 30 TAC §122.146(1) and the Act, §382.085(b), by failing to submit annual compliance certifications; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Dan Landenberger, (915) 570-1359; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(18) COMPANY: Archer Daniels Midland dba Southern Cotton Oil Mill Company; DOCKET NUMBER: 2000-0219-IHW-E; IDENTIFIER: Industrial Hazardous Waste Facility Identification Number 38951; LOCATION: Lubbock, Lubbock County, Texas; TYPE OF FACILITY: cottonseed oil mill; RULE VIOLATED: 30 TAC §335.62, by failing to perform hazardous waste determinations; 30 TAC §335.474, by failing to prepare a Source Reduction and Waste Minimization Plan; 30 TAC §335.4 and the Code, §26.121, by failing to properly handle, store, process, or dispose of industrial solid waste; and 30 TAC §335.6(b), by failing to provide current notification as to the facility's routinely generated waste streams, active waste management units and closure of waste management units; PENALTY: $8,400; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796-7092; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(19) COMPANY: Charlie F. Supak dba Highway 21 Septic Systems; DOCKET NUMBER: 2000-0368-OSI-E; IDENTIFIER: On-Site Sewage Facility Installer Identification Number 4683; LOCATION: Bastrop, Bastrop County, Texas; TYPE OF FACILITY: on-site sewage; RULE VIOLATED: 30 TAC §285.58(a)(11), by failing to call for the required inspection from the permitting authority; PENALTY: $200; ENFORCEMENT COORDINATOR: Erika Fair, (512) 239-6673; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(20) COMPANY: Union Oil Company of California; DOCKET NUMBER: 2000-0408-AIR-E; IDENTIFIER: Air Account Numbers AB-0015-Q and GA-0135-G; LOCATION: Andrews and Seminole, Andrews and Gaines Counties, Texas; TYPE OF FACILITY: natural gas processing; RULE VIOLATED: 30 TAC §122.146(2) and the Act, §382.085(b), by failing to submit annual compliance certifications; PENALTY: $800; ENFORCEMENT COORDINATOR: Dan Landenberger, (915) 570-1359; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(21) COMPANY: Mr. Joe Watson dba Watson Used Cars; DOCKET NUMBER: 2000-0646- AIR-E; IDENTIFIER: Air Account Number HF-0185-L; LOCATION: Silsbee, Hardin County, Texas; TYPE OF FACILITY: used car sales; RULE VIOLATED: 30 TAC §114.20(c)(1) and the Act, §382.085(b), by failing to equip a motor vehicle with a catalytic converter; PENALTY: $300; ENFORCEMENT COORDINATOR: Susan Kelly, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

TRD-200005760
Paul Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: August 15, 2000

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## Notice of Receipt of Application and Intent to Obtain a Municipal Solid Waste Permit

APPLICATION. Regional Land Management Services, LTD., P.O. Box 333, Laredo, Texas 78042 has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a permit for a Type I municipal solid waste landfill which will authorize the disposal of municipal solid waste, construction-demolition waste, and special waste. The proposed facility will be located south of State Highway 359, approximately 11 miles east of Loop 20, Webb County, Texas. This application was submitted to the TNRCC on July 3, 2000. The permit application is available for viewing and copying at the Laredo Public Library, 1120 East Calton Road, Laredo, Texas 78041, telephone number (956) 795-2400. The TNRCC executive director has determined the application is administratively complete and will conduct a technical review of the application. After completion of the technical review, the TNRCC will issue a Notice of Application and Preliminary Decision.

MAILING LISTS. You may ask to be placed on a mailing list to obtain additional information on this application by sending a request to the Office of the Chief Clerk, at the address below. You may also ask to be on a county- wide mailing list to receive public notices for TNRCC permits in the county.

PUBLIC COMMENT / PUBLIC MEETING. You may submit public comments on this application. The TNRCC will hold a public meeting on this application. Information concerning this meeting will be given in another public notice. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. A public meeting is not a contested case hearing. Written public comments must be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, Texas 78711-3087.

ADDITIONAL NOTICE. After technical review of the application is complete, the executive director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list or the mailing list for this application. That notice will contain the final deadline for submitting public comments.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for public comments, the executive director will consider the comments and prepare a response to all relevant and material, or significant public comments. The response to comments, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments or who is on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the executive director's decision and for requesting a contested case hearing. A contested case hearing is a legal proceeding similar to a civil trial in state district court. A contested case hearing will only be granted based on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised during the public comment period and not withdrawn.

INFORMATION. If you need more information about this permit application or the permitting process, please call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TNRCC can be found at our web site at www.tnrcc.state.tx.us. Further information may also be obtained from Regional Land Management Services, LTD. at the address stated above or by calling Mr. Brent W. Ryan, Attorney at Law at (512) 327-8111.

TRD-200005785
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: August 16, 2000

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## Notice of Public Hearing

The Texas Natural Resource Conservation Commission (commission) will conduct public hearings to receive testimony regarding revisions to 30 TAC Chapters 101, 110, 114, 115, and 117, and to the State Implementation Plan (SIP) under the requirements of the Texas Health and Safety Code, §382.017; Texas Government Code, Subchapter B, Chapter 2001; and 40 Code of Federal Regulations, §51.102, of the United States Environmental Protection Agency (EPA) regulations concerning SIPs. The revisions concern the attainment demonstration for the Houston/Galveston (HGA) ozone nonattainment area and the emission reduction strategy for central and eastern Texas.

The commission has approved soliciting public input on the proposed revisions to the SIP for central and eastern Texas. The commission strategy is designed to reduce nitrogen oxide ($NO_x$) emissions by more than 75% in the eight-county HGA ozone nonattainment area.

Because Texas cities are affected by air pollution from other parts of the state, the commission has also taken a regional approach to reducing ozone. These proposed revisions will result in $NO_x$ emission reductions in that portion of the state, designated as central and eastern Texas along and east of Interstate 37 from Corpus Christi to San Antonio, and from there along and east of Interstate 35 north to the Oklahoma border. About 80% of Texans reside in the central and eastern Texas area, which includes the HGA, Dallas/Fort Worth, and Beaumont/Port Arthur ozone nonattainment areas.

The proposed SIP revisions include various control strategies. Revisions to the air quality plan for the HGA area include a more effective vehicle emissions testing program expanded to eight counties, a 90% reduction in $NO_x$ emissions from major stationary sources; reduced speed limits; a reduction in emissions from ground-support equipment at George Bush Intercontinental Airport, William P. Hobby Airport, and Ellington Field; an April - October restriction on morning operation of heavy-duty construction equipment and lawn service equipment; vehicle idling restrictions; requirements for diesel emulsion fuel and $NO_x$ reduction systems for certain on-road and non-road vehicles and equipment; a requirement for accelerated purchase of heavy diesel equipment; energy conservation, transportation control, and voluntary measures; establishment of an allowance trading system for $NO_x$ sources; and volatile organic compound requirements for batch processes, bakeries, and offset lithographic printers.

Three statewide rules have also been proposed as part of this air quality plan: requirements for cleaner diesel fuel for on-road vehicles; emission standards for non-road, large spark-ignition engines; and revisions to the emissions banking and trading rules.

In addition, the following requirements apply specifically in the central and eastern Texas area: cleaner diesel fuel for non-road vehicles; low sulfur gasoline; and requirements for new residential and commercial air conditioners.

Public hearings on these proposed revisions will be held at the following times and locations: September 18, 2000, 10:00 a.m., Lone Star Convention Center, 9055 Airport Road (FM 1484), Conroe; September 18, 2000, 7:00 p.m., Lake Jackson Civic Center, 333 Highway 332 East, Lake Jackson; September 19, 2000, 10:00 a.m. and 7:00 p.m., George Brown Convention Center, 1001 Avenida de Las Americas, Houston; September 20, 2000, 9:00 a.m., VFW Hall, 6202 George Bush Drive, Katy; September 20, 2000, 6:00 p.m., East Harris County Community Center, 7340 Spencer, Pasadena; September 21, 2000, 10:00 a.m., Southeast Texas Regional Airport Media Room, 6000 Airline Drive, Beaumont; September 21, 2000, 2:00 p.m., Amarillo City Commission Chambers, City Hall, 509 East 7th Avenue, Amarillo; September 21, 2000, 6:00 p.m., Charles T. Doyle Convention Center, 21st Street at Phoenix Lane, Texas City; September 22, 2000, 10:00 a.m., Dayton High School, 2nd Floor Lecture Room, 3200 North Cleveland Street, Dayton; September 22, 2000, 11:00 a.m., El Paso City Council Chambers, 2 Civic Center Plaza, 2nd Floor, El Paso; September 22, 2000, 2:00 p.m., North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington; September 25, 2000, 10:00 a.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building E, Room 201S, Austin; and September 25, 2000, 2:00 p.m., Port of Corpus Christi, 1st Floor Conference Room, 222 Power Street, Corpus Christi.

The hearings are structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to each hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at each hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal one hour before each hearing, and will answer questions before and after each hearing.

Written comments may be submitted to Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087; faxed to (512) 239-4808; or emailed to *siprules@tnrcc.state.tx.us*. The public comment period will close at 5:00 p.m. on September 25, 2000.

For further information on the proposed revisions, please contact Bill Jordan at (512) 239-2583. Copies of the proposed rules and SIP revisions can be obtained from the commission's Web Site at *http://www.tnrcc.state.tx.us/oprd/hgasip.html*.

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

TRD-200005623
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: August 11, 2000

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## Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 311

In accordance with the requirements of Texas Government Code, Chapter 2001, Subchapter B, the Texas Natural Resource Conservation Commission (TNRCC or commission) will conduct a public hearing to receive testimony concerning new sections of 30 TAC Chapter 311, Subchapters A, B, and F.

The proposed revisions to these subchapters will allow for the discharge of storm water runoff and certain other non-storm water runoff into the Lakes Travis, Austin, Inks, Buchanan, Lyndon B. Johnson, and Marble Falls Water Quality Areas, if authorized by a Texas pollutant discharge elimination system (TPDES) permit.

A public hearing on this proposal will be held in Austin on September 11, 2000, at 2:00 p.m. at the TNRCC complex in Building F, Room 2210, located at 12015 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.

Comments may be submitted to Joyce Spencer, MC 205, TNRCC, Office of Environmental Policy, Analysis, and Assessment, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should reference Rule Log Number 2000-010-311-WT. Comments must be received by 5:00 p.m., September 25, 2000. For further information, please contact Mary Ambrose, Policy and Regulations Division, (512) 239-4813.

TRD-200005703
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: August 14, 2000

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## Notice of Water Rights Application

Notice is given that EBCO LAND DEVELOPMENT, LTD., P.O. Box 659, Rye, Texas 77369, submitted Application No. 5694 on July 1, 1998. Information needed to complete processing the application was received on July 26, 2000, and the application was declared administratively complete on August 2, 2000. The Executive Director recommends that public notice of the application be given pursuant to 30 TAC §295.152. The applicant seeks authorization to construct a dam and reservoir on Fish Creek, tributary of Lake Creek, tributary of the San Jacinto River, San Jacinto River Basin. The proposed lake will have a surface area of 43 acres and impound 108 acre-feet of water and will be an amenity in a residential development in Montgomery County, Texas. Station 4+30 on the centerline of the dam will be at Latitude 30.309°N, Longitude 95.588°W also described as bearing S 88°W, 1060 feet from the northeast corner of the Thomas V. Mortimer Survey, Abstract No. 383, approximately 7 miles southwest of Conroe, Texas. Applicant has indicated that the reservoir will be maintained at the normal operating level using ground water.

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.

BEXAR METROPOLITAN WATER DISTRICT, applicant, 2047 W. Malone, San Antonio, Texas 78225, seeks an amendment to Certificate of Adjudication No. 19-1966, 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. 19-1966 authorized the owner, with a time priority of August 9, 1911, to maintain a dam and reservoir on the San Antonio River, to impound therein not to exceed 34 acre-feet of water and to divert and use not to exceed 481 acre-feet of water per annum from a point on the reservoir at a maximum rate of 1200 gallons per minute for irrigation of 240 acres of land out of a 322.946 acre tract in the Jose de la Garza Grant, Abstract No. 3, Bexar County, Texas. The certificate, as amended, authorizes Bexar Metropolitan Water District to use the 481 acre-feet of water per annum for municipal purposes within Bexar Metropolitan Water District's service area in Bexar County, Texas in lieu of the authorization to use the water for irrigation purposes. The applicant seeks authorization to amend Certificate of Adjudication No. 19-1966, as amended, to allow use of the 481 acre feet of water per annum now authorized for municipal purposes, for municipal, industrial, recreation and irrigation purposes in Bexar County, Texas. The diversion point authorized by the District's Certificate of Adjudication No.

19-1966, as amended, is also authorized by Certificate of Adjudication No. 19-2019, as amended, this notice is being sent to the Blue Wing Club, owner of the amended certificate.

Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by August 30, 2000. 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 by August 30, 2000. The Executive Director can consider an approval of the application unless a written request for a contested case hearing is filed by August 30, 2000. 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;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested amendment which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TNRCC Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not issue the requested amendment and may forward the application and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103 at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-200005784
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: August 16, 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 August 14, 2000. Executive Director of the Texas Natural Resource Conservation Commission, Petitioner v. Hilltop Estates WSC, dba Hilltop Estates Water Supply, Respondent; SOAH Docket No. 582-00-0639; TNRCC Docket No. 1999-0494-PWS-E. In the matter to be considered by the Texas Natural Resource Conservation Commission on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 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 P.O. Box 13087. If you have any questions or need assistance, please contact Doug Kitts, Chief Clerk's Office, (512) 239-3317.

TRD-200005783
Douglas A. Kitts
Agenda Coordinator
Texas Natural Resource Conservation Commission
Filed: August 16, 2000

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## Panhandle Regional Planning Commission

### Legal Notice

The Panhandle Regional Planning Commission (PRPC) is issuing a Request for Proposals to secure a contractor to manage and operate Texas Workforce Centers and deliver services associated with Workforce Investment Act, Job Training Partnership Act-National Reserve Account, Temporary Assistance to Needy Families-Employment Services (CHOICES), Food Stamp Employment, and Training and Welfare-to-Work programs in the 26 counties of the Texas Panhandle Workforce Development Area.

Contract award will be based primarily on prior experience, demonstrated effectiveness, and cost competitiveness. Proposers must be willing to provide services on a cost reimbursement basis. Funds will be available to pay authorized costs for an initial contract period starting no later than November 1, 2000. Contract renewal for three subsequent one-year periods will be contingent upon acceptable performance.

Entities interested in submitting a proposal are encouraged to attend a Proposers Conference at 1:30 p.m. on Tuesday, August 22, 2000, in the PRPC Third Floor Conference Room, 415 West Eighth Avenue, Amarillo, Texas. Sealed proposals must be submitted by 3:00 p.m. on Monday, September 18, 2000, for public opening immediately thereafter. A copy of the Request for Proposals may be obtained by contacting PRPC's Workforce Development Director at (806) 372-3381, or (800) 477-4562.

TRD-200005555
Tom Dressler
Director, Workforce Development
Panhandle Regional Planning Commission
Filed: August 9, 2000

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## Public Utility Commission of Texas

### Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On August 10, 2000, TelePacific Communications 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 60329. Applicant intends to reflect transfer/control in connection with a financing transaction.

The Application: Application of TelePacific Communications for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 22903.

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 30, 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 22903.

TRD-200005721

Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 15, 2000

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## Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On August 10, 2000, Taylor Communications Group, 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 60050. Applicant intends to remove the resale-only restriction.

The Application: Application of Taylor Communications Group, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 22904.

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 30, 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 22904.

TRD-200005720
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 15, 2000

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## Notice of Application Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on July 27, 2000, pursuant to P.U.C. Substantive Rule §26.171 for approval to implement minor rate changes.

Tariff Title and Number: Application of Nortex Communications To Implement Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171. Tariff Number 22840.

The Application: Nortex Communications (Nortex), formerly Muenster Telephone Corporation of Texas, seeks approval to implement minor rate changes to its calling number and calling name ID business rate and increase its returned check fee. Nortex estimates the proposed rate changes will result in an increase of $4,194 in intrastate gross annual revenues for the first year of service. The company proposes an effective date of December 1, 2000.

Subscribers of Nortex have a right to petition the commission for review of this proposed rate change by filing a protest with the commission. The protest must be signed by a minimum of 5.0%, or 1,500 of the affected local service customers, and must be received by the commission no later than October 31, 2000.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326 or call the commission's Office of Customer Protection at (512) 936-7120 on or before October 31, 2000. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. Please reference Tariff Number 22840.

TRD-200005686
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 14, 2000

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## Notice of Application Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on August 7, 2000, pursuant to P.U.C. Substantive Rule §26.171 for approval to implement a new optional service offering.

Tariff Title and Number: Application of Brazoria Telephone Company For Approval to Offer a New Service Pursuant to P.U.C. Substantive Rule §26.171. Tariff Number 22888.

The Application: Brazoria Telephone Company (Brazoria) seeks approval to offer Centrex as a new optional service that will be available in all of the company's exchanges. Brazoria estimates the proposed new service offering will result in an increase of $502. in intrastate gross annual revenues for the first year of service. The company proposes an effective date of November 6, 2000.

Subscribers of Brazoria have a right to petition the commission for review of the proposed rate change by filing a protest with the commission. The protest must be signed by a minimum of 5.0%, or 1,500 of the affected local service customers, and must be received by the commission no later than September 6, 2000. The 5.0% minimum limitation equals 329 customers.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326 or call the commission's Office of Customer Protection at (512) 936-7120 on or before September 6, 2000. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. Please reference Tariff Number 22888.

TRD-200005685
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 14, 2000

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## Notice of Petition for Expanded Local Calling Service

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a petition on July 5, 2000, for expanded local calling service (ELCS), pursuant to Chapter 55, Subchapter C of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Project Title and Number: Petition of the Oenaville for Expanded Local Calling Service, Project Number 22757.

The petitioners in the Oenaville exchange request ELCS to the exchanges of Marlin, Rogers, and Zabcikville.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas at P.O. Box 13326, Austin, Texas 78711-3326 or call the commission's Office of Customer Protection at (512) 936-7120 no later than September 8, 2000. Hearing

and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200005722
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 15, 2000

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## Public Notice of Amendment to Interconnection Agreement

On August 3, 2000, Southwestern Bell Telephone Company and Sage Telecom, 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 22878. 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 22878. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 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 22878.

TRD-200005589
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2000

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## Public Notice of Amendment to Interconnection Agreement

On August 7, 2000, Southwestern Bell Telephone Company and AT&T Communications of Texas, LP, 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 22890. 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 22890. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 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 22890.

TRD-200005590
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2000

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## Public Notice of Amendment to Interconnection Agreement

On August 8, 2000, Southwestern Bell Telephone Company and TXOL Internet, 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 22894. 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 22894. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 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 22894.

TRD-200005591
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2000

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## Public Notice of Amendment to Interconnection Agreement

On August 8, 2000, Southwestern Bell Telephone Company and CC-CTX, Inc. doing business as Connect!, 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 22895. 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 22895. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 5, 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 22895.

TRD-200005592
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2000

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## Public Notice of Amendment to Interconnection Agreement

On August 10, 2000, Southwestern Bell Telephone Company and HBC TexasTel, 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 22900. 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 22900. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 12, 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 22900.

TRD-200005766
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 15, 2000

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## Public Notice of Amendment to Interconnection Agreement

On August 10, 2000, Southwestern Bell Telephone Company and Dialtone Depot, 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 22901. 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 22901. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 12, 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 22901.

TRD-200005765
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 15, 2000

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### Public Notice of Workshop on Amendments to the Procedural Rules

The Public Utility Commission of Texas (commission) will hold a workshop regarding possible amendments to the commission's Procedural Rules, Chapter 22, scattered sections throughout Subchapters A - O, on Tuesday, September 12, 2000, at 10:00 a.m. in Hearing Room Gee, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 22870, *Rulemaking to Amend Procedural Rules to Establish and/or Clarify Procedures regarding Confidential Material, Late Intervention, Motions for Reconsideration of Interim Orders Issued by the Commission, Appeal of Interim Orders, Motions for Rehearing and Representative Appearances; and to Clarify and Correct References to the General Counsel, and Other Statutes, Rules, and Divisions within the Commission*, has been established for this proceeding. No later than August 25, 2000, staff will make available in Central Records and on the Project Number 22870 web site at www.puc.state.tx.us a draft of changes under consideration for discussion at the workshop.

Questions concerning the workshop or this notice should be referred to Roni Dempsey, Rules Coordinator, at (512) 936-7308 or roni.dempsey@puc.state.tx.us. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200005723
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 15, 2000

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## Stephen F. Austin State University

### Notice of Outside Counsel Contract Award

Stephen F. Austin State University furnishes this notice of outside counsel contract award pursuant to a Request for Proposals published according to procedures promulgated by the Office of the Attorney General. Outside counsel will file a patent on behalf of the University, both in the U.S. and potentially worldwide. The Request for Proposals was filed in the March 10, 2000, issue of the *Texas Register*, Volume 25 Number 10 TexReg Pages 1913-2222.

The contract was awarded to Alan R. Thiele of Jenkens & Gilchrist, 1400 Frost Bank Tower, 100 West Houston Street, San Antonio, Texas 78205, for an estimated value of $30,000.00 plus the possibility of worldwide patent costs.

The contract period involves all work surrounding the utility patent application during the 1999-2000 fiscal year and beyond. The ending date cannot be determined at this time.

No documents, films, recording, or reports of intangible results will be required to be presented by the outside counsel. Services are provided on an as-needed basis. This outside counsel contract must be approved by the Attorney General.

For further information, please call (936) 468-4305.

TRD-200005585
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: August 11, 2000

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## North Texas Tollway Authority

### Request for Qualifications Maintenance Engineering Management Services

Notice of Invitation. The North Texas Tollway Authority (the NTTA), a regional tollway authority and a political subdivision of the State of Texas, intends to issue a request for qualifications (RFQ) to enter into an agreement or agreements with a qualified engineering firm or firms pursuant to Chapter 366 of the Texas Transportation Code and Chapter 2254 of the Texas Government Code to provide professional Maintenance Engineering Management Services.

To be considered, potential proposers must submit a Letter of Request, requesting a copy of the Request for Qualifications (RFQ), which letter must also contain the name of the proposer, a contact person, and an address to which the RFQ may be sent. The NTTA will send only one copy of the RFQ to each proposer.

Deadline. A Letter of Request notifying the NTTA of a request for an RFQ will be accepted by fax at (214) 528-4826, or by mail or hand delivery to: North Texas Tollway Authority, 5900 W. Plano Parkway, P.O. Box 260729, Plano, Texas 75026, Attn: Ms. Nancy Greer.

Letters of Request will be received until 1:00 p.m. on September 1, 2000.

Agency Contact. Any requests for additional information regarding this notice of invitation should be sent, in writing, to Mr. Mark Bouma, P.E., Director of Engineering, at the above address or fax number.

TRD-200005558
Katharine D. Nees
Deputy Executive Director
North Texas Tollway Authority
Filed: August 9, 2000

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## The University of Texas System

### Consultant Proposal Request

The University of Texas at Austin requests, pursuant to the provisions of the Government Code, Chapter 2254.029, the submission of proposals leading to the award of a contract for Consulting Services. The University's objective is to seek assistance with the development of an

intercollegiate athletics Long Range Strategic Plan for the Men's Athletics Department and the Women's Athletics Department.

An award for the services specified herein will be made following a procedure using competitive sealed proposals. Proposals will be opened publicly to identify the names of the RESPONDENTS, but will be afforded security sufficient to preclude disclosure of the contents of the proposal, including prices or other information, prior to award. After opening, an award may be made on the basis of the proposals initially submitted, without discussion, clarification, or modification, or on the basis of negotiation with any of the RESPONDENTS or, at UNIVERSITY'S sole option and discretion, UNIVERSITY may discuss or negotiate all elements of the proposal with selected RESPONDENTS which represent a competitive range of proposals. For purposes of negotiation, a competitive range of acceptable or potentially acceptable proposals may be established comprising the highest rated proposal(s). After the submission of a proposal but before making an award, UNIVERSITY may permit the offeror to revise the proposal in order to obtain the best final offer. UNIVERSITY may not disclose any information derived from the proposals submitted from competing offers in conducting such discussions. UNIVERSITY will provide each offeror with an equal opportunity for discussion and revision of proposals. Further action on proposals not included in the competitive range will be deferred pending an award, but UNIVERSITY reserves the right to include additional proposals in the competitive range if deemed in the best interest of UNIVERSITY. UNIVERSITY reserves the right to award a Contract for all or any portion of the requirements proposed by reason of this request, award multiple Contracts, or to reject any and all proposals if deemed to be in the best interests of UNIVERSITY and to re-solicit for proposals, or to reject any and all proposals if deemed to be in the best interests of UNIVERSITY and to temporarily or permanently abandon the procurement. If UNIVERSITY awards a contract, it will award the contract to the offeror whose proposal is the most advantageous to UNIVERSITY, considering price and the evaluation factors set forth in this RFP. The contract file must state in writing the basis upon which the award is made. Interested parties may contact Floyd Self at The University of Texas at Austin Purchasing Office for a copy of the RFP document by calling (512) 471-4266. An original and ten (10) copies of the proposal must be submitted by the Proposal submission deadline of 2 P.M., September 25, 2000.

TRD-200005791
Francie A. Frederick
Executive Secretary to the Board
The University of Texas System
Filed: August 16, 2000

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### Consultant Proposal Request

The University of Texas at Austin requests, pursuant to the provisions of the Government Code; Chapter 2254.029, the submission of proposals leading to the award of a contract for Consulting Services. The University's objective is to create an operations template and proof-of-concept business plan around the identification and realization of knowledge-based e-businesses that serve the University's educational, research and community service missions.

An award for the services specified herein will be made following a procedure using competitive sealed proposals. Proposals will be opened publicly to identify the names of the RESPONDENTS, but will be afforded security sufficient to preclude disclosure of the contents of the proposal, including prices or other information, prior to awards. After opening, an award may be made on the basis of the proposals initially submitted, without discussion, clarification, or discretion. UNIVERSITY may discuss or negotiate all elements of the proposal with selected RESPONDENTS which represent a competitive range of proposals. For purposes of negotiation, a competitive range of acceptable or potentially acceptable proposals may be established comprising the highest rated proposal(s). After the submission of a proposal but before making an award, UNIVERSITY may permit the offeror to revise the proposal in order to obtain the best final offer. UNIVERSITY may not disclose any information derived from the proposals submitted from competing offers in conducting such discussions. UNIVERSITY will provide each offeror with an equal opportunity for discussion and revision of proposals. Further action on proposals not included in the competitive range will be deferred pending an award, but UNIVERSITY reserves the right to include additional proposals in the competitive range if deemed in the best interest of UNIVERSITY. UNIVERSITY reserves the right to award a Contract for all or any portion of the requirements proposed by reason of this request, award multiple Contracts, or to reject any and all proposals if deemed to be in the best interest of UNIVERSITY and to re-solicit for proposals, or to reject any and all proposals if deemed to be in the best interests of UNIVERSITY and to temporarily or permanently abandon the procurement. If UNIVERSITY awards a contract, it will award the contract to the offeror whose proposal is the most advantageous to UNIVERSITY, [considering the evaluation factors set forth in this RFP.] The contract file must state in writing the basis upon which the award is made.

Interested parties may contact Floyd Self at The University of Texas at Austin Purchasing Office for a copy of the RFP document by calling (512) 471-4266 or by email at: fself@mail.utexas.edu An original and six (6) copies of the proposal must be submitted by the Proposal submission deadline of September 18, 2000.

TRD-200005794
Francie Frederick
Executive Secretary to the Board
The University of Texas System
Filed: August 16, 2000

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## Texas Water Development Board

### Request for Proposals for Water Research

Pursuant to 31 Texas Administrative Code §355.3, the Texas Water Development Board (TWDB) requests the submission of water research proposals leading to the possible award of contracts for Groundwater Availability Models for the Carrizo-Wilcox aquifer and parts of the Gulf Coast and Ogallala aquifers in Texas. Guidelines for water research proposals, which include an application form and more detailed research topic information, will be supplied by the TWDB.

Description of Research Objectives: During the 76th legislative session, the Texas Legislature approved initial funding for the Groundwater Availability Modeling (GAM) program. The purpose of the GAM program is to provide reliable and timely information on groundwater availability to the citizens of Texas to ensure adequate supplies or recognize inadequate supplies over a 50-year planning period. Numerical groundwater flow models of the major aquifers in Texas will be used to make this assessment of groundwater availability. The expectation is that GAM will (1) include substantial stakeholder input; (2) result in standardized, thoroughly-documented, and publicly available numerical groundwater flow models and support data; and (3) provide predictions of groundwater availability through 2050 based on current projections of groundwater demands during drought-of-record conditions. GAM will provide the tools to evaluate water-management strategies in regional water plans and groundwater conservation district management plans.

In support of the GAM effort, the TWDB is requesting proposals for the development of numerical groundwater availability models for (1) the Carrizo-Wilcox aquifer, (2) the coastal bend area of the Gulf Coast aquifer, and (3) the southern part of the Ogallala aquifer. The Carrizo-Wilcox shall be modeled in three parts (three separate models): one for the northeastern part of the aquifer, one for the central part of the aquifer, and one for the southwestern part of the aquifer. The model for the Coastal Bend area of the Gulf Coast aquifer and the model for the Ogallala aquifers shall each be single models. Separate proposals for each of the five models are expected.

Details on the modeling projects and project requirements are available from the TWDB. The TWDB Web site includes (1) copies of the attachments, (2) a list of review criteria, and (3) some supporting material (http://www.twdb.state.tx.us/assistance /financial/fin_research/research.htm).

The following issues need to be addressed in the proposal:

* communication between the contractor and the technical advisory group for the model, regional water planning groups, and groundwater conservation districts;

* conceptual model of recharge and how recharge will be modeled;

* how surface-water/groundwater interaction will be modeled;

* how hydraulic properties will be distributed;

* hydrostratigraphy for the model;

* Approach for modeling the down dip boundary (if applicable);

* approach for calibrating and gaging the verification of the model;

* approach for handling dewatered cells;

* how effects on environmental resources will be gaged; and

* how the project will benefit state-wide water planning and groundwater districts.

In addition, we expect potential contractors to indicate their abilities in:

* general hydrogeology,

* hydrogeology of the modeled aquifer,

* numerical groundwater flow modeling,

* geographical information systems,

* communicating with the public,

* technology transfer,

* producing high-quality reports, and

* meeting deadlines.

The research proposal description shall not be more than 10 pages in length. On September 6, 2000, in Room 111, William B. Travis building, 1701 North Congress Avenue, Austin, Texas, we will hold an information session to address questions about the request for proposals.

Description of Funding Consideration. Up to $1.3 million has been initially authorized for water research assistance from the TWDB's Research and Planning Fund for this research for FY 01. A total of $1.6 million in funds is anticipated to be appropriated by the 77th Legislature for FY 02. Thus the total anticipated cost of this program is $2.9 million. Following the receipt and evaluation of all applications, the TWDB may adjust the amount of funding initially authorized for water research. Oral presentations may be required as part of proposal review. However, invitation for oral presentation is not an indication of probable selection. Up to 100 percent funding may be provided to individual applicants; however, applicants are encouraged to contribute matching funds or services, and funding will not include reimbursement for indirect expenses incurred by political subdivisions of the state or other state and federal agencies. In the event that acceptable proposals are not submitted, the TWDB retains the right to not award funds for the contracts.

Deadline, Review Criteria, and Contact Person for Additional Information. Ten double-sided copies of a complete water research application form, including the required attachments, must be filed with the TWDB prior to 5:00 PM, September 25, 2000. Proposals must be directed either in person to Ms. Phyllis Thomas, Texas Water Development Board, Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas; or by mail to Ms. Phyllis Thomas, Texas Water Development Board, P.O. Box 13231-Capitol Station, Austin, Texas 78711-3231. Applications will be evaluated according to 31 Texas Administrative Code §355.5 and the proposal rating form included in the TWDB's Guidelines for Water Research Grants. Research shall not duplicate work planned or underway by state agencies. All potential applicants must contact the TWDB to obtain these guidelines. Requests for information, the TWDB's rules covering the Research and Planning Fund, detailed evaluation criteria, more detailed research topic information, and the guidelines may be directed to Ms. Phyllis Thomas at the preceding address or by calling (512) 463-7926. Technical questions should be directed to Dr. Robert Mace, (512) 936-0861.

TRD-200005787
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: August 16, 2000

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## North Texas Workforce Development Board

### Workforce Investment Act (WIA) Providers of Training Services

Purpose for this notice is to solicit applicant information on the basis of which the North Texas Workforce Development Board (Board) and Texas Workforce Commission (TWC) can develop a statewide list of approved training facilities for the Workforce Investment Act (WIA).

WIA reforms Federal job training programs with a comprehensive workforce investment system, intended to be customer-focused, to help Americans access tools they need to manage their careers through information and high quality services, and to help U.S. companies find skilled workers.

The North Texas Workforce Development Board is administrative entity for WIA programs within the North Texas Workforce Delivery Area, including Archer, Baylor, Clay, Cottle, Foard, Hardeman, Jack, Montague, Wichita, Wilbarger, and Young Counties.

Eligible training providers shall be: post-secondary educational institutions, entities that carry out programs under the National Apprenticeship Act, and other public or private providers of a program of training services. Applications may be obtained by contacting North Texas Workforce Development Board, 1101 Eleventh Street, P.O. Box 4671, Wichita Falls, TX 76308. Phone (940) 767-1432 or fax (940) 322-2683.

TRD-200005690
Mona Williams-Statser
Executive Director
North Texas Workforce Development Board
Filed: August 14, 2000

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